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.

Australian Security Intelligence Organisation Amendment Bill 2020

Purpose	This bill seeks to amend the *Australian Security Intelligence Organisation Act 1979* to modify the organisation's compulsory questioning and surveillance device powers
Portfolio	Home Affairs
Introduced	House of Representatives on 13 May 2020

Trespass on personal rights and liberties[1]

1.2 Schedule 1 to the bill seeks to repeal and replace the Australian Security Intelligence Organisation's (ASIO) compulsory questioning framework, including amending the provisions related to questioning warrants, and abolishing questioning and detention warrants.[2]

1.3 The Director-General may apply to the Attorney-General for a questioning warrant in order to question a person about certain matters. For adults the warrant may be issued in relation to matters which relate to protecting Australia from espionage, acts of foreign interference, and politically motivated violence (which would include acts of terrorism, as well as financing terrorism and offences relating to control orders, preventative detention orders and continuing detention orders). For children aged between 14 to 18 years of age, a warrant may be issued in relation to matters that relate to the protection of Australia from politically motivated violence. The Attorney-General may issue a warrant in relation to an adult where they are satisfied that: the person is at least 18 years old; there are reasonable grounds for believing that a warrant will substantially assist in the collection of intelligence that is important in relation to an adult questioning matter; and having

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

2 *Australian Security Intelligence Organisation Act 1979*, Part III, Division 3, Subdivision C.

regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.

1.4 On receiving notice of a questioning warrant, a subject may contact a lawyer for legal advice about the warrant, subject to a number of limitations. A questioning warrant may require the subject to appear at a particular time for questioning, or to appear immediately. It may also authorise that a subject be apprehended and searched in order to ensure that they comply with the warrant. A subject may be questioned for up to 24 hours, or 40 hours where an interpreter is being used. Questioning warrants may operate for up to 28 days, and subjects may be prevented from travelling outside Australia during the warrant period and be required to surrender their travel documents.

1.5 The committee considers that the questioning warrant framework established by this bill has the potential to significantly trespass on an individual's rights and liberties and considers that the inclusion of such provisions should be sufficiently justified and appropriate safeguards surrounding the use of these provisions should be in place. The committee's consideration of specific aspects of the bill is outlined in the paragraphs below.

Prescribed authorities

1.6 Proposed section 34AD sets out who may be appointed by the Attorney-General as a prescribed authority. This includes:

- a person who has been a judge in a superior court for at least 5 years who no longer holds a commission as a judge;
- a President or Deputy President of the Administrative Appeals Tribunal (AAT) who has been enrolled as a legal practitioner for at least 5 years;
- a person who has been a legal practitioner for at least 10 years and holds a practicing certificate.

1.7 The Attorney-General must be satisfied that the person has the appropriate knowledge and experience and must consider whether any conflict of interest may exist. The appointment of a prescribed authority may only be terminated on limited grounds, including misbehaviour, a failure to comply with the requirements to disclose interests or where the Attorney-General considers that a conflict of interest may exist.

1.8 The committee notes that while the statement of compatibility at various points notes the role of the 'independent prescribed authority', there is little information on the face of the bill or in the explanatory materials to ensure that a prescribed authority is sufficiently independent. The committee notes that there is no fixed term for a prescribed authority, the prescribed authority is both appointed and terminated by the Attorney-General and persons may be appointed as a prescribed authority who are not part of a body that traditionally maintains a robust

independence from the executive branch of government (ie former members of the judiciary).

1.9 The committee's concerns regarding the independence of prescribed authorities is heightened by the very significant powers that are provided to prescribed authorities under the bill, including allowing for the questioning of children under 14 and the significant limits that can be placed on a person's choice of legal representation by prescribed authorities.

1.10 As a result, from a scrutiny perspective, the committee is concerned that there are not appropriate safeguards surrounding the use of broad coercive powers by prescribed authorities under the bill. The committee does not consider that the explanatory memorandum adequately addresses this issue.

1.11 The committee therefore requests the minister's more detailed advice regarding whether appropriate safeguards are in place to ensure that any prescribed authorities are independent, noting the significant coercive powers provided to them.

Issuing of warrants by the Attorney-General

1.12 As noted above, proposed section 34B provides that the Director-General may request that the Attorney-General issue a questioning warrant for either an adult or a minor. In addition, proposed section 26R provides that the Director-General may request that the Attorney-General issue a warrant for the recovery of tracking devices.

1.13 The committee has a long-standing scrutiny view that the power to issue warrants or orders relating to the use of intrusive power should only be conferred on judicial officers. In this regard, the committee does not consider that consistency with existing provisions is, of itself, a sufficient justification for allowing warrants or orders relating to the use of intrusive powers to be issued by non-judicial officers.

1.14 In light of the significant coercive powers that flow from the issuing of a questioning warrant or a warrant for the recovery of tracking devices, the committee would expect a detailed justification to be given as to the appropriateness of conferring such powers on the Attorney-General. In this instance, the explanatory memorandum provides no such justification. Additionally, the committee notes, that given the broad discretionary nature of the power, it may be difficult for an affected person to obtain a judicial remedy.

1.15 The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to allow the Attorney-General to issue questioning warrants and warrants for the recovery of tracking devices; and**

- **whether the bill can be amended to provide that questioning warrants and warrants for the recovery of tracking devices are instead issued by judicial officers.**

Screening of persons

1.16 Proposed section 34D provides that a person who is due to appear before a prescribed authority for questioning under a warrant may be required to undergo a screening procedure, produce a thing in their possession for inspection or examination and undergo an ordinary search or a frisk search. A police officer may also request the person leave a dangerous item or a communication device with the officer for safekeeping while the person is being questioned. A person who fails to comply with a request from a police officer under proposed section 34D will be taken to have failed to appear and will commit an offence under section 34GD(2). The penalty for this offence is 5 years imprisonment.

1.17 The explanatory memorandum states:

> The purpose of this section is to ensure the safety of those involved in questioning and prevent the transmission of sensitive information disclosed during questioning by preventing the possession of dangerous items or communication devices at the questioning place.[3]

1.18 The committee notes that these screening provisions contain no protections for circumstances where a request made by a police officer may be unreasonable or where a person, due to an intellectual disability or for whom English is a second language, may not understand the request being made of them. The committee's concerns in this instance are heightened by the significant penalty that can be imposed on persons who have failed to appear. The explanatory memorandum contains no information on whether there are appropriate safeguards in place to ensure that requests made by officers are reasonable in the circumstances and that persons who may have difficulty understanding a request that has been made of them are sufficiently informed of both their obligations and the consequences of failing to appear.

1.19 In light of the above, the committee requests the minister's more detailed advice regarding whether there are appropriate safeguards in place to protect the personal rights and liberties of persons presenting to a place for questioning. In particular, the committee requests the minister's advice as to whether the bill can be amended to include a defence to proposed subsection 34GD(2) so that the offence will not apply in circumstances where the request was unreasonable or the person was not capable of understanding a request made of them.

3 Explanatory memorandum, p. 61.

Privilege against self-incrimination

1.20 A person subject to a questioning warrant is required to give any information or produce any record or other thing requested by ASIO.[4] Failure to comply would be a criminal offence, subject to up to five years imprisonment. As well as being issued in relation to a person not charged with an offence, a questioning warrant may be issued 'post-charge', that is, after a subject has been charged with a related offence which is yet to be resolved, or in cases where such a charge is imminent.[5] A person subject to a warrant is not excused from providing information or producing a record or thing on the basis that it may incriminate them.[6] Although anything said or produced by them is not generally admissible in criminal proceedings against them (which provides a 'use immunity'),[7] this immunity does not extend to information derived from questioning materials (meaning there is no 'derivative use immunity').

1.21 The committee recognises there may be certain circumstances in which the privilege against self incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. In general, however, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by a use and derivative use immunity (providing that the information or documents produced or answers given, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings).

