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.

Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020

Purpose	This bill seeks to introduce a Serious Incident Response Scheme for residential aged care and flexible care delivered in a residential aged care setting
Portfolio	Health
Introduced	House of Representatives on 2 December 2020

Significant matters in delegated legislation[1]

1.2 Item 2 of Schedule 1 seeks to add proposed section 54-3 at the end of Division 54 of the *Aged Care Act 1997* in relation to reportable incidents. Proposed subsection 54-3(1) provides that the Quality of Care Principles ('the principles') must make provision for dealing with reportable incidents for the purposes of proposed subparagraph 54-1(1)(e)(i). Reportable incidents are set out in proposed subsection 54-3(2) and include incidents such as the unreasonable use of force or unlawful sexual conduct inflicted on a residential care recipient. Proposed subsection 54-3(5) provides that despite proposed subsection 54-3(2), the principles may provide that a specified act, omission or event involving a residential care recipient is or is not a reportable incident.

1.3 Proposed subsection 54-3(6) provides that the principles may provide for matters including the manner and period within with reportable incidents must be reported to the Quality and Safety Commissioner,[2] action that must be taken,[3] and authorising the provision of related information to the Minister, the Quality and Safety Commissioner or other specified bodies.[4] Proposed subsection 54-3(7)

1 Schedule 1, item 2, proposed section 54-3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Paragraph 54-3(6)(a).

3 Paragraph 54-3(6)(b).

4 Paragraph 54-3(6)(c).

specifies a range of actions that could be taken under the principles such as requiring an aged care provider to arrange and pay for an independent investigation into the reportable incident.

1.4 The committee's view is that significant matters, such as how reportable aged care incidents are managed, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides little explanation as to why these matters are left to delegated legislation. However, in relation to proposed subsection 54-3(5) the explanatory memorandum explains:

> This will allow for the Quality of Care Principles to provide clarity about reportable incidents and to specify certain events that do not fall within the definition of a reportable incident. For example, circumstances involving a staff member raising their voice to attract attention or to speak to a residential care recipient with hearing difficulties could be specified in the Quality of Care Principles as not being a reportable incident.[5]

1.5 While acknowledging this explanation, the committee considers that the rationale for leaving these significant matters to the principles is insufficiently set out in the explanatory memorandum. From a scrutiny perspective, in light of the serious nature of a reportable incident, the committee considers that these matters should be set out on the face of primary legislation and should be subjected to the full range of parliamentary oversight.

1.6 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to leave significant matters, such as how reportable aged care incidents are managed, to delegated legislation.

Significant matters in delegated legislation[6]

1.7 Item 3 of Schedule 1 seeks to insert proposed subsection 21(7) into the *Aged Care Quality and Safety Commission Act 2018*. Proposed subsection 21(7) provides that rules may prescribe matters in relation to how the Commissioner deals with reportable incidents. The rules may include, but are not limited to, the following:

- action that may be taken by the Commissioner including requiring an approved provider to do something;[7]
- circumstances in which the Commissioner may authorise or carry out an inquiry on a reportable incident on their own initiative;[8] and

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5 Explanatory memorandum, p. 9.

6 Schedule 1, item 3, proposed subsection 21(7). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

7 Paragraph 21(7)(a).

- how information given to the Commissioner about a reportable incident may be dealt with.[9]

1.8 The committee's view is that significant matters, such as how the Commissioner deals with reportable aged care incidents, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> This is a broad provision to ensure that there is flexibility to allow the Commissioner to ensure the safety needs of aged care consumers are met.[10]

1.9 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

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

- **why it is considered necessary and appropriate to leave the way in which the Commissioner deals with reportable aged cared incidents to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Broad delegation of administrative powers[11]

1.11 Schedule 2 seeks to insert a range of provisions into the *Aged Care Quality and Safety Commission Act 2018* which are enforceable under the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act):

- proposed section 74EA in relation to civil penalty provisions enforceable under Part 4 of the Regulatory Powers Act;
- proposed section 74EB in relation to infringement notices under Part 5 of the Regulatory Powers Act;
- proposed section 74EC in relation to undertakings enforceable under Part 6 of the Regulatory Powers Act; and

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8 Paragraph 21(1)(b).

9 Paragraph 21(7)(c).

10 Explanatory memorandum, p. 13.

11 Schedule 2, item 1, proposed section 74ED. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- proposed section 74ED in relation to injunctions enforceable under Part 7 of the Regulatory Powers Act.

1.12 The Commissioner is the authorised person for the purposes of the Act for proposed sections 74EA, 74EB, 74EC and 74ED.

1.13 In addition, item 2 of Schedule 2 seeks to insert proposed section 74EE into the *Aged Care Quality and Safety Commission Act 2018*, to provide that the Commissioner may issue compliance notices in certain circumstances. Item 3 of Schedule 2 seeks to insert proposed section 74GA which provides the Commissioner the power to require a person to give information or documents.

1.14 The Commissioner may delegate any of these functions or powers provided for in proposed sections 74EA, 74EB, 74EC, 74ED, 74EE and 74GA to any member of staff of the commission.[12]

1.15 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum provides no justification as to why it is necessary and appropriate for these powers to be delegated to any member of staff of the commission.

1.16 The committee is concerned that any staff member of the commission may be appointed as an authorised applicant, infringement officer or authorised person in relation to Parts 4 to 7 of the Regulatory Powers Act or may give written compliance notices or notices requiring the giving of information or the production of documents. Furthermore, it appears to the committee that there is no requirement for the Commissioner to be satisfied that the staff member possesses appropriate qualifications or training in the use of the relevant functions and powers.

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

- **why it is considered necessary and appropriate to allow for the delegation of any or all of the Commissioner's functions or powers under the Regulatory Powers Act and proposed sections 74EE and 74GA to any member of staff of the commission; and**

12 As per subsection 76(1) of the *Aged Care Quality and Safety Commission Act 2018*.

- **whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.**

Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020

Purpose	This bill seeks to make several technical amendments to simplify and clarify aspects of the design system, and to provide more flexibility for designers during the early stages of registering design protection
Portfolio	Industry, Science and Technology
Introduced	Senate on 2 December 2020

Instruments not subject to parliamentary disallowance [13]

1.18 Item 4 of Schedule 6 seeks to insert proposed section 149A to allow the Registrar of Designs to determine the formal requirements that a designs application must comply with for the purposes of a formalities check under sections 39 and 40 of the *Designs Act 2003*. Proposed subsection 149A(3) provides that a determination made under subsection 149A(1) is not a legislative instrument.

1.19 The committee notes that as instruments made under proposed section 149A are specified not to be legislative instruments they will not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why determinations that are to be made under proposed section 149A are not legislative in character. In this instance, the explanatory memorandum notes in relation to proposed subsection 149A(3):

> Subsection 149A(3) is intended to assist readers as it clarifies that a determination made under section 149A(1) is not a legislative instrument for the purposes of the *Legislation Act 2003*.[14]

1.20 While acknowledging this explanation it is unclear to the committee, on the basis of the explanatory materials provided, why determinations made under proposed section 149A are not legislative in character.

13 Schedule 6, item 4, proposed subsection 149A(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

14 Explanatory memorandum, p. 38.

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

- **why it is appropriate to specify that determinations made under proposed section 149A are not legislative instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2020

Purpose	This bill seeks to amend the *National Consumer Credit Protection Act 2009* and the National Credit Code in relation to small amount credit contracts and consumer leases
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representative on 30 November 2020

1.22 This bill is identical to a bill that was introduced in the House of Representatives on 26 February 2018.[15] The committee raised a number of scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 13 of 2018*[16] and reiterates those comments in relation to this bill.

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

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2018*, pp. 24-27.