1.22 In this instance, the explanatory memorandum states:

> It is appropriate that material derived from the pre-charge questioning of a person should be able to be provided to a prosecutor without additional restrictions. The ASIO Act overrides the privilege against self-incrimination in compulsory questioning, but provides that anything said or any record or thing produced by the subject while appearing before a prescribed authority for questioning under the warrant in order to comply with a requirement is inadmissible. While it is appropriate to ensure that there are strict limits on the disclosure of questioning material to a prosecutor of

4 Schedule 1, item 10, proposed subsection 34GD(3).

5 Schedule 1, item 10, proposed section 34A. 'Imminent' means: the person is under arrest for an offence, but has not been charged with the offence; or a person with authority to commence a process for prosecuting the person for an offence has decided to commence, but not yet commenced, the process.

6 Schedule 1, item 10, proposed subsection 34GD(5).

7 Schedule 1, Part 1, item 10, proposed subsection 34GD(6). This does not prevent such information being produced in specified proceedings, including those related to the offence of providing false or misleading information.

> the subject, material derived from the pre-charge questioning of a subject stands in a different category.
>
> The ASIO Act has always intended to authorise the derivative use of questioning material for a number of purposes, including to provide to law enforcement for use in the investigation and prosecution of the subject and other people. This is an important part of enabling ASIO to fulfil its statutory functions, which include communicating intelligence for purposes relevant to security and co-operating with and assisting law enforcement agencies in the performance of their functions.[8]

1.23 The committee draws this matter to the attention of the Senate and leaves to the Senate as a whole whether it is appropriate to not include a derivative use immunity when abrogating the privilege against self-incrimination for persons subject to a questioning warrant.

Significant matters in non-disallowable delegated legislation[9]

1.24 Proposed section 34AF provides that the Director-General of ASIO may prepare a written statement of procedures to be followed in the exercise of authority under a questioning warrant. The Director-General must consult with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police regarding the preparation of the statement and the statement must be approved by the Attorney-General. The purpose of the statement is to set out standard operational procedures in relation to the execution of a questioning warrant, and may include, for example, operational procedures about the transportation of the subject, and matters pertaining to the health and wellbeing of the subject. Proposed subsection 34AF(5) provides that while any written statement of procedures will be a legislative instrument, it will not be subject to disallowance.

1.25 The committee's view is that significant matters, such as the operational procedures in relation to the exercise of coercive powers, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the explanatory memorandum states:

> As is the case under existing section 34C, it is appropriate to exclude the statement of procedures from the disallowance provisions because the statement is an instrument that is an internal management tool of government to ensure the basic standards applicable when a person is apprehended and/or questioned under a warrant issued under Division 3.

8 Explanatory memorandum, p. 77.

9 Schedule 1, item 10, proposed section 34AF. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

> In addition, given the nature of the questioning warrants to which the statement of procedures apply, the statement of procedures is an instrument that provides for the specific security needs in relation to persons who are subject to these warrants. For these reasons, it is appropriate to exempt the statement of procedures from the disallowance regime in the *Legislation Act*.[10]

1.26 While noting that proposed section 34AF contains a number of measures relating to consultation and approval of the statement of procedures, the committee considers that not making the statement disallowable removes the opportunity for the Parliament as a whole to have oversight and scrutiny over the content of any statement. The committee's concerns in this instance are heightened by the significant matters that may be included in the statement of procedures and the potential for these matters to have a significant impact on the protection or otherwise of a person's rights and liberties. As a result, from a scrutiny perspective, the committee does not consider that the explanatory memorandum has sufficiently justified why such a significant element of the questioning warrant scheme has been left to non-disallowable delegated legislation.

1.27 In light of the above, the committee requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave the statement of procedures, which will contain significant practical information in relation to the execution of questioning warrants, to non-disallowable delegated legislation; and**
- **whether the bill can be amended to provide that the statement of procedures will be disallowable to allow for appropriate parliamentary scrutiny of the procedures.**

Significant matters in delegated legislation[11]

1.28 Proposed section 34FH provides that the regulations may prohibit or regulate access to information, access to which is otherwise controlled or limited on security grounds, by lawyers acting for a person in connection with proceedings for a remedy relating to a questioning warrant or the treatment of a person in connection with that warrant.

1.29 The committee's view is that significant matters, such as the regulation of access to information by lawyers, should be included in the primary legislation unless

10 Explanatory memorandum, p. 39.

11 Schedule 1, item 10, proposed section 34FH. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no information regarding why this matter will be left to delegated legislation.

1.30 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's concerns in this instance are heighted by the potential consequences that may flow from a lawyer not being able to access all relevant information regarding their client's case.

1.31 The committee therefore requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to allow the regulation of access to information by lawyers to be left to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance in this regard on the face of the primary legislation.**

Reversal of the evidential burden of proof[12]

1.32 Proposed subsection 34GD(3) provides that the subject of a questioning warrant commits an offence if the subject is appearing before a prescribed authority and fails to comply with a request to give any information or produce any record or thing. Proposed subsection 34GD(4) provides an exemption to the offence (offence-specific defence), which applies if the subject does not have the information. The offence carries a penalty of imprisonment for 5 years. The explanatory memorandum states:

> In accordance with subsection 13.3(3) of the Criminal Code, it is the defendant who must adduce evidence that suggests a reasonable possibility that he or she does not have the information requested. The evidential burden has been placed on the defendant because the matter is peculiarly within the defendant's knowledge and would be too difficult for the prosecution to prove.[13]

1.33 Proposed subsection 34GD(8) provides that the subject of a questioning warrant commits an offence if the subject makes a statement, that to their knowledge, false or misleading in purported compliance with a request from ASIO. Proposed subsection 34GD(9) provides an exemption to the offence if the statement is not false or misleading in a material particular. The offence carries a penalty of imprisonment for 5 years. The explanatory memorandum states:

12 Schedule 1, item 10, proposed subsections 34DF(4) and (9). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

13 Explanatory memorandum, p. 99.

> A person should not commit a criminal offence by making a false or misleading statement on a matter which is immaterial, but it will often be difficult to determine whether a matter is material. The person best placed to know whether a matter is material or not, and consequently to give evidence on this matter, is the defendant.[14]

1.34 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.[15]

1.35 The committee notes that the *Guide to Framing Commonwealth Offences*[16] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[17]

1.36 In this case, it is not apparent that matters such as whether a statement is not false or misleading in a material particular, are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. Additionally, the committee considers that, in relation to subsection 34GD(4), it may be very difficult to raise evidence to suggest the exemption applies as may be difficult to suggest the existence of a negative. As a result, from a scrutiny perspective, the committee considers that these matters appear to be matters more appropriate to be included as elements of the offence.

1.37 The committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to include the specified matters as offence-specific defences; and**
- **the appropriateness of amending proposed section 34GD so that the matters specified in proposed subsections 34GD(4) and (9) are framed as elements of the relevant offence.**

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14 Explanatory memorandum, p. 101.

15 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.

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

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

Strict liability[18]

1.38 Proposed section 34GF makes provision for two offences in relation to unauthorised disclosures. Proposed subsection 34GF(1) provides that it is an offence, where a questioning warrant has been issued, for a person to disclose the existence of the warrant, a fact relating to the content of the warrant or to the questioning or apprehension of a person in connection with the warrant, or any operational information, for the life of the warrant. Proposed subsection 34GF(2) provides that it is an offence, in the two years after a questioning warrant has been issued, for a person to disclose operational information that the person obtained as a direct or indirect result of the issue of the warrant.

1.39 Proposed subsection 34GF(3) provides that strict liability will apply to the subject of the warrant and their lawyer in relation to whether the information indicates the fact that the warrant has been issued, or a fact relating to the content of the warrant or to the questioning or apprehension of a person in connection with the warrant or is operational information.

1.40 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence or element of an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[19] The explanatory memorandum contains no justification for the use of strict liability in this instance.

1.41 The committee therefore requests a detailed justification from the minister for the proposed application of strict liability to certain elements of the unauthorised disclosure offences in proposed section 34GF, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[20]

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18 Schedule 1, item 10, proposed subsection 34GF(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

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

Broad discretionary power[21]

1.42 Proposed section 34JE provides that an application for financial assistance may be made to the Attorney-General in respect of the subject of a questioning warrant's appearance before a prescribed authority for questioning. Proposed subsection 34JE(5) provides that the Attorney-General may determine guidelines that are to be applied in authorising the provision of financial assistance. Proposed subsection 34JE(6) provides that the guidelines are not legislative instruments.

1.43 The committee considers that this provision provides the Attorney-General with a broad power to determine the operation of the scheme for financial assistance in circumstances where there is limited guidance on the face of the primary legislation as to when these powers should be exercised. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, there is no such justification in the explanatory memorandum.

1.44 Additionally, the committee is concerned that there will be limited oversight of the guidelines as they will not be a legislative instrument and therefore there is no requirement that the guidelines are published or subject to parliamentary scrutiny or disallowance. The explanatory memorandum states:

> The guidelines made under proposed subsection 34JE(5) will not be legislative in character. Section 34JE sets out the circumstances in which financial assistance may be sought and received. It is expected that the guidelines will cover procedural issues such as the process for lodging an application and the level of fees available to barristers and solicitors appearing for a subject. While these guidelines may affect a person's interests, they will not determine or alter the content of the law. Though eligibility may be determined or assessed by reference to the guidelines, they will not affect a person's right to apply for financial assistance. Accordingly, the guidelines will be administrative in character.[22]

1.45 While noting this explanation, the committee considers that the broad and undefined power to make guidelines could allow the Attorney-General to make guidelines that limit a person's right to seek financial assistance, and may therefore determine or alter the content of the law. In any event, from a scrutiny perspective, the committee considers, that given the significant nature of the power to grant financial assistance in these circumstances, it is important to allow for additional parliamentary scrutiny and oversight.

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21 Schedule 1, item 10, proposed subsection 34JE. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

22 Explanatory memorandum, p. 113.

1.46 The committee therefore requests the minister's more detailed advice regarding:

- **why it is necessary and appropriate to provide the Attorney-General with a broad discretionary power to determine guidelines regarding the provision of financial assistance in circumstances where there is limited guidance on the face of the primary legislation as to when or how this power should be exercised; and**
- **whether the bill can be amended to provide that the guidelines are legislative instruments subject to parliamentary disallowance.**

Trespass on personal rights and liberties—use of tracking devices[23]

1.47 Schedule 2 to the bill seeks to amend ASIO's powers with respect to the use of tracking devices. The ASIO Act currently provides that surveillance devices may only be used pursuant to a warrant issued by the Attorney-General.[24] This bill would expand that power to provide that ASIO may instead obtain internal ASIO authorisation to use a tracking device (or enhancement equipment)[25] to track a person or object.[26]

1.48 Proposed section 26G provides that an ASIO employee or affiliate may request that an authorised officer (the Director-General or an SES-level ASIO employee) give an authorisation for the installation, use, maintenance and recovery of tracking devices in respect of a security matter. A request may be made in writing or orally. The authorising officer must only grant the request if the authorising officer is satisfied that there are reasonable grounds for believing that the use of a tracking device will substantially assist the collection of intelligence in respect of the security matter.

1.49 The committee notes that the ability for ASIO to obtain internal authorisations for the use of tracking devices may significantly trespass on a person's rights and liberties. The committee's scrutiny concerns in this instance are heightened due to a number of factors that appear to reduce or limit the level of oversight in place regarding the use of these powers. This includes that an internal

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

24 Subdivision D of Division 2 of Part III of the *Australian Security Intelligence Organisation Act 1979*.

25 Section 22 of the *Australian Security Intelligence Organisation Act 1979* defines 'enhancement equipment' to mean 'equipment capable of enhancing a signal, image or other information obtained by the use of the surveillance device'.

26 Schedule 2, item 8.

device may be issued orally; that the limits around when it will be considered proportionate for the powers to be exercised will be contained in internal policy guidance that is not subject to parliamentary scrutiny; and the broad test for authorising the use of a tracking device.

1.50 The committee would expect that the inclusion of a broad power to allow for the internal authorisation of the use of tracking devices to be sufficiently justified in the explanatory memorandum. In this instance the statement of compatibility states:

> ASIO will now have the ability to internally authorise the use of these devices in circumstances where a warrant is not required – in line with the powers of law enforcement agencies. That is, where ASIO officers are not required to enter a private premises or vehicle to install the device and the device cannot be used to listen or record a person. There are a number of safeguards associated with these internal authorisations, including periodic reporting to the Attorney-General in relation to the number of internal authorisations and information pertaining to those activities, as well as the requirement to maintain a register of this information to allow IGIS oversight.[27]

1.51 While noting this explanation, it remains unclear to the committee that appropriate safeguards are in place to ensure that internal authorisations for the use of tracking devices are appropriate.

1.52 The committee also notes proposed section 34AAB provides that if an internal authorisation is given, the Director-General must give the Attorney-General a written report regarding a number of matters in relation to the issuing of the internal authorisation and the use of the tracking device. The committee considers that while this provides the Attorney-General with oversight of the use of internal authorisations, consideration should be given to amending the bill to require that at least broad guidelines relation to the internal authorisation process should be contained in a legislative instrument to allow for additional scrutiny and oversight.

1.53 In light of the above, the committee requests the minister's more detailed advice regarding:

- **why it is necessary and appropriate for tracking devices to be approved for use by ASIO through an internal authorisation process, noting the potential trespass on personal rights and liberties;**
- **whether proposed subsections 26G(3) and 26H(1) of the bill can be amended to remove the ability to orally request and approve an internal authorisation for the use of a tracking device; and**
- **whether the bill can be amended to require that at least broad guidelines relating to the internal authorisation of the use of tracking devices are**

27 Statement of compatibility, p. 15.

contained in a legislative instrument which is subject to parliamentary disallowance.

Australian Sports Commission Amendment (Ensuring a Level Playing Field) Bill 2020

Purpose	This bill seeks to amend the *Australian Sports Commission Act 1989* to provide for the Australian Sports Committee to fund applications that were recommended to the minister but not funded under the Community Sports Infrastructure Grants Program
Sponsor	Senator Janet Rice
Introduced	Senate on 14 May 2020

Delegated legislation not subject to disallowance[28]

1.54 Proposed subsection 57AA(9) provides that the Australian Sports Commission may determine that an amount be paid to a State or Territory for the purpose of making a grant of financial assistance for the purpose of expenditure in relation to community sport infrastructure projects.

1.55 Proposed subsection 57AA(12) provides that a determination under subsection 57AA(9) is not subject to disallowance. The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum does not appear to provide any such justification.

1.56 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting determinations made under proposed subsection 57AA(9) from disallowance.

28 Schedule 1, item 1, proposed subsection 57AA(12). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

Purpose	This bill seeks to amend the *Migration Act 1958* to allow the Minister to determine that a thing is a prohibited thing in relation to immigration detention facilities and detainees. These things may include drugs, mobile phones, SIM cards, and internet-capable devices
Portfolio	Home Affairs
Introduced	House of Representative on 14 May 2020

Personal rights and liberties[29]

1.57 The bill seeks to amend the *Migration Act 1958* (Migration Act) to allow the minister to determine, by legislative instrument, that a thing is a 'prohibited thing' in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility).[30] A note in the bill gives examples of the things that may be determined to be a prohibited thing, including mobile phones, SIM cards or computers and other internet-capable electronic devices. The explanatory memorandum further specifies that controlled drugs (as defined in the *Criminal Code Act 1995*) and prescription drugs not taken by the person to whom they are prescribed may also be determined to be prohibited things.[31]

1.58 In addition, the bill proposes to extend or strengthen powers to:

- search a detainee's person, clothing and property to find out whether a prohibited thing is hidden on the person, in the clothing or in their property;[32]
- require a detainee, or their possessions, to be strip-searched or screened by screening equipment to find out whether a prohibited thing is hidden on the person, in their clothing or in their possession;[33]
- enable authorised officers and their assistants to search, without a warrant, the rooms and personal effects of immigration detainees to find out if a

29 Items 2, 4, 5, 8, 11-14, 19, 21-23, 29-32, 37. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

30 Explanatory memorandum, p. 2.

31 Item 2, proposed section 251A.

32 Item 2, proposed section 251B; item 4, proposed section 252.

33 Items 2 and 11, and 19-23.

prohibited thing, weapon or other thing capable of being used to inflict injury or help a detainee escape is in the detention facility (and to use detector dogs for this purpose);[34] and