National Emergency Declaration Bill 2020

Purpose	This bill seeks to establish a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Minister
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020

Broad discretionary power[17]

1.23 Clause 11 of the bill sets out conditions for making a national emergency declaration. These include that an emergency has recently occurred, is occurring or is likely to occur (whether in or outside Australia), the emergency has caused or is likely to cause nationally significant harm in Australia or in an Australian offshore area, and any one of circumstances listed in subparagraphs 11(1)(c)(i) to (iv) apply, including that the emergency has affected, is affecting or is likely to affect Commonwealth interests. The conditions for extending a national emergency declaration under clause 12 of the bill mirror those set out in clause 11.

1.24 Clause 10 of the bill provides a number of definitions, however, key terms relevant to conditions that must be satisfied before a national emergency can be declared including 'emergency' and 'Commonwealth interest' are not defined. The committee considers that, by leaving such key terms undefined, the bill provides a broad discretionary power to the executive to declare a national emergency.

1.25 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, in relation to leaving the terms 'emergency' and 'Commonwealth interest' undefined in the bill, the explanatory memorandum states:

> Emergency is not defined, and instead takes its natural and ordinary meaning, which supports the 'all hazards' approach adopted in the national emergency declaration framework. This is important so as not to limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies. The Macquarie Dictionary defines emergency as an unforeseen occurrence; a sudden and urgent occasion for action. The term 'emergency' is not intended to include predictable, ongoing or recurring events such as drought or the effect of long term coastal erosion.

17 Clauses 11 and 12. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

> The term 'emergency' is not intended to be limited to a single incident or disaster. It is intended that multiple concurrent or successive incidents or disasters, or incidents and disasters that occur in a particular set of circumstances, may together constitute an emergency…[18]
>
> 'Commonwealth interests' is not defined and is intended to reflect the full extent of the Commonwealth's constitutional interests and power, and may include, for example, the protection of Commonwealth property or facilities (such as Parliament House or Defence facilities across the nation), the protection of Commonwealth public officials as well as visiting foreign dignitaries or heads of State, and major events like the Commonwealth Games or G20. The ability for the Governor-General to declare a national emergency in such circumstances, without a request from one or more State or Territory governments, is in recognition of the fact that it is the Commonwealth's responsibility to protect the Commonwealth's interests.[19]

1.26 The committee notes the explanation provided in the explanatory memorandum and acknowledges the 'all-hazards approach' adopted in the framework established by the bill. However, the committee has scrutiny concerns about the breadth of the discretionary power provided to the Governor-General to declare and extend an emergency in circumstances where neither 'emergency' nor 'Commonwealth interests' are defined in primary legislation.

1.27 The committee's scrutiny concerns about this broad discretionary power are heightened a number of factors, including that the declaration of a national emergency is a precondition to the operation of clause 15, which allows ministers to make determinations overriding primary legislation.

1.28 The committee's scrutiny concerns are further heightened by:

- the exemption from disallowance of the initial national emergency declaration, and subsequent extensions of the period for which the national emergency declaration is in force; and
- subclause 12(4) which provides that, while the period of an extension must not exceed 3 months, such extensions may be made more than once, with no limit on the number of extensions.

1.29 The committee therefore requests the Attorney-General's more detailed advice as to:

- **why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined; and**

18 Explanatory memorandum, p. 13.

19 Explanatory memorandum, p. 15.

- **whether the bill can be amended to include inclusive definitions of 'emergency' and 'Commonwealth interest', or, at minimum, additional guidance on the exercise of the power in relation to these concepts on the face of the primary legislation.**

Exemption from disallowance[20]

1.30 The bill seeks to provide for the declaration of national emergencies, including through providing a consolidated list of existing emergency powers to provide greater visibility to decision-makers of the full range of powers available in a national emergency.

1.31 Clause 11 sets out the conditions for making a national emergency declaration. Subclause 11(1) provides that the Governor-General may make a national emergency declaration if the Prime Minister is satisfied in relation to matters set out in paragraphs 11(1)(a) through (d). Subclause 11(6) provides that a national emergency declaration is a legislative instrument but is not subject to disallowance. Similarly, subclause 12(5) provides that an extension of a national emergency declaration made under subclause 12(1) is a legislative instrument that is not subject to disallowance.

1.32 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 states:

> A core objective of the declaration is to clearly signal to the Australian community the severity of the emergency event, and provide certainty about the Commonwealth's role, and the statutory powers that are available, in respect of a particular emergency event. This objective would be undermined if such a declaration were disallowable, as the prospect of disallowance is likely to call into question the status of the emergency event.
>
> This exemption also reflects the critical nature of the declaration, which puts into effect a range of mechanisms that may be employed to respond to the emergency event. The making of the declaration ensures that urgent and decisive action can be taken in response to a nationally significant emergency event. This also provides the greatest level of certainty for emergency response agencies about the legal framework under which they are operating, including the various legal obligations and duties that may flow from the making of a declaration. If a declaration were disallowed, it would destabilise the framework under which emergency response agencies are operating, leading to uncertainty and

20 Clauses 11 and 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

> potential delays in the response and recovery effort where time is of the essence.[21]

1.33 While noting this explanation, it is unclear to the committee how the prospect of disallowance is likely to call into question the status of an emergency event or prevent the taking of urgent and decisive action in response to a nationally significant emergency event. In this regard the committee notes the observations of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Scrutiny of Delegated Legislation Committee) in its *Interim report on the Exemption of delegated legislation from parliamentary oversight* (Interim report):

> …the disallowable status of delegated legislation does not impede the commencement of a legislative instrument, with legislative instruments made by the executive able to commence the day after they are registered. The subsequent disallowance of a legislative instrument (which may only occur after the instrument has been tabled in the Parliament) does not invalidate actions taken under the instrument prior to the time of disallowance. Consequently, the committee does not consider that the disallowable status of a legislative instrument would, of itself, prevent the government from taking immediate and decisive action in response to a significant emergency...
>
> …the instances of the disallowance procedure resulting in disallowance by the Parliament is very low…In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised. Consideration of the risks and opportunities of subjecting emergency-related delegated legislation to disallowance must be assessed with this in mind.[22]

1.34 The Scrutiny of Delegated Legislation Committee also noted that:

> …arguments against making emergency related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. This need is particularly pronounced in times of emergencies, where legislative measures implemented in response to emergencies may be more likely to trespass on personal rights and liberties than those implemented in non-emergency periods.[23]

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21 Explanatory memorandum, p. 16–17.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 61-62.

23 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 62.

1.35 The Scrutiny of Delegated Legislation Committee further noted that:

> …views about the manner and appropriateness of exempting emergency-related delegated legislation from disallowance must be informed by the constitutional separation of powers between the legislature and executive, and Parliament's role in Australia's system of representative democracy. The committee considers that the Parliament, and particularly the Senate, has an important role in ensuring that delegated legislation is subject to effective scrutiny by elected representatives who reflect the considered views of the community and that governments of all persuasions do not introduce extreme measures in the absence of broad community support.[24]

1.36 The committee also notes that clauses 11 and 12 are closely modelled on sections 475 and 476 of the *Biosecurity Act 2015* (Biosecurity Act) which set out the circumstances in which a human biosecurity emergency may be declared by the Governor-General to exist, and the circumstances in which such a declaration may be varied to extend the human biosecurity emergency, respectively. Both the original declaration and extensions to the declaration are not subject to disallowance.

1.37 In its interim report the Scrutiny of Delegated Legislation Committee recommended the government propose amendments to the Biosecurity Act to provide that declarations of human biosecurity emergency periods and associated extensions are subject to disallowance.[25] The Scrutiny of Delegated Legislation Committee noted that exempting the declarations and associated extensions was inappropriate, particularly because the declaration of a human biosecurity emergency is a pre-condition to the implementation of other non-disallowable legislative measures which may override any Australian law and may restrict personal rights and liberties.[26] In this regard, the committee notes that a national emergency declaration made under clause 11 or extended under clause 12 of the bill is a precondition for enlivening the 'streamlined framework' for the exercise of the emergency powers set out in the bill and other legislation amended by the National Emergency Declaration (Consequential Amendments) Bill 2020.