- require authorised officers to seize a prohibited thing, weapon or escape aid or any documents or other thing that may be evidence for grounds for cancelling the visa of the person being searched.[35]

1.59 The bill also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.[36]

1.60 The explanatory memorandum states that immigration detention facilities accommodate an increasing number of 'higher risk detainees', including members of organised crime groups with serious criminal histories. Accordingly, it notes that the amendments made by the bill are intended to prevent the use of mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape efforts, as a commodity for exchange, to aid the movement of contraband, and to convey threats to other detainees and staff.[37] The explanatory memorandum further explains that the existing search and seizure powers in the Migration Act are not sufficient to prevent the increasing prevalence of illegal and anti-social behaviour in immigration detention facilities.[38]

1.61 The committee considers that the amendments in the bill, in restricting the possessions a detainee may have inside immigration detention facilities and empowering authorised officers to search a detainee without a warrant (including strip searches and searches of a detainee's room and personal effects), may trespass on the detainee's rights and liberties, particularly their right to privacy. While the committee acknowledges the difficulties posed by detainees with serious criminal histories, and appreciates there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences, the committee notes that the proposed amendments in the bill would apply to all immigration detainees equally, irrespective of whether they are considered a high-risk detainee. In this regard, the committee notes that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa and not as punishment for having committed a crime. The committee does

34 Item 19, proposed section 252BA.

35 Item 5, proposed subsection 252(4C).

36 Item 19, proposed subsection 252BA(7).

37 Explanatory memorandum, p. 2.

38 Explanatory memorandum, p. 37.

not consider that the explanatory memorandum adequately addresses these matters.

1.62 The committee's scrutiny concerns are further heightened, noting the broad discretionary nature of the powers conferred on authorised officers to search for and seize prohibited things and the risk of arbitrariness in how these powers are administered.

1.63 The committee therefore requests the minister's more detailed advice regarding why it is necessary and appropriate to broadly extend powers for the search and seizure of items in immigration detention facilities, including by allowing the use of force, noting that doing so may trespass on the personal rights and liberties of all detainees, including those detainees that are not 'higher risk' and have never been convicted of an offence.

Significant matters in delegated legislation[39]

1.64 As noted above, proposed subsection 251A(2) provides that the minister may, by disallowable legislative instrument, determine that a 'thing' is prohibited in an immigration detention facility. The power to make such a determination can be exercised if the minister is satisfied that possession of the thing is prohibited by law in a place or places in Australia, or possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility, or to the order of the facility. While proposed subsection 251A(3) provides that a medication or health care supplement prescribed or supplied for a detainee's individual use by a health service provider authorised for the purpose by the person in charge of the facility may not be determined to be a prohibited thing, there is otherwise no limit on the type of things that the minister may determine to be prohibited.

1.65 The committee notes that the terms in proposed subsection 251A(2) are not defined and it is not clear on the face of the primary legislation what might constitute an item that might pose a risk to the 'order of the facility'. While the bill provides certain examples, it does not directly prohibit any 'thing' but leaves it to the discretion of the minister to determine these details in delegated legislation.

1.66 The committee's general view is that significant matters, such as what is prohibited in immigration detention facilities, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum notes that specifying prohibited

39 Item 2, proposed subsection 251A(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

things in delegated legislation will give the minister flexibility to respond quickly if operational requirements change.

1.67 Generally the committee expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions. The committee considers that determining what is prohibited in immigration detention facilities delegates important policy decisions, which have not been adequately justified in the explanatory materials. In this regard, the committee does not generally consider that administrative flexibility alone justifies the inclusion of such significant policy matters in delegated legislation.

1.68 The committee's scrutiny concerns in this instance are heightened by the potential consequences flowing from declaring an item to be a prohibited item. The committee notes that the bill provides authorised officers with broad coercive powers to search for and seize prohibited items, and that the exercise of the minister's power to determine a prohibited thing may have the effect of expanding the scope of the discretion that an authorised officer may use in exercising these coercive powers.

1.69 Noting the above, the committee requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to allow the minister to determine, by legislative instrument, what things are to be prohibited in immigration detention facilities; and**
- **whether the bill can be amended to include additional high-level guidance regarding when the power in subsection 251A(2) may be exercised, including providing a definition for 'order of the facility'.**

Broad discretionary powers

Significant matters in non-disallowable delegated legislation[40]

1.70 Proposed subsection 251B(6) provides that the minister may, by non-disallowable legislative instrument, direct an authorised officer (or an authorised officer in a specified class of relevant officers) to seize a prohibited thing by exercising the relevant seizure powers under proposed paragraphs 252(4)(a) and (4A)(a) and subsections 252C(1) and 252CA(2) when conducting searches of facilities and screenings and strip searches of detainees. The minister may give a direction in relation to:

40 Item 2, proposed subsection 251B(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

- a person in a specified class of persons, or all persons, to whom the relevant seizure power relates;
- a specified thing, a thing in a specified class of things, or all things, to which the relevant seizure power relates;
- a specified immigration detention facility, an immigration detention facility in a specified class of such facilities, or all immigration detention facilities; or
- any circumstances specified in the directions.

1.71 The committee considers that this provision, along with proposed subsection 251A(2), provides the minister with broad discretionary powers to authorise the seizure of items from persons in immigration detention in circumstances where there is limited guidance on the face of the bill as to when those powers may be exercised.

1.72 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum contains no information regarding why such a broad discretionary power has been provided to the minister to direct an authorised officer to exercise the relevant seizure powers via non-disallowable legislative instrument.

1.73 Noting the above, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to provide the minister with broad discretionary powers to require an authorised officer to exercise seizure powers via non-disallowable legislative instrument in circumstances where there is limited guidance on the face of the primary legislation as to when the powers may be exercised.

Delegation of administrative powers[41]

1.74 Proposed section 252BA provides that an authorised officer may, without a warrant, conduct a search of a wide range of areas in immigration detention facilities operated by or on behalf of the Commonwealth, including of detainees' personal effects and rooms, to find out whether certain things, including a prohibited thing, are at the facility. Proposed sections 252C, 252CA and 252CB further provide for the seizure (and return) of prohibited things found during a search, strip search or screening procedure.

1.75 Proposed section 252BB provides that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties in conducting a search of an immigration detention facility under section 252BA (other

41 Items 19-23 The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

than subsection 252BA(4)) or in relation the seizure of prohibited things found during a search, strip search or screening of a detainee under section 252C, 252CA or 252CB, if that assistance is necessary and reasonable. Proposed subsection 252BA(7) also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.

1.76 The explanatory memorandum provides no information as to the persons that will be authorised to exercise these coercive powers. The committee notes that section 5 of the Migration Act defines 'authorised officer' as an officer authorised in writing by the minister, the Secretary or the Australian Border Force Commissioner. An 'officer' is defined in the same section as including any person, or classes of persons, authorised in writing by the minister to be an officer. There is no requirement that these are to be government employees. In relation to an authorised officer's assistant, there appears to be no legislative guidance as to who these persons are, whether they are to have any particular expertise or training, or how they are to be appointed.

1.77 The committee's consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing of Commonwealth Offences*[42] indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information.

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

- **who it is intended will be authorised as an 'authorised officer' and an 'authorised officer's assistant' to exercise coercive powers and whether these will include non-government employees;**
- **why it is necessary to confer coercive powers on 'other persons' to assist an authorised person and how such persons are to be appointed; and**
- **what training and qualifications will be required of persons conferred with these powers, and why the bill does not provide any legislative guidance about the appropriate training and qualifications required of authorised officers and assistants.**

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42 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 73-75.

Payment Times Reporting Bill 2020

Purpose	This bill seeks to introduce a new Payment Times Reporting Scheme which requires large businesses and government enterprises with an annual total income of over $100 million to publicly report on their payment terms and practices for their small business suppliers
Portfolio	Employment, Skills, Small and Family Business
Introduced	Hose of Representatives on 13 May 2020

Broad delegation of investigatory powers[43]

1.79 The bill seeks to establish a framework for a new Payment Times Reporting Scheme, which requires large businesses and large government enterprises with an annual total income of over $100 million to publicly report on their payment terms and practices for their small business suppliers. Clauses 31 and 32 seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*. Subclauses 31(4) and 32(3) provide that an authorised person may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation.

1.80 In relation to monitoring powers, the explanatory memorandum notes

> it may be necessary and reasonable for a person to assist the authorised officer when making copies of documents and securing evidence on a premises.[44]

1.81 In relation to investigatory powers, the explanatory memorandum notes

> given the volume of information and data a reporting entity relies on in preparing a Payment Times Report, it may be reasonable and necessary for a person to assist the authorised offer when examining and seizing evidential material on the premises.[45]

1.82 However, the committee notes that the explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training. The committee's consistent scrutiny position in relation to the

43 Clauses 31 and 32. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

44 Explanatory memorandum, p. 30.

45 Explanatory memorandum, p. 31.

exercise of coercive or investigatory powers is that persons authorised to use such powers should have the appropriate training and experience.

1.83 The committee therefore requests the minister's more detailed advice as to:

- **why it is necessary to confer investigatory powers on any 'other person' to assist an authorised person; and**
- **whether it would be appropriate to amend the bill to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out (as is the case with authorised officers under subclause 35(2) of the bill).**

Reversal of the evidential burden of proof[46]

1.84 Clause 46 of the bill provides that an entrusted person will commit an offence if the person uses or discloses protected information in an unauthorised way. Subclause 46(2) provides an exception (offence-specific defence) to this offence, stating that the offence will not apply to a person to the extent that the use or disclosure was in good faith and in purported compliance with the provisions of the bill.

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

1.86 The committee notes that the *Guide to Framing Commonwealth Offences*[47] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[48]

1.87 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden

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46 Clause 46. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

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

(requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in clause 46 has not been addressed in the explanatory materials.

1.88 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[49]

Incorporation of external materials existing from time to time[50]

1.89 Subclause 58(3) provide that rules (delegated legislation) made for the purpose of the definition of small business may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum states:

> It is envisaged that this will be necessary if, for example, a list of small business suppliers who meet the definition of having an annual total income of $10 million is incorporated into the Rules, and that list changes from time to time as small businesses are created or shut down.
>
> Using the example of a list, the intention would be to reduce the regulatory burden on reporting entities by them having to cross-check their systems to determine which of their suppliers is a 'small business' as the document incorporated by reference could serve as a definitive source of information about this. Such a list would be subject to change frequently, and it would not be practical to draft a rule every time this list was updated. The ability to incorporate such a document "from time to time" gives reporting entities continuity of their obligations by ensuring the list (for example) is up to date, and so they can be certain about their obligations and rights under the Act.[51]

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

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

50 Clause 58. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

51 Explanatory memorandum, p 43.

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

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

1.92 Noting the above comments, the committee requests the minister's advice as to whether documents incorporated by reference into the rules will be made freely available to all persons interested in the law.

Primary Industries (Customs) Charges Amendment (Dairy Cattle Export Charge) Bill 2020

Purpose	This bill seeks to authorise the imposition of primary industries charges that are duties of customs, expanding existing provisions relating to the export of cattle other than dairy cattle
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives on 13 May 2020

Charges in delegated legislation[52]

1.93 This bill seeks to make amendments to the *Primary Industries (Customs) Charges Act 1999* (the Act) to provide for the imposition of an export charge on the export of dairy cattle. Item 3 provides that the charge for dairy cattle will be prescribed per head of cattle so exported. Items 4 to 10 provide that the amount of the charge payable may be prescribed by the regulations.

1.94 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[53] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Where charges are to be prescribed by regulation the committee considers that, at a minimum, a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.95 In this instance, the explanatory memorandum states that the Australian Livestock Exporters' Council (ALEC), as the peak industry body representing Australia's livestock export sector, requested that the government consider implementing a statutory Dairy Cattle Export Charge, and that ALEC undertook stakeholder consultation on a statutory Dairy Cattle Export Charge of $6 per head of dairy cattle.[54] The committee also notes that existing subclause 5(5) of Schedule 2 to the Act specifies that the charge rate cannot be greater than the amount recommended to the minister.[55]

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

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

54 Explanatory memorandum, p. 1.

55 Explanatory Memorandum, p. 6.

1.96 However, from a scrutiny perspective, the committee remains concerned that no maximum charge is specified on the face of the primary legislation. The inclusion of a maximum charge would ensure that there is appropriate parliamentary oversight of the rate of the charge. In addition, it would provide long-term certainty for those liable to pay the charge that the rate of the charge could not exceed the maximum specified without an amendment to the primary legislation.

1.97 The committee takes this opportunity to emphasise that it does not generally consider consistency with existing provisions to be sufficient justification for including significant matters, such as the rate of a charge, in delegated legislation.

1.98 In light of the above, the committee requests the minister's advice as to whether a maximum rate of charge that may be imposed on the export of dairy cattle can be included on the face of the bill.

Treasury Laws Amendment (2020 Measures No. 2) Bill 2020

Purpose	This bill seeks to amend various laws in the Treasury portfolio relating to: • hybrid mismatch rules; • single touch payroll reporting; • deductible gift recipients; • funding capital increases for the World Bank Group; and • tax secrecy.
Portfolio	Treasury
Introduced	House of Representatives on 13 May 2020

Parliamentary scrutiny[56]

1.99 Schedule 4 to the bill seeks to amend the *International Finance Corporation Act 1955* (IFC Act) and the *International Monetary Agreements Act 1947* (IMA Act) to facilitate Australia making additional capital contributions to the International Bank for Reconstruction and Development (IBRD) and the International Finance Corporation (IFC) of the World Bank Group. Specifically, the bill seeks to alter the existing legislative processes under which Australia enters into agreements to fund capital increases to the IBRD and to revise the way the existing 'Articles of Agreement' of the IFC are incorporated into the IFC Act. The bill also seeks to establish standing appropriations for payments that Australia commits to make to the IBRD and IFC. If passed, these changes would mean that further amendments to the IFC Act or IMA Act will not be required to facilitate future capital increases to the IBRD or the IFC.[57]

International Bank for Reconstruction and Development

1.100 Previous capital increases to the IBRD have been authorised through amendments to the IMA Act. Item 8 of Schedule 4 to the bill seeks to insert a new standing appropriation into section 9 of the IMA Act so that future capital increases will no longer need to be so authorised. The explanatory memorandum states:

56 Schedule 4. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

57 Explanatory memorandum, p. 57.

> With the exception of section 9, every other provision in the IMA Act 1947 includes a standing appropriation to facilitate payments that Australia is required to make in respect of agreements covered by the Act. Appropriations in these contexts are appropriate because they ensure that Australia is able to comply with any international obligations it has under an agreement to make payments of a particular kind. Importantly, any agreements that impose obligations of this kind constitute treaty actions that are subject to scrutiny through the JSCOT process.[58]

International Finance Corporation

1.101 Section 3 of the IFC Act currently defines 'the Agreement' as 'the Articles of Agreement of the International Finance Corporation set out in the First Schedule to this Act, as amended in accordance with the resolutions set out in the Second and Third Schedules to this Act…'. The bill proposes to repeal the Schedules to the IFC Act and instead incorporate the Articles of Agreement and the related amendments by reference into the Act.

1.102 Proposed section 5A provides that when amendments are made to the Articles of Agreement in the future, the Treasurer may, by legislative instrument, give notice of the amendment. Such a legislative instrument commences after the disallowance period for the instrument has passed, and once it commences the amendment to the Articles of Agreement would be incorporated by reference into the IFC Act. The explanatory memorandum states:

> Allowing the updates to be specified through a legislative instrument means that the Parliament is not required to enact amendments to the IFC Act 1947 to ensure alignment between Australia's legislated version of the Articles of Agreement, and the Articles of Agreement that are actually in force.
>
> However, any legislative instrument that is made to update the Articles of Agreement cannot commence until after the disallowance period for the instrument has passed.
>
> This deferred commencement ensures that the Parliament can consider and deal with any amendment to Australia's legislated version of the Articles of Agreement before they take effect.[59]

1.103 In addition, section 5 of the IFC Act currently authorises the appropriation of 'moneys necessary to provide the subscription of Australia to the capital stock of the International Finance Corporation…(that is to say, moneys the equivalent in Australian currency of Two million two hundred and fifteen thousand dollars in currency of the United States of America)'. Item 2 of Schedule 4 to the bill seeks to replace section 5 with two standing appropriation clauses so that amendments to

58 Explanatory memorandum, pp. 58-59.

59 Explanatory memorandum, p. 64.

the IFC Act will no longer be required to appropriate money for payments to facilitate additional subscriptions to the IFC.