1.38 Having regard to comments and recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its *Interim report on the exemption of delegated legislation from parliamentary oversight*, the committee therefore requests the Attorney-General's more detailed advice as to:

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24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 63.

25 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 69.

26 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 68.

- **why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance; and**
- **whether the bill can be amended to omit subclauses 11(6) and 12(5) so that national emergency declarations made under subclause 11(1) and extensions of a national emergency declaration under subclause 12(1) are subject to the usual parliamentary disallowance process.**

Power for delegated legislation to modify primary legislation (Henry VIII clause)[27]

1.39 Clause 15 establishes a process for ministers to modify certain provisions of legislation they administer relating to administrative requirements during the period a national emergency declaration is in force. Subclause 15(1) provides that the section applies to a provision of a law of the Commonwealth that requires or permits a prescribed list of relevant matters, set out in paragraphs 15(1)(a) to (j). Subclause 15(2) provides that if a declaration is in force, a responsible minister for an affected provision (as set out in subclause 15(1)) may, by legislative instrument, determine that, to the extent the affected provision relates to a relevant matter, the provision, for a period of time specified in the determination:

(a) is varied as specified in the determination;

(b) does not apply; or

(c) does not apply, and that another provision specified in the determination applies instead. [28]

1.40 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to amend primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the inclusion of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.41 In this instance, the explanatory memorandum states:

> The purpose of a determination under subclause 15(2) is to enable Ministers and decision-makers to suspend, vary or substitute requirements

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

28 Paragraphs 15(2)(a) to (c).

> in legislation they administer when a national emergency declaration is in force, where this would be of benefit to the public, or a section of the public, during or following a national emergency. It would allow Ministers and decision-makers to act quickly and decisively in response to a declared national emergency and adopt a tailored approach to suspending, varying and substituting regulatory requirements, depending on the particular emergency event.
>
> The determination can be classified as a Henry VIII clause, which enables delegated legislation to alter or override the operation of primary legislation. In the context of a national emergency declaration, such a clause is justified as a time-limited, targeted mechanism to facilitate the provision of support to communities affected by the declared emergency. The clause, which may apply to a wide variety of Acts or instruments, is specifically confined to certain kinds of procedural requirements, as enumerated in the Bill. It is intended to have beneficial application, in that it would make it easier for persons affected by a declared national emergency to obtain government support without having to complete, for instance, certain manner and form requirements, or requirements for official documents to be witnessed or provided.
>
> The power for Ministers to make such determinations acknowledges that it may not be possible for individuals or entities to meet certain regulatory requirements, in an emergency…The power to suspend, vary or substitute requirements in subclause 15(2) is limited to the enumerated list of requirements set out in subclause 15(1). The power would not, for example, enable a Minister to modify, suspend or substitute substantive provisions, such as eligibility criteria for a benefit or statutory criteria for a decision, or impose any obligations or liabilities on individuals.[29]

1.42 The committee notes this explanation, including that determinations made under clause 15 are intended to have beneficial application.

1.43 Determinations made under clause 15 will cease either on a day specified in the determination or may continue while a national emergency declaration is in force.[30] The committee notes that, due to the power under clause 12 of the bill to extend the period of an emergency declaration for an indefinite number of 3-month periods,[31] determinations made under clause 15 to modify the operation of primary legislation may be in effect for an extended period of time.

1.44 In this regard, the committee notes recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the duration of instruments made in response to emergencies including that:

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29 Explanatory memorandum, p. 20–21.

30 Subclause 15(7).

31 Subclause 12(4).

- the government ensure that all delegated legislation made in response to emergencies ceases to be in force after three months. Where measures implemented by delegated legislation are required for a longer period of time the relevant legislative instrument should be remade to facilitate parliamentary oversight; and
- where primary legislation empowers the executive to make delegated legislation to amend or modify the operation of primary legislation in times of emergency (via a 'Henry VIII' clause), parliamentarians and the government should ensure that the primary legislation:
    - specifies a time limit in which those powers can be exercised; and
    - requires the maker of the delegated legislation to be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the relevant instrument is made before they make the instrument.[32]

1.45 In light of the recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation, the committee requests the Attorney-General's advice as to whether the bill can be amended to provide that:

- **determinations made under clause 15 cease to be in force after three months; and**
- **before making a determination under clause 15, a minister must be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the determination is made.**

Tabling of reports[33]

1.46 Clause 17 requires that ministers administering a national emergency law (defined in clause 10) must prepare a report on the exercise of powers or functions under such national emergency laws. The report must be given to the minister administering the National Emergency Declarations Act (the Act) as soon as practicable after the national emergency declaration ceases to be in force or, if the national emergency declaration is extended, within three months after the declaration came into force and every subsequent period of three months that the declaration remains in force.[34] The minister administering the Act must then cause a

32 Recommendations 12 and 13. See Senate Standing Committee for the Scrutiny of Delegated Legislation*, Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 100.

33 Clause 17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

34 Subclauses 17(2) and (4).

copy of the report to be tabled in each House of the Parliament 'as soon as practicable' after the minister receives it.[35]

1.47 In relation to the presentation and tabling of reports 'as soon as practicable' at a general level, the committee notes that subsections 34C(2) and (3) of the *Acts Interpretation Act 1901* provide that:

> (2) Where an Act requires a person to furnish a periodic report to a Minister but does not specify a period within which the report is to be so furnished, that person shall furnish the report to the Minister as soon as practicable after the end of the particular period to which the report relates and, in any event, within 6 months after the end of that particular period.
>
> (3) Where an Act requires a person to furnish a periodic report to a Minister for presentation to the Parliament but does not specify a period within which the report is to be so presented, that Minister shall cause a copy of the periodic report to be laid before each House of the Parliament within 15 sitting days of that House after the day on which he or she receives the report.

1.48 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling and making reports on the exercise of powers or performance of functions in relation to a national emergency declaration available online in a timely manner promotes transparency and accountability.

1.49 The committee also notes that, in response to emergency situations, there may be variations to the parliamentary sitting calendar such that a period of 15 sitting days may stretch over a number of months.[36] Noting the importance of parliamentary oversight during periods of emergency, the committee considers that it would be appropriate for the bill to provide more specific timeframes in which reports on the exercise of powers and functions in relation to a national emergency should be provided to Parliament and made available to the public. In this regard,

35 Subclause 17(5).

36 For example, the Senate Standing Committee for the Scrutiny of Delegated legislation noted that, as a consequence of variations to the 2020 sitting calendar in response to the COVID-19 pandemic, as at 30 November 2020, the House of Representatives had sat on 18 days fewer than originally agreed for 2020, and the Senate had sat 15 days fewer than originally agreed. See Senate Standing Committee for the Scrutiny of Delegated Legislation*, Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 39.

the committee also notes the availability of mechanisms under parliamentary rules and procedure for documents to be presented when the Parliament is not sitting.[37]

1.50 The committee therefore requests the Attorney-General's advice as to whether proposed paragraph 17(4)(a) of the bill can be amended to provide that reports on the exercise of powers and the performance of functions in relation to a national emergency declaration must be given to the minister responsible for administering the National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force.

1.51 The committee also requests the Attorney-General's advice as to whether subclause 17(5) of the bill can be amended to provide:

- **that the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and**
- **that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.**

Significant matters in delegated legislation[38]

1.52 Subclause 17(6) sets out certain matters that must not be included in reports on the exercise of powers and performance of functions in relation to a national emergency declaration, including information that is commercially sensitive, or affects national security. Paragraph 17(6)(c) expands these matters to include a kind of information prescribed by the regulations for the purposes of this paragraph.

1.53 The committee's view is that significant matters, such as the kind of information that must be omitted from reports on the exercise of powers during a national emergency, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> The regulation-making power in paragraph 17(6)(c) will allow additional kinds of information to be prescribed, as necessary. This may include, for example, information that would ordinarily not be required to meet

37 See, for example, Senate standing order 166. This standing order is referenced in a number of Senate orders of continuing effect which provide for the tabling of documents while the Senate is not sitting, such as the presentation of information on departmental and agency appointments and vacancies.