Committee comment

1.104 If passed, the bill would allow future capital increases to the IBRD or the IFC to be made without the need to amend primary legislation in the following circumstances:

- where the minister enters into an agreement with the IBRD or the IFC that provides for Australia to buy additional shares of the capital stock of the IBRD or the IFC;[60] or
- where the Treasurer has, by legislative instrument, given notice of an amendment of the Articles of Agreement of the IFC that imposes obligations on Australia to subscribe to shares in the IFC and the disallowance period for the instrument has passed.[61]

1.105 The removal of the requirement to amend the IFC Act or IMA Act to facilitate future capital increases to the IBRD or the IFC may limit the opportunity for Parliament to review and scrutinise these proposed capital increases. While the committee notes the explanation that such an approach has been adopted in other similar contexts, from a scrutiny perspective, the committee does not generally consider consistency with existing provisions to be sufficient justification for limiting parliamentary oversight. In addition, while the committee notes that treaty actions may be subject to scrutiny through the Joint Standing Committee on Treaties, the committee does not consider that such scrutiny is a substitute for the level of scrutiny inherent in the passage of a bill through both Houses of the Parliament.

1.106 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of removing the requirement to amend primary legislation to facilitate Australia making additional capital contributions to the International Bank for Reconstruction and Development and the International Finance Corporation of the World Bank Group.

60 See proposed section 9 of the IMA Act and proposed section 5B of the IFC Act.

61 See proposed sections 5 and 5A of the IFC Act.

Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020

Purpose	This bill seeks to amend various acts to: • create a new commissioner position on the Repatriation Commission and Military Rehabilitation and Compensation Commission to represent the perspectives of families and veterans; • assist former Australian Defence Force member to transition into civilian work; and • extend eligibility for the quarterly energy supplement to eligible Repatriation Health Card – For All Conditions (Gold Card) holders
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 13 May 2020

Significant matters in delegated legislation[62]

1.107 Item 4 of Schedule 2 seeks to insert proposed section 268D into the *Military Rehabilitation and Compensation Act 2004.* Proposed section 268D provides that the regulations may make provision for and in relation to the granting of assistance or benefits of a specified kind to former members to assist them to transition into civilian work. Proposed subsection 268D(2) provides that this may include eligibility criteria for the assistance or benefits; what a former member has to do to get the assistance or benefits; the conditions on which the assistance or benefits are granted; and any limits (whether financial or otherwise) on the provision of the assistance or benefits.

1.108 The committee has consistently drawn attention to 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. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as details of the operation of a scheme to provide assistance or benefits to former members, should be in the primary legislation unless a sound justification for the use of delegated

62 Schedule 2, item 4, proposed section 268D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

legislation is provided. In this instance the explanatory memorandum contains no justification for why the details of the scheme have been left to delegated legislation.

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

- **why it is considered necessary and appropriate to leave the details of the operation of a scheme to provide assistance or benefits to former members to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation.**

Incorporation of external materials existing from time to time[63]

1.110 Proposed subsection 268D(4) provides that the regulations may make provision in relation to a matter by incorporating any matter contained in an instrument or other writing as in force or existing from time to time. The explanatory memorandum contains no justification for why the provision is necessary or what documents are intended to be incorporated.

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

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

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

1.113 In light of the above, the committee requests the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 268D(4), whether these documents will be

63 Schedule 2, item 4, proposed subsection 268D(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

Bills with no committee comment

1.114 The committee has no comment in relation to the following bills which were introduced into the Parliament between 12 – 4 May 2020:

- Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020
- Aged Care Legislation Amendment (Emergency Leave) Bill 2020
- Australian Prudential Regulation Authority Amendment (APRA Industry Funding) Bill 2020
- Authorised Non-operating Holding Companies Supervisory Levy Imposition Amendment Bill 2020
- Authorised Deposit-taking Institutions Supervisory Levy Imposition Amendment Bill 2020
- Aviation Legislation Amendment (Liability and Insurance) Bill 2020
- Excise Tariff Amendment Bill 2020
- Export Control Legislation Amendment (Certification of Narcotic Exports) Bill 2020
- Fair Work Amendment (COVID-19) Bill 2020
- General Insurance Supervisory Levy Imposition Amendment Bill 2020
- Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Bill 2020
- Life Insurance Supervisory Levy Imposition Amendment Bill 2020
- National Skills Commissioner Bill 2020
- Norfolk Island Amendment (Supreme Court) Bill 2020
- Payment Times Reporting (Consequential Amendments) Bill 2020
- Product Stewardship (Oil) Amendment Bill 2020
- Retirement Savings Account Providers Supervisory Levy Imposition Amendment Bill 2020
- Services Australia Governance Amendment Bill 2020
- Social Services and Other Legislation Amendment (Omnibus) Bill 2020
- Superannuation Supervisory Levy Imposition Amendment Bill 2020
- Treasury Laws Amendment (More Flexible Superannuation) Bill 2020

Commentary on amendments and explanatory materials

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

- Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019;[64] and
- Telecommunications (Regional Broadband Scheme) Charge Bill 2019.[65]

64 On 14 March 2020 the Senate committee of the whole agreed to 7 Government and 10 Opposition amendments, and the House of Representatives agreed to the Senate amendments.

65 On 14 March 2020 the Senate agreed to one Government amendment, and the House of Representatives agreed to the Senate amendments.

Chapter 2

Commentary on ministerial responses

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

Coronavirus Economic Response Package Omnibus Bill 2020

Purpose	This bill is part of a legislation package which seeks to amend various Acts to provide an economic response, and deal with other matters, relating to the coronavirus
Portfolio	Treasury
Introduced	House of Representatives on 23 March 2020
Bill status	Received the Royal Assent on 24 March 2020

Henry VIII clauses—modification of primary legislation by delegated legislation[1]

2.2 In *Scrutiny Digest 5 of 2020* the committee requested the Treasurer's advice as to why it is necessary and appropriate to include broad powers in the bill which allow delegated legislation to amend the operation of the *Corporations Act 2001*, and the circumstances in which it is envisaged that these powers are likely to be used.[2]

Treasurer's response[3]

2.3 The Treasurer advised:

> As the Bill has now been enacted, I provide this advice in relation to the *Coronavirus Economic Response Package Omnibus Act 2020*. The powers given to the Treasurer under section 1362A of the *Corporations Act 2001* are a necessary and appropriate response to the impact on Australian

1 Schedule 8, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 13-14.

3 The Treasurer responded to the committee's comments in a letter dated 21 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

businesses of the Coronavirus pandemic and the health measures put in place to limit its spread.

The nature of the impact of the Coronavirus health crisis is unprecedented. While it is difficult to predict precisely what regulatory issues will arise, Australian businesses and the economy will require extraordinary levels of support. To that end, section 1362A has been enacted on a contingency basis to relieve, if necessary, any unreasonable pressure being placed by the existing law on business as a direct consequence of the Coronavirus.

Section 1362A establishes a temporary and time-limited mechanism to provide short-term regulatory relief to classes of persons that, due to the Coronavirus, are unable to meet their obligations under the Corporations Act or the Corporations Regulations 2001 (the Corporations Regulations). The impact of the Coronavirus and the health measures in place to limit its spread, particularly social distancing, have impeded businesses' ability to comply with certain provisions of the Corporations Act and Corporations Regulations.

Section 1362A also provides for short-term regulatory changes to facilitate continuation of business or mitigate the economic impact of the Coronavirus. The powers included in section 1362A are appropriate to achieve these objectives. The powers granted are limited, in terms of scope, by subsection 1362A(2), and in terms of time, by subsections 1362A(4) and 1362A(5). The provision does not provide a blanket power to amend the Corporations Act or Corporations Regulations. It is a temporary provision intended to provide targeted, short-term relief for companies from specified obligations in the Corporations Act and Corporations Regulations during the Coronavirus health crisis.

Under subsection 1362A(2), in order to make a legislative instrument under subsection 1362A(1), the Minister must be satisfied that certain circumstances exist, specifically that:

- it would not be reasonable to expect a specified class of persons to comply with the provisions because of the impact of the Coronavirus; or
- the exemption or modification is otherwise necessary or appropriate to: facilitate business continuity in circumstances relating to the Coronavirus; or, mitigate the economic impact of the Coronavirus.

The power to grant regulatory relief is thereby limited in scope to the Coronavirus pandemic or its impact on business or the economy. Under subsection 1362A(5), the time in which instruments can be made under subsection 1362A(1) is limited to 6 months, so that instruments cannot be made after 24 September 2020. Further, a legislative instrument made under section 1362A ceases to be in force six months after it is made, or earlier if specified. It is anticipated that Australian individuals, businesses and the economy will need extraordinary levels of support during this

period, and so it is appropriate the Treasurer be given this power during this time.

Finally, any legislative instruments made by the Minister under section 1362A would be disallowable under section 42 of the *Legislation Act 2003* and subject to review by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Committee comment

2.4 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that section 1362A establishes a temporary and time-limited mechanism to provide short-term regulatory relief to classes of persons that, due to the coronavirus, are unable to meet their obligations under the *Corporations Act 2001* or the Corporations Regulations 2001.

2.5 The committee also notes the Treasurer's advice that the time in which instruments can be made under subsection 1362A(1) is limited to 6 months, so that instruments cannot be made after 24 September 2020, and that a legislative instrument made under section 1362A ceases to be in force six months after it is made, or earlier if specified. The committee further notes the Treasurer's advice that any legislative instruments made under section 1362A would be disallowable and subject to review by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

2.6 While the committee welcomes this additional information, the committee takes this opportunity to reiterate that there are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

2.7 The committee considers that if the Parliament is sitting changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of a Henry VIII clause.

2.8 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

Deferral of sunsetting[4]

2.9 In *Scrutiny Digest 5 of 2020* the committee requested the Attorney-General's advice as to what criteria ministers will consider before determining whether it is appropriate to defer sunsetting under the provisions of the bill, including whether any guidance is being developed in this regard. The committee also requested that the Attorney-General provide the committee with a list of Acts and provisions of Acts that are due to sunset on or before 15 October 2020.[5]

Attorney-General response

2.10 The Attorney-General advised:

> Sunset provisions are intended to compel Ministers and the Parliament to consider whether, past a particular time, a law is still required. Schedule 16 of the Economic Response Act allows Ministers responsible for Acts or legislative instruments which are due to sunset on or before 15 October 2020 to extend the operation of these laws by up to six months through a ministerial determination (a deferral determination). This will ensure that there are no gaps in our laws while Parliament's attention is focused on other high priority and urgent measures.
>
> The deferral determination mechanism is subject to a range of important safeguards. First, the mechanism only applies to Acts and legislative instruments that are due to sunset on or before 15 October 2020. Second, the sunset date can only be extended for up to six months and cannot be extended a second time. Third, I have advised Ministers that the Explanatory Statement accompanying a determination should clearly outline the steps that will be taken to address the sunsetting of an Act or legislative instrument ahead of the revised sunset date. Finally, as deferral determinations are disallowable legislative instruments, they will be subject to Parliamentary scrutiny.
>
> Sunsetting Acts, or provisions of Acts
>
> As the Committee has identified, there are no criteria within the Economic Response Act or its Explanatory Memorandum that Ministers must apply in making a deferral determination. However, I have advised Ministers that they should consider, and address in explanatory statements:
>
> (i) whether the sunsetting Act or provision should continue beyond the current sunset date;
>
> (ii) whether, as a result of the coronavirus pandemic, there are material difficulties in passing legislation to extend the sunset date before the Act or provision is due to sunset;

4 Schedule 16. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 15-16.

(iii) whether there is an identifiable risk to the public of allowing the Act or provision to sunset, such as detriment to the welfare of the community, creating adverse consequences for industry and the economy, constraining the ability of Government to effectively carry out its functions, or prejudicing Australia's national security interests, and

(iv) any other exceptional circumstances that justify the making of a deferral determination.

Legislative instruments or provisions of legislative instruments that are sunsetting

Section 50 of the *Legislation Act 2003* provides for the automatic repeal of legislative instruments. The next sunset date under section 50 of the Legislation Act is 1 October 2020. For these instruments, Ministers should use the existing mechanisms for deferral and alignment of sunset dates in sections 51 and 51A of the Legislation Act. A deferral determination can only be made if these deferral and alignment mechanisms have been exhausted, or are not appropriate.

For legislative instruments that cannot be extended through the deferral and alignment provisions in the Legislation Act, or for legislative instruments or provisions of instruments that are self-ceasing, a deferral determination may be appropriate where:

(i) there is insufficient time to assess the ongoing need for an instrument or provisions of an instrument, due to competing priorities or circumstances arising from the coronavirus pandemic, or

(ii) the instrument is still required, and there is insufficient time to develop a replacement or amending instrument due to competing priorities or circumstances arising from the coronavirus pandemic.

I have provided the advice contained in this letter to all portfolio Ministers to guide their consideration when assessing the need for a deferral determination.

The Committee also requested a list of all Acts and provisions of Acts that are due to sunset on or before 15 October 2020. My department has sought input from all Commonwealth agencies to compile this information. Outlined below are provisions of Acts which I am aware are due to sunset during this period, and their relevant sunset date:

- Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* – 7 September 2020
- paragraph 124PF(1)(b) and paragraphs 123UF(1)(g) and 2(h) of the *Social Security (Administration) Act 1999* – 30 June 2020 and 1 July 2020, and
- subsection 504(2) of the *Social Security Act 1991* – 25 September 2020.

> Since the passage of the Economic Response Act, the Parliament has also enacted time limited amendments to the *Fair Work Act 1999* to complement the $130 billion JobKeeper payment scheme. These amendments sunset on 28 September 2020 to align with the operation of that scheme.

Committee comment

2.11 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the provisions which allow ministers responsible for Acts or legislative instruments which are due to sunset on or before 15 October 2020 to extend the operation of these laws by up to six months are intended to ensure that there are no gaps in our laws while Parliament's attention is focused on other high priority and urgent measures.

2.12 In relation to sunsetting Acts, or provisions of Acts, the committee welcomes the Attorney-General's advice that he has advised ministers that they should consider, and address in explanatory statements:

- whether the sunsetting Act or provision should continue beyond the current sunset date;
- whether, as a result of the coronavirus pandemic, there are material difficulties in passing legislation to extend the sunset date before the Act or provision is due to sunset;
- whether there is an identifiable risk to the public of allowing the Act or provision to sunset; and
- any other exceptional circumstances that justify the making of a deferral determination.

2.13 In relation to sunsetting legislative instruments, or provisions of legislative instruments, the committee notes the Attorney-General's advice that ministers should use the existing mechanisms for deferral and alignment of sunset dates in sections 51 and 51A of the *Legislation Act 2003*, and that a deferral determination can only be made if these deferral and alignment mechanisms have been exhausted, or are not appropriate. The committee welcomes the Attorney-General's statement that he has provided the advice contained in his letter to the committee to portfolio ministers to guide their consideration when assessing the need for a deferral determination for legislative instruments.

2.14 While the committee welcomes the guidance that the Attorney-General has set out in his response to the committee in relation to the criteria that ministers should consider before determining whether it is appropriate to defer sunsetting, the committee considers that it would have been preferable to include such guidance on the face of the primary legislation.