38 Subclause 17(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> tabling requirements under Acts that contain national emergency laws—such as information relating to an exemption for the stockpiling of therapeutic goods, including biologicals and medical devices, to create a preparedness to deal with a potential threat to public health, which is not subject to tabling requirements under the *Therapeutic Goods Act 1989*.[39]

1.54 However, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.55 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 also notes that allowing the regulations to prescribe types of information that must not be provided in reports presented to Parliament provides the minister with a broad power to prevent important information about the exercise of powers and functions during emergency from being reviewed by the Parliament in circumstances where there are already limitations on the Parliament's ability to review actions of the executive in relation to the declaration of national emergencies.

1.56 In light of the above, the committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to leave the specification of additional kinds of information that must not be included in a report on the exercise of powers and functions during a national emergency to delegated legislation; and**
- **whether the bill can be amended omit proposed paragraph 17(6)(c) or, at a minimum, to include at least high-level guidance regarding the kinds of additional information that may be prescribed in the regulations.**

39 Explanatory memorandum p. 25.

National Emergency Declaration (Consequential Amendments) Bill 2020

Purpose	This bill seeks to amend various Acts and Regulations that contain powers used by the Commonwealth when responding to, or supporting the recovery from, emergencies to enable the use of alternative or simplified statutory tests to streamline the exercise of those powers where a national emergency has been declared
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020

Limitation on judicial review[40]

1.57 Item 2 of Schedule 1 seeks to insert proposed paragraph (zfa) into Schedule 1 to the *Administrative Decisions (Judicial Review Act) 1977* (the ADJR Act). This would exempt decisions made under Part 2 of the *National Emergency Declaration Act 2020,* in relation to a declaration made under proposed subsection 11(1), from judicial review under the ADJR Act. This is intended to cover advice provided by the Prime Minister to the Governor-General in relation to a decision made under Part 2 of the National Emergency Declaration Bill 2020 in the event that such advice constitutes a decision.[41]

1.58 Judicial review of certain decisions made under the National Emergency Declaration Bill 2020 is nonetheless available under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the Constitution.[42]

1.59 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion. In this instance, the explanatory memorandum states:

> Decisions of the Governor-General are not subject to review under the ADJR Act, pursuant to paragraph (d) of the definition of decision to which this Act applies in section 3 of that Act. As such, a decision of the Governor-General to declare a national emergency under section 11 of the NED Act or to extend, vary or revoke such a declaration under sections 12, 13 or 14 of that Act, would not be subject to review of the ADJR Act. The

40 Schedule 1, item 2, proposed paragraph (zfa) of Schedule 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

41 Explanatory memorandum, p, 16.

42 Explanatory memorandum, p. 16.

> purpose of this item is to place beyond doubt that, if the Prime Minister's advice to the Governor-General in relation to a decision under Part 2 of the NED Act was considered to constitute a 'decision' for the purposes of the ADJR Act, that such a decision would not be subject to review under the ADJR Act, to ensure that the non-application of the ADJR Act to decisions of the Governor-General is not undermined by the character of the decisions that relate to the making of a declaration.[43]

1.60 The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act 1903*) and also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.61 In light of the detailed information provided in the explanatory memorandum, and the availability of judicial review under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the Constitution, the committee leaves to the Senate as a whole the appropriateness of exempting decisions made under Part 2 of the National Emergency Declaration Bill 2020 from the judicial review under the ADJR Act.

Significant matters in non-disallowable instruments

Privacy[44]

1.62 Item 40 of Schedule 1 seeks to insert proposed subsection 80J(2) into the *Privacy Act 1988*. Section 80J of the *Privacy Act 1988* provides that the Prime Minister or the minister may declare an emergency where they are satisfied that an emergency or disaster has occurred and it is of such a kind that it is appropriate in the circumstances for Part VIA of the *Privacy Act 1988* to apply. The emergency or disaster must be of national significance and affect one or more Australian citizens or permanent residents. Proposed subsection 80J(2) provides that the Prime Minister or the minister may also make a declaration under section 80J if a national emergency declaration is in force, and they are satisfied that the emergency to which the declaration relates is of such a kind that it is appropriate in the circumstances for Part VIA to apply.

1.63 The effect of this is to authorise the collection, use and disclosure of personal information by entities in relation to affected individuals at any time an emergency declaration is in force, in line with the further requirements in section 80P. As per

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43 Explanatory memorandum, p. 16.

44 Schedule 1, item 40, proposed subsection 80J(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

subsection 80L(3), an emergency declaration made under section 80J is not a legislative instrument.

1.64 The committee's view is that any exemption of instruments from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

> The purpose of this item is to simplify the process for the making of an emergency declaration under Part VIA of the Privacy Act where a national emergency declaration is in force, by omitting criteria in the statutory test for the making of an emergency declaration that overlap with the criteria for the making of a national emergency declaration.[45]

1.65 While noting this explanation, the committee does not consider that a desire to simplify legislative procedures or to have consistency with existing legislative provisions is an adequate justification for such measures to be provided for in an instrument other than a legislative instrument. The committee notes that such instruments are excluded from all forms of parliamentary oversight, including disallowance.

1.66 The committee's scrutiny concerns in this instance are heightened by the potential impact of the provisions on individual privacy.

1.67 In light of the above, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments which are not subject to parliamentary scrutiny.

Significant matters in non-disallowable legislative instruments[46]

1.68 Item 55 of Schedule 1 seeks to insert proposed subsection 313(4A) into the *Telecommunications Act 1997*. Proposed subsection 313(4A) provides that a carrier or carriage service provider must, in connection with the operation or supply of services, give officers and authorities of the Commonwealth and the States and Territories such help as is reasonably necessary for the following purposes:

- preparing for, responding to or recovering from an emergency to which a national emergency declaration in force relates;[47]

45 Explanatory memorandum, p. 34.

46 Schedule 1, item 55, proposed subsections 313(4A) – (4H). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

47 Proposed paragraph 313(4A)(c).

- preparing for, responding to or recovering from a disaster or emergency that has been declared to be a disaster or state of emergency by or with the approval of a minister of a State or Territory under that law;[48] and
- preparing for, responding to or recovering from an emergency about which a declaration made under proposed subsection 313(4D) relates.[49]

1.69 Proposed subsection 314(4B) provides for the same measures in relation to carriage service intermediaries.

1.70 Proposed subsection 313(4D) provides that the minister may declare in writing that an emergency exists, and proposed subsection 313(4F) provides that such a declaration is a legislative instrument exempt from disallowance. Proposed subsection 313(4H) provides that the minister may formulate guidelines, by legislative instrument, which under proposed subsection 313(4G) the officer or authority of the Commonwealth, State or Territory who is requiring help under proposed subsections 313(4A) or (4B) must have regard to.

1.71 The committee's view is 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 states:

> New subsection 313(4F) provides that a declaration made under subsection 313(4D) is a legislative instrument, but that section 42 of the *Legislation Act 2003* (disallowance) does not apply to the declaration. This aligns with the status of a national emergency declaration under the NED Act. A declaration made under subsection 313(4D) can be made independently of a declaration being made under the NED Act. A key objective of the declaration is to provide clarity and certainty about the status of an emergency event, whether impending or currently existing. Certainty will be critical to ensure that participants are sufficiently prepared and can readily divert resources to assist in the response and recovery effort. The prospect of a declaration being disallowed would undermine a key objective of the making of such a declaration, and may disrupt the underlying framework that would support further action being taken. This provision provides telecommunications companies with certainty that once the Minister declares that an emergency exists, there is no risk that immunities would fall away in the event of Parliamentary disallowance.[50]

1.72 While noting this explanation, from a scrutiny perspective it is unclear to the committee why it is necessary for the minister to have a secondary power to declare an emergency for the purposes of proposed subsections 313(4A) and (4B), when

48 Proposed paragraph 313(4A)(d).

49 Proposed paragraph 313(4A)(e).

50 Explanatory memorandum, p. 42.

these provisions are enlivened when a declaration of emergency is made under the National Emergency Declaration Bill 2020. The power to declare an emergency in proposed subsection 313(4D) appears to be a much broader power when compared to the National Emergency Declaration Bill 2020, which requires certain conditions to first be met before an emergency may be declared. By contrast, there is no guidance or criteria on the face of the bill to be taken into account by the minister when making a non-disallowable emergency declaration under proposed subsection 313(4D).

1.73 In addition, the committee does not consider that the prospect of disallowance would undermine certainty during an emergency, as the subsequent disallowance of an instrument does not invalidate actions taken under it prior to disallowance. Moreover, the committee notes the observations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its *Interim report on the exemption of delegated legislation from parliamentary oversight* which are outlined at paragraphs 1.33–1.38 above.[51]

1.74 The committee's scrutiny concerns are heightened by the broad, onerous and potentially intrusive powers that proposed subsections 313(4A) and 313(4B) provide for in relation to requiring carriers, carriage service providers and carriage service intermediaries to give such help as is reasonably necessary to officers and authorities of the Commonwealth and the States and Territories.

1.75 In light of the above, the committee requests the Attorney-General's advice as to whether the bill can be amended to:

- **provide that an emergency declaration made under proposed subsection 313(4D) is subject to parliamentary disallowance; and**
- **set out at least high-level guidance in relation to when an emergency may be declared under proposed subsection 313(4D).**

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51 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report on the Exemption of delegated legislation from parliamentary oversight* (2 December 2020) p. 62.

Significant matters in non-disallowable instruments (provisions akin to Henry VIII clause)[52]

Exclusion from tabling[53]

1.76 Items 60, 65 and 70 of Schedule 1 extend the circumstances in which the minister may exempt therapeutic goods, biologicals and devices from the operation of Division 2 of Part 3-2 of the *Therapeutic Goods Act 1989* (the Act) by non-legislative instrument.

1.77 Existing section 18A provides the minister with the power to exempt specified therapeutic goods or classes of therapeutic goods from the operation of Division 2 of Part 3-2 of the Act. Subsection 18A(2) sets out the criteria that the minister must be satisfied of in determining that it is in the national interest to exempt such goods. Item 60 would insert proposed subsection 18A(2A) into section 18A to provide that an exemption may be made if a national emergency declaration is in force, and either the exemption should be made so that goods may be stockpiled to deal with a potential threat to public health,[54] or so that the goods can be urgently available to deal with an actual threat to public health.[55] The health emergency must be the emergency to which the national emergency declaration relates.

1.78 An exemption made under subsection 18A of the Act is not a legislative instrument as per subsection 18A(9A).

1.79 Item 65 seeks to insert proposed subsection 32CB(2A) which provides for the same measures in relation to exempting biologicals from the operation of Division 4 of the Act by non-legislative instruments.

1.80 Item 70 seeks to insert proposed subsection 41GS(2A) which provides for the same measures in relation to exempting medical devices from Division 1 of Part 4-2 and Division 1 of Part 4-3, Part 4-4- and Part 4-5 of the Act by non-legislative instruments.

1.81 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to amend primary legislation. While, in this instance, the provisions do not allow delegated legislation to directly amend the primary legislation, the committee has

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52 Schedule 1, item 60, proposed subsection 18A(2A); item 65, proposed subsection 32CB(2A); and item 70, proposed subsection 41GS(2A). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

53 Schedule 1, item 62, proposed paragraph 18A(11)(a); item 67, proposed paragraph 32CF(2)(a); item 72, proposed paragraph 41GW(2)(a)(v).

54 Subparagraph 18A(2A)(b)(i).

55 Subparagraph 18A(2A(b)(ii).

significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.82 In this regard, no explanation has been provided in the explanatory memorandum as to why it is necessary and appropriate for proposed subsections 18A(2A), 32CB(2A) and 41GS(2A) to provide for further circumstances under which the operation of the *Therapeutic Goods Act 1989* may be modified by non-legislative instruments.

1.83 In addition, items 62, 67 and 72 of Schedule 1 seek to limit the circumstances in which these non-legislative instruments made under the *Therapeutic Goods Act 1989* must be tabled in the Parliament. Each of these items provides that only instruments made under proposed subparagraphs 18A(2A)(b)(ii), 32CB(2A)(b)(ii), and 41GS(2A)(b)(ii) are subject to tabling in the Parliament. This has the effect that non-legislative instruments exempting specified therapeutic goods, biologicals or devices from the operation of the *Therapeutic Goods Act 1989* on the basis of a 'potential' as opposed to 'actual' threat to public health will be exempt from tabling requirements.

1.84 The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. As such, the committee expects there to be appropriate justification where instruments are not required to be tabled in the Parliament.

1.85 In relation to each of the three items the explanatory memorandum explains that this approach is consistent with the current tabling requirements not applying to the similar existing exemptions.[56] While noting this, the committee's view is that the fact that a certain matter continues current arrangements does not, of itself, provide an adequate justification. The committee's concerns in this regard are heightened by the fact that non-legislative instruments are subject to little to no parliamentary scrutiny, particularly noting that they are exempt from the disallowance process.

1.86 As no justification has been provided in the explanatory materials, the committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to include powers in the bill which allow non-legislative instruments to modify the operation of the *Therapeutic Goods Act 1989*; and**

56 Explanatory memorandum, pp. 45, 46, and 48.

- **why it is necessary and appropriate to provide that instruments made under proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) are not required to be tabled in the Parliament.**

Treasury Laws Amendment (2020 Measures No. 6) Bill 2020

Purpose	Schedule 1 of this bill seeks to amend the temporary full expensing and backing business investment provisions in the income tax law to provide greater flexibility for entities to access concessions Schedule 2 seeks to amend the *Competition and Consumer Act 2010* by reallocating the responsibility for conducting sectoral assessments and making consumer data rules Schedule 3 seeks to amend the *Australian Charities and Not-for-profits Commission Act 2012* to incentivise basic religious charities that may be responsible for past institutional child sexual abuse to join the National Redress Scheme for Institutional Child Sexual Abuse Schedule 4 seeks to make a number of minor and technical amendments to various laws in the Treasury portfolio
Portfolio	Treasury
Introduced	House of Representatives on 2 December 2020

No-invalidity clause[57]

1.87 Item 36 of Schedule 2 seeks to replace section 56BS of the *Competition and Consumer Act 2010*. Proposed subsection 56BS(1) provides that the minister may make consumer data rules under existing subsection 56BA(1) without complying with paragraphs 56BP(b) or (c), after consultation with the Commission and the Information Commissioner. The minister must believe (whether or not that belief is reasonable) that is it necessary to make consumer data rules to avoid a risk of serious harm to the efficiency, integrity or stability of any aspect of the Australian economy, or the interests of consumers. Failure to consult the Commission and Information Commissioner does not invalidate the consumer data rules,[58] but rules made without this consultation cease to be in force six months after the day they are made.[59]

57 Schedule 2, item 36, proposed section 56BS and proposed section 56BTA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

58 Proposed subsection 56BS(2).

59 Proposed section 56BT.

1.88 The committee previously raised concerns about the inclusion of no-invalidity clauses in relation to the consumer data rules in its comments on the Treasury Laws Amendment (Consumer Data Right) Bill 2019 in *Scrutiny Digest 4 of 2019*.[60]

1.89 In addition, proposed section 56BTA provides that a failure to comply with proposed section 56BP, 56BQ or 56BR does not invalidate consumer data rules made under existing subsection 56BA(1). The committee considers that providing that the consumer data rules remain valid even if there is a failure to comply with the statutory requirements undermines including such obligations in the legislation.

1.90 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

1.91 In this regard, the explanatory memorandum does not justify the no-invalidity clauses in proposed subsection 56BS(2) or proposed section 56BTA.

1.92 The committee therefore requests the Assistant Treasurer's advice as to the rationale for including no-invalidity clauses in proposed subsection 56BS(2) and proposed section 56BTA in relation to requirements for making consumer data rules.

Reverse evidential burden of proof[61]

1.93 Item 143 of Schedule 4 seeks to insert proposed section 355-67 into the *Taxation Administration Act 1953* (the Act) to provide that the offence in relation to the disclosure of protected information by taxation officers in section 355-25 of the Act does not apply in certain circumstances.

1.94 Specifically, proposed subsection 355-67(1) provides that section 355-25 does not apply if the entity is a taxation officer, the Commissioner and no other

60 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2019*, 31 July 2019, pp. 27- 29.

61 Schedule 4, item, 143, proposed section 355-67. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

person or body is appointed as a registrar, and the record or disclosure is made for the performance of the registrar's functions or powers. The defendant bears the evidential burden of proof in relation to the matters in proposed subsection 355-67(1).

1.95 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.[62]

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[63]

1.97 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof has not been addressed in the explanatory materials.

1.98 As the explanatory materials do not address this issue, the committee requests the Assistant Treasurer'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*.[64]

62 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.

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

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

Bills with no committee comment

1.99 The committee has no comment in relation to the following bills which were introduced into the Parliament between 30 November – 3 December 2020:

- Customs Tariff Amendment (Incorporation of Proposals and Other Measures) Bill 2020
- Electoral Amendment (Territory Representation) Bill 2020
- Migration Amendment (Common Sense Partner Visa) Bill 2020
- National Collecting Institutions Legislation Amendment Bill 2020
- Telecommunications Amendment (Infrastructure in New Developments) Bill 2020

Commentary on amendments and explanatory materials

Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020

1.100 On 30 November 2020, the Assistant Minister for Finance, Charities and Electoral matters (Senator Seselja) tabled a revised explanatory memorandum, and the debate was adjourned till next day of sitting.

1.101 The committee thanks the minister for tabling this revised explanatory memorandum which appears to address the committee's scrutiny concerns relating to the inclusion of significant matters in delegated legislation.

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

- Australia's Foreign Relations (State and Territory Arrangements) Bill 2020;[65]
- Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020;[66]
- Health Insurance Amendment (Compliance Administration) Bill 2020;[67]
- Transport Security Amendment (Serious Crime) Bill 2020.[68]

65 On 2 December 2020, the Senate committee of the whole agreed to one Opposition amendment, and the committee reported progress. On 3 December 2020, the Senate committee of the whole agreed to one Opposition amendment, the report of the committee was adopted as amended, and the bill was read a third time. On 3 December 2020, the House of Representatives agreed to the Senate amendment, and the bill passed both Houses.

66 On 2 December 2020, the Senate committee of the whole agreed to one Senator Patrick amendment. On 3 December 2020 in the Senate the bill was read a third time, and the House of Representatives disagreed to the Senate amendment.

67 On 30 November 2020, the Minister for Defence Industry (Ms Price) presented a replacement explanatory memorandum.

68 On 9 November 2020, the Minister for Aged Care and Senior Australians (Senator Colbeck) tabled revised explanatory memorandum and the bill was read a first time in the Senate.

Chapter 2

Commentary on ministerial responses

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

Australia's Foreign Relations (State and Territory Arrangements) Bill 2020

Purpose	This bill seeks to establish a legislative scheme for Commonwealth engagement with arrangements between State or Territory governments and foreign governments, to foster a systemic and consistent approach to foreign engagement across all levels of Australian government
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 3 September 2020
Bill status	Passed both Houses on 3 December 2020

Broad discretionary power[1]

Procedural fairness[2]

2.2 In *Scrutiny Digest 14 of 2020* the committee requested the minister's advice regarding why it is necessary and appropriate to provide the minister with such broad discretionary powers under the bill.[3]

2.3 The committee also requested the minister's more detailed justification regarding why it is necessary and appropriate to remove the requirement to observe *any* requirements of procedural fairness in exercising *any* power or performing *any* function under the bill.[4]

1 General comment. The committee draws senators' attention to this bill pursuant to Senate Standing Order 24(1)(a)(ii).

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

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 1-3.

4 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 6-8.

Minister's response[5]

2.4 The minister advised:

Extent of the Minister for Foreign Affairs' Discretion

It is appropriate that the Bill provides the Minister for Foreign Affairs with broad discretion for several reasons.

Firstly, Ministers of the Crown enjoy broad non-statutory executive powers. In this case, the Minister for Foreign Affairs has broad powers to determine Australia's foreign policy. Section 51(xxix) of the Constitution empowers the Commonwealth to make laws with respect to 'external affairs'. This external affairs power extends to making laws with respect to matters involving Australia's relations with other nations, implementing Australia's international obligations under treaties to which it is a party, and matters or things outside the geographical limits of Australia.

Secondly, foreign policy and foreign relations evolve in response to domestic and international factors. Australia's foreign policy and foreign relations can be impacted by the behaviour and actions of other states-such as the outbreak of war or regime changes, as well as less predictable events such as widespread disease or natural disasters. While foreign policy settings often change very slowly and incrementally, they can change quickly in response to global events. Reflecting this dynamism, it is important that Australia's foreign policy is defined broadly in the Bill, and that the Minister's corresponding decision-making power is flexible. This enables the Minister to respond to changes in Australia's foreign policy settings in Australia's national interest.

In recent years, there has been rapid expansion in the engagement of States, Territories and their associated entities with foreign governments. At the same time, the global context has become increasingly complex and contested. The Minister for Foreign Affairs is responsible for managing Australia's foreign policy and foreign relations and is briefed on, and makes decisions about, foreign policy and foreign relations on a daily basis. The Minister is able to draw on the expertise of the Commonwealth, particularly the Department of Foreign Affairs and Trade (DFAT) and its global overseas network, to be informed of foreign policy and foreign relations matters. The Minister also has access to the national intelligence community, and is privy to highly sensitive, but relevant, information. Where the Minister determines foreign policy and foreign relations priorities, she does so in consultation with the Prime Minister and the Cabinet. It is, therefore, entirely appropriate that the Minister be given

5 The minister responded to the committee's comments in a letter dated 30 November 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

broad discretionary powers in light of her role in determining Australia's foreign policy.

That said, the fact that the Minister's decisions in respect of foreign arrangements will be published in the public register [unless one of the exceptions in subsection 53(3) applies] will enable State/Territory entities to build a picture of the kinds of arrangements that may be considered adverse to or inconsistent with Australia's foreign policy, as well as promote public transparency on the operation of the scheme. There will also be ongoing dialogue between DFAT and State/Territory entities (including universities and local governments) about Australia's foreign policy and foreign relations to ensure they continue to be well informed of Australia's foreign policy and foreign relations interests. Australia's foreign policies and foreign relations are also commonly set out or described in various other publicly available sources, including Parliamentary discussion and debate, and speeches such as the Prime Minister's address to the UN General Assembly on 26 September 2020, as well as the 2017 *Foreign Policy White Paper*.

The Committee has suggested it may be difficult for relevant entities to negotiate and enter arrangements given the Minister for Foreign Affairs' discretion to determine foreign policy. However, the Bill has been designed deliberately to negate this concern. The vast majority of foreign arrangements required to be notified under the scheme will be non-core arrangements. Non-core arrangements do not require a decision by the Minister to proceed. Instead, after notifying the Minister, it is expected that entities will enter into the arrangement. This means entities proposing to enter non-core arrangements can continue to negotiate and enter such arrangements just as they would have done prior to the scheme commencing, subject to the Minister having been notified. If an arrangement is a core arrangement, the Minister's approval is required before an entity negotiates and enters the arrangement. However, the Minister must make a decision within 30 days, or the Minister is deemed to have given approval. This means that entities proposing to enter core arrangements will have an early decision (or deemed decision) from the Minister that enables an arrangement to progress.

While the Minister retains the ability to make a declaration about an arrangement in future, the Minister would need to be satisfied that the arrangement was adverse to Australia's foreign policy or inconsistent with foreign relations. However, the Minister would also need to take account of relevant factors set out in section 51 of the Bill, before making a declaration. This includes the extent of the performance of the arrangement, and whether a declaration for that arrangement would have significant financial consequences for the State or Territory. It is anticipated that the vast majority of arrangements would not be subject to a declaration.

Exclusion of Procedural Fairness and Absence of Merits Review

The Committee has said its concerns are heightened by the exclusion of procedural fairness, the exclusion of review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), and the absence of merits review.

Procedural fairness has been excluded as the Minister's decision-making powers under the Bill involve considerations entirely within the Commonwealth's responsibility and discretion. While this will exclude the hearing rule, the Minister will receive entities' views on arrangements via the notification scheme, and consider relevant section 51 factors. These require input from the relevant State/Territory entity. Transparency of decisions will also be provided via the public register.

Australia's foreign relations and foreign policy evolve with time and in response to international events and circumstances. It would not be appropriate in the majority of circumstances for reasons for a decision based on foreign relations and foreign policy to be shared with State/Territory entities or the public at large. Providing reasons for a decision made under the Bill could itself adversely affect Australia's foreign relations, especially to the extent that the decision may disclose Australia's foreign policy or position in relation to particular issues. This could compromise Australia's bilateral relationships, and disadvantage Australia's position in international forums or negotiations. Affording a hearing or providing reasons for a decision could, therefore, defeat the object of the Bill to protect and manage Australia's foreign relations. It is also of note that the exclusion of procedural fairness and the ADJR Act would not unduly trespass on personal rights and liberties as the Bill predominately regulates the conduct of State and Territory entities, rather than individuals.

It is also appropriate not to provide for merits review. Policy decisions of a high political content – such as those affecting Australia's relations with other countries – have been identified by the Administrative Review Council as being generally unsuitable for merits review [Administrative Review Council, *What decisions should be subject to merit review?*]. They are decisions appropriately taken by the Minister for Foreign Affairs. Given the high political consequence of decisions that may be made under the Bill, as well as the impact such decisions have on Australia's relationship with other countries, Commonwealth-State relationships and national security, it is appropriate that decisions not be subject to merits review.

Decisions made under the Bill remain subject to judicial review by the Federal Court under section 39B of the *Judiciary Act 1903*, and by the High Court in its original jurisdiction. These avenues of judicial review will provide a robust mechanism to challenge the legality of decision-making, and will ensure that entities may challenge a decision that affects them.

Broad Scope of Arrangements and Application of the Bill to Universities

The Committee has said its concerns are further heightened by the broad scope of 'arrangements' covered by the Bill, and because the Bill applies to entities not conventionally understood to be associated with government policy programs, such as universities.

The definition of 'arrangement' is broad to capture the range of means by which arrangements are entered into, and to avoid the provisions of the Bill being easily circumvented by entities using less formal means to transact.

However, the scope of the Bill is also deliberately limited. Where university-to-university arrangements are concerned, only those between Australian public universities and foreign universities that are an agency or department of a foreign government or that lack institutional autonomy are within the Bill's scope. Australian universities' arrangements with the vast majority of foreign universities will remain unaffected by the Bill. Similarly, arrangements by corporations are not targeted through the Bill.

The Government will further reduce the scope of the Bill by making rules to exempt certain arrangements. Draft rules are published on the Department of Foreign Affairs and Trade website. The rules will address the Committee's concerns and significantly reduce the scope of the scheme by exempting:

- core foreign arrangements which solely deal with the sharing of information or resources for the management of a declared emergency in Australia; and are negotiated, proposed to be entered or entered, while that emergency is declared;
- foreign arrangements solely dealing with minor administrative or logistical matters; and
- minor variations of a previously notified arrangement that does not alter the substance of the arrangement.

The Minister for Foreign Affairs has an ongoing rule-making ability, and if needed, can further exempt certain other kinds of arrangements under the rules. Once pre-existing arrangements are notified to the Commonwealth and the Minister has greater visibility of arrangements entered into by State/Territory entities, the Minister can consider whether certain other types of arrangements are less critical from a foreign policy perspective and consider exempting such arrangements.

The inclusion of universities recognises that publicly funded Australian universities are institutions established by state and territory law with a fundamental role in international research and partnerships. While established by Commonwealth law, the Australian National University has been specifically included to ensure equity between public universities. The status of Australia's public universities and their international posture means their foreign arrangements have the potential to impact Australia's foreign relations and foreign policy. However, it is also the case that university arrangements present a lower degree of risk to Australia's

foreign relations and foreign policy than State and Territory arrangements with foreign national governments. As a consequence, university arrangements are classified as non-core arrangements and there are fewer requirements and a lesser degree of scrutiny afforded to such arrangements under the Bill.

Committee comment

2.5 The committee thanks the minister for this response. The committee notes the minister's advice about the importance of broadly defining Australia's foreign policy in the bill and ensuring that the minister's corresponding decision-making power is flexible, as foreign policy settings can change quickly in response to global events. The minister advises that broad discretionary powers are appropriate in light of the minister's role in determining foreign policy, noting the minister's ability to draw on the expertise of the Commonwealth and the national intelligence community.

2.6 The committee also notes the minister's advice that ministerial decisions in respect of foreign arrangements will be published in the public register, that there will be ongoing dialogue between DFAT and State/Territory entities to ensure they continue to be well informed of Australia's foreign policy and foreign relations interests, and that foreign policies and foreign relations are also commonly set out or described in various other publicly available sources.

2.7 The minister also advises that the bill has been designed deliberately to negate concerns that it may be difficult for relevant entities to negotiate and enter arrangements, with the vast majority of arrangements required to be notified under the scheme being 'non-core' arrangements that do not require a decision by the minister to proceed.

2.8 With respect to procedural fairness, the committee notes the minister's advice that the ministerial decision-making powers under the bill involve considerations entirely within the Commonwealth's responsibility and discretion. The committee also notes the minister's advice that providing reasons for a decision made under the bill could adversely affect Australia's foreign relations, especially to the extent that the decision may disclose Australia's foreign policy or position in relation to particular issues. The minister advises that, while the hearing rule will be excluded, the minister will receive entities' views on arrangements via the notification scheme and will consider relevant section 51 factors which require input from the relevant State/Territory entity. While the committee acknowledges this advice, the committee notes that there is no requirement on the face of the bill that the minister consider the interests of the State/Territory entities when making a decision to make a declaration in relation to non-core arrangements.

2.9 While the committee also acknowledges the minister's advice that, as the bill predominately regulates the conduct of State and Territory entities, the exclusion of procedural fairness and the ADJR Act would not unduly trespass on personal rights

and liberties, the committee remains concerned about the exclusion of procedural fairness to the extent that non-state entities may be affected.

2.10 The committee further notes the minister's advice that the exclusion of merits review is appropriate noting that policy decisions of a high political content—such as those affecting Australia's relations with other countries—have been identified by the Administrative Review Council as being generally unsuitable for merits review.

2.11 With respect the broad scope of arrangements covered by the bill and application of the bill to universities, the committee notes the minister's advice that the definition of 'arrangement' is broad to capture the range of means by which arrangements are entered into, and to avoid the provisions of the bill being easily circumvented by entities using less formal means to transact. The minister also advises that the scope of the bill is deliberately limited so that Australian universities' arrangements with the vast majority of foreign universities will remain unaffected by the bill and that arrangements by corporations are not targeted through the bill.

2.12 The minister further advises that the government will reduce the scope of the bill by making rules to exempt certain arrangements, and that draft rules are published on the Department of Foreign Affairs and Trade website. However, it is unclear to the committee why these exemptions could not be provided for on the face of the bill, noting that it does not appear that these exemptions would require regular modification.

2.13 The committee reiterates its scrutiny concern that the bill provides the minister with what may be characterised as an unfettered discretionary power.

2.14 The committee also reiterates its concerns about the removal of requirements to observe any requirements of procedural fairness in exercising any power or performing any function under the bill, and in relation to leaving provisions to constrain the scope of the bill to be set out in delegated, rather than primary, legislation.

2.15 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on these matters.

Broad discretionary power—definition of Australia's foreign policy[6]

2.16 In *Scrutiny Digest 14 of 2020* the committee requested the minister's advice as to the appropriateness of omitting paragraph 5(2)(d) from the bill to narrow the scope of the definition of 'Australia's foreign policy' so that such policy does not

6 Proposed paragraph 5(2)(d). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

explicitly include policy that has not 'been formulated, decided upon, or approved by any particular member of body of the Commonwealth'.[7]

Minister's response

2.17 The minister advised:

> Paragraph 5(2)(d) should be retained in the Bill.
>
> Paragraph 5(2)(d) recognises that foreign policy is dynamic, and ensures that the definition of Australia's foreign policy will be sufficiently flexible to cover a policy regardless of whether it was the product of, or approved by, the Cabinet, any other ministerial decision-making body, the Prime Minister or any other Minister, or DFAT or any other department of State. This ensures that the Minister is not required to identify a particular written policy, such as the *2017 Foreign Policy White Paper*, prior ministerial or departmental statements or other formal documents, in assessing whether or not an arrangement is consistent with, or is not inconsistent with, Australia's foreign policy. This is particularly important given the information that a Minister relies upon in determining Australia's foreign policy may be classified or sensitive, and appropriately not within the public domain.
>
> The Minister for Foreign Affairs is the Minister with responsibility for Australia's foreign policy. It would not be congruent with the scope of the Minister's executive powers to limit her ability to determine Australia's foreign policy to only those matters also considered or decided by other persons or bodies, or written down prior to a decision being made.
>
> However, in practice, the Minister for Foreign Affairs is a member of the Cabinet and participates in the deliberative processes of government. The Minister also remains accountable to the Parliament.

Committee comment

2.18 The committee thanks the minister for this response. The committee notes the minister's advice that it would not be congruent with the scope of the minister's executive powers to limit her ability to determine Australia's foreign policy to only those matters also considered or decided by other persons or bodies, or written down prior to a decision being made.

2.19 The committee also notes the minister's advice that proposed paragraph 5(2)(d) ensures that the definition of Australia's foreign policy will be sufficiently flexible to cover a policy regardless of its source, and that this, in-turn, ensures that the minister is not required to identify a particular written policy in assessing whether or not an arrangement is consistent with Australia's foreign policy.

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7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 1-3.

The minister states that this is important as the information relied upon in determining foreign policy may be classified or sensitive.

2.20 While acknowledging the minister's advice in relation to proposed paragraph 5(2)(d), the committee reiterates its scrutiny concern about the minister's broad discretionary power under the bill.

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

Broad delegation of legislative power—exempt arrangements[8]

2.22 In *Scrutiny Digest 14 of 2020* the committee requested the minister's advice as to why it is proposed to confer on the minister the broad power to exempt arrangements from the application of the law, and whether the bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for the minister to exempt an arrangement from the operation of the bill.[9]

Minister's response

2.23 The minister advised:

> Any decision to exempt an arrangement from the application of the law requires a point-in-time assessment of the risk of a particular arrangement. These types of judgments are subject to change over time as Australia's domestic and international interests, and the geopolitical landscape, evolves. Arrangements which are low risk now, might be considered high-risk in the future, and vice versa. It is important that the Government of the day be able to exempt arrangements flexibly and in response to changing circumstances without needing to amend the Act.
>
> The Bill has been introduced in response to an identified gap in State/Territory engagement with the Commonwealth on arrangements with foreign governments. The fact that, to date, State and Territory entities have had inconsistent engagement with the Commonwealth on such arrangements, means the Commonwealth does not have full visibility of the extent and nature of such arrangements. This runs counter to the Commonwealth's primary responsibility for managing Australia's foreign relations. Once the Bill commences and the Minister is given greater visibility of arrangements, the Minister will have fuller understanding of the nature and extent of arrangements entered into by State/Territory entities and may, at that time, consider it appropriate to introduce further

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8 Clauses 4 and 13. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 3-5.

exempt arrangements. It is important that the Minister retain the ability to manage implementation of the Bill over time and minimise regulatory impact by exempting arrangements considered to be low risk through the rules.

The rules prescribing exempt arrangements will be subject to disallowance in accordance with section 42 of the *Legislation Act 2003*.

Committee comment

2.24 The committee thanks the minister for this response. The committee notes the minister's advice that the types of judgements required for any decision to exempt an arrangement at a point in time are subject to change as Australia's domestic and international interests evolve, and it is therefore important that the government of the day be able to exempt arrangements flexibly and in response to changing circumstances without needing to amend the Act.

2.25 The committee recognises the importance of allowing some flexibility to exempt certain arrangements in light of the broad discretionary powers in the bill. However, the committee remains concerned about the underlying breadth of discretion conferred on the minister, without at least high-level guidance on the face of primary legislation regarding the circumstances where it will be appropriate for the minister to exempt an arrangement from the operation of the bill.

2.26 The committee reiterates its scrutiny concerns about the broad power of the minister to exempt arrangements from the application of the law.

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

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

Significant matters in delegated legislation[10]

2.29 In *Scrutiny Digest 14 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow delegated legislation to determine the scope of key definitions in the bill, and whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding the criteria or considerations that the minister must take into account before altering the scope of key definitions in the bill.[11]

10 Clauses 4, 7, 8, 10 and 12. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 5-6.

Minister's response

2.30 The minister advised:

> The Government has addressed the Committee's recommendations and has amended the Bill to introduce the definition of foreign universities that lack institutional autonomy. The definition of foreign universities is clear and appropriately targeted to bring in foreign universities that are substantially controlled by a foreign government. There are a finite number of foreign universities in scope, and institutions with a comparable level of autonomy to Australian universities are not in scope of the Bill.
>
> The Government has also amended the legislation to require a review of the operation of the Act. This statutory review will provide an opportunity for the Government to review operation of the legislation after three years, its effectiveness and whether any amendments are required. The Government is committed to continued collaboration with stakeholders throughout the process of implementation and review.

Committee comment

2.31 The committee thanks the minister for this response. The committee notes the minister's advice that the government has successfully moved amendments to the bill to introduce a definition of foreign universities that lack institutional autonomy.

2.32 The committee welcomes the amendments that set out a definition of foreign universities that lack institutional autonomy on the face of the primary legislation. However, the committee reiterates its scrutiny concerns in relation to allowing delegated legislation to determine the scope of other key definitions in the bill.

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

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

Retrospective application[12]

2.35 In *Scrutiny Digest 14 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to apply the measures in the bill to agreements that have already entered into force and whether there may be any detrimental effect on individuals. [13]

12 Clause 9 and Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2020*, pp. 8-9.

Minister's response

2.36 The minister advised:

> There has been rapid expansion in recent years in the engagement States, Territories and their associated entities have with foreign governments and associated overseas partners. These arrangements have the capacity to impact foreign relations. At the same time, the global context has become increasingly complex and contested. Despite this, there has been no systematic way to ensure that States, Territories and their associated entities consult with or notify the Commonwealth Government when they enter into arrangements with foreign governments and their associated entities. This has led to a situation where the Minister for Foreign Affairs, as the Minister responsible for Australia's foreign relations and foreign policy, has not had clear visibility of how Australia has been engaging with foreign governments across various levels of government, or an ability to shape that engagement in line with the national interest.
>
> It is necessary for the Bill to capture arrangements entered into prior to its commencement, and remaining in operation, to provide the Minister with visibility of existing foreign arrangements, and to enable the Minister to consider whether such arrangements are adverse to Australia's foreign relations or inconsistent