2.15 The committee also takes this opportunity to draw Senators' attention to the following provisions of Acts that are not related to the COVID-19 pandemic and are due to sunset on or before 15 October 2020:

- **paragraph 124PF(1)(b) and paragraphs 123UF(1)(g) and 2(h) of the *Social Security (Administration) Act 1999* (relating to the Cape York Welfare Reform Income Management measure and the Cashless Debit Card trials)—due to sunset on 30 June 2020; and**
- **Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (relating to special powers relating to terrorism offences)—due to sunset on 7 September 2020.**

2.16 The committee notes that this bill passed the Parliament on 23 March 2020. Since that time both Houses have revised the parliamentary sitting calendar, which provides for a greater number of sitting days than was envisaged at the time the bill was passed. In light of this, the committee considers that it is not clear that the Parliament would lack the time to debate and, if appropriate, pass primary legislation to extend the operation of provisions due to sunset such as those outlined above. If it is considered that a sunset date should nevertheless be extended by delegated legislation the committee considers the date should only be extended to the extent necessary to provide time for the Parliament to consider relevant primary legislation (rather than the full six months permitted under Schedule 16 to the bill).

2.17 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020

Purpose	This bill implements changes to various Acts in relation to the coronavirus economic response
Portfolio	Treasury
Introduced	House of Representatives on 8 April 2020
Bill status	Received the Royal Assent on 9 April 2020

Broad discretionary powers

Significant matters in delegated legislation[6]

2.18 In *Scrutiny Digest 6 of 2020* the committee requested the Minister for Industrial Relations' advice as to why it is necessary and appropriate to provide the minister with broad discretionary powers to exempt employers from provisions of the bill in circumstances where there is no guidance on the face of the bill regarding the circumstances in which these powers are to be exercised.[7]

Minister's response[8]

2.19 The Minister advised:

> The Committee has sought advice on s 789GX of the Bill (the provision), which temporarily amends the *Fair Work Act 2009* (FW Act) to provide the Minister with the power to exclude specified employers from seeking to apply any of sections 789GDC, 789GE, 789GF, 789GG and 789GJ of the FW Act, as introduced by the Bill.
>
> As the Committee notes, the provision is a limited regulation-making power, which only enables the Minister, by legislative instrument, to exclude one or more specified employers from applying any or all of the sections in the FW Act that authorise a JobKeeper enabling direction or agreement. The explanatory memorandum also notes that this might be done in circumstances that include where an employer contravenes a civil remedy provision.

6 Schedule 1, item 5, proposed section 789GX. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2020*, pp. 9-10.

8 The minister responded to the committee's comments in a letter dated 29 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> The provision is an integrity measure designed to protect employees. It can only operate to restrict an employer's access to the JobKeeper enabling direction or agreement provisions in the Bill. That is, the powers cannot expand the application of the JobKeeper enabling direction or agreement provisions in the Bill in any way. I consider the provision is an appropriate safeguard that will enable the Government to swiftly address any emerging issues in the operation of the provisions pertaining to instances of misuse, such as where an employer has contravened the new civil penalty provisions in sections 789GD, 789GDA, 789GDB, 789GU, 789GW or 789GXA.
>
> The provision supports the overall intent of the Bill's temporary amendments to the FW Act, which is to support the practical operation of the JobKeeper scheme in Australian workplaces in the national system and to keep Australians employed.
>
> My department is progressing guidelines on how this power may be exercised by the Minister. I also note that these powers, which must be exercised by legislative instrument, would be subject to Parliamentary scrutiny.

Committee comment

2.20 The committee thanks the minister for this response. The committee notes the minister's advice that section 789GX is an integrity measure, designed to protect employees, and can only operate to restrict an employer's access to the JobKeeper enabling direction or agreement provisions elsewhere in the Act. It cannot expand the application of those provisions in any way. The committee also notes the minister's advice that section 789GX is an appropriate safeguard that will enable the Government to address any 'emerging issues' in the operation of the provisions pertaining to instances of misuse—such as where an employer has contravened one of the new civil penalty provisions.

2.21 The committee further notes the minister's advice that his department is progressing guidelines on how the power in section 789GX may be exercised. Finally, the committee notes the advice that these powers, which must be exercised by legislative instrument, would be subject to parliamentary scrutiny.

2.22 While noting this advice, from a scrutiny perspective, the committee remains concerned that section 789GX confers on the minister a broad power to exempt employers from provisions of the bill, in circumstances where there is no guidance on the face of the bill as to how those powers are to be exercised. In this respect, the committee acknowledges that the guidance to be prepared by the department, and the requirement that the power in section 789GX be exercised by legislative instrument, may help guard against the arbitrary exercise of broad administrative powers. However, the committee remains of the view that it would be more appropriate for guidance as to how the power in section 798GX is to be exercised to be set out on the face of the Act.

2.23 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

Coronavirus Economic Response Package (Payments and Benefits) Bill 2020

Purpose	This bill seeks to provide financial support to entities directly or indirectly affected by the coronavirus, in relation to the coronavirus economic response
Portfolio	Treasury
Introduced	House of Representatives on 8 April 2020
Bill status	Received the Royal Assent on 9 April 2020

Incorporation of external materials existing from time to time[9]

2.24 In *Scrutiny Digest 6 of 2020* the committee requested the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 20(5), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.[10]

Treasurer's response[11]

2.25 The Treasurer advised:

> As this Bill has now been enacted, I provide this advice in relation to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act).
>
> In that letter, the Committee sought my advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference as they exist from time to time in rules made under the Act as a result of subsection 20(5) of the Act and whether those documents would be freely available to the public.
>
> The power to make rules that make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument

9 Subclause 20(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2020*, pp. 7-8.

11 The minister responded to the committee's comments in a letter dated 28 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

as they exist from time to time was included to provide flexibility in the event unforeseen developments required urgent payments in circumstances where it may not have been possible to arrange for the sitting of Parliament. It has not been exercised in relation to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* and it is not currently expected that it will be used.

The inclusion of the power allows, for example, a future payment to operate by reference to a concept set out in a document that was published by an international medical organisation or in a State or Territory Act or instrument, the incorporation of a definition set out in an instrument detailing the current travel restrictions applying in a State or Territory or an industry classification as set out in a publication of the Australian Statistician.

While it was not considered likely that such a reference would be required for the purposes of a future payment at this time, the need for this to occur to permit an appropriate response to unforeseen developments could not be ruled out.

Given this and the seriousness of the Coronavirus pandemic, ensuring that the rules could apply, adopt or incorporate documents as they exist from time to time was considered a reasonable precaution, noting that if such rules were needed there may be significant adverse effects from a delay.

As noted above, this power has not been exercised, however, if it were, any relevant document applied, adopted or incorporated into the relevant rules would be available to the public or made available to the public free of charge.

Committee comment

2.26 The committee thanks the Treasurer for this response. In relation to the type of documents that may be adopted, applied or incorporated by reference, the committee notes the Treasurer's advice that the power in subclause 20(5) would allow the rules to incorporate a document published by an international medical organisation, or in a State or Territory Act or instrument. Other examples of documents that may be incorporated by reference include instruments detailing travel restrictions, and industry classifications as set out in a publication of the Australian Statistician.

2.27 As to why it is necessary to incorporate the relevant documents as in force from time to time, the committee notes the Treasurer's advice that subclause 20(5) was included to provide flexibility in the event that unforeseen developments require making urgent payments in accordance with the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, in circumstances where it may not be possible to arrangement for the sitting of Parliament. The committee also notes the advice that while these circumstances were considered unlikely, they could not be ruled out.

2.28 Finally, the committee notes the Treasurer's advice that if the power in subclause 20(5) were used, any relevant document applied, adopted or incorporated into the relevant rules would be made available to the public free of charge.

2.29 The committee considers that it would have been useful had the information set out in the Treasurer's response been included in the explanatory memorandum.

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

3.4 The committee draws the following bills to the attention of senators:

- **Great Barrier Reef Marine Park Amendment (Coronavirus Economic Response Package) Bill 2020** – Schedule 1, item 2, subsection 39FG(5); and
- **Treasury Laws Amendment (2020 Measures No. 2) Bill 2020** – Schedule 4, item 2, section 5 and 5B; and Schedule 4, item 8, subsection 9(2).

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*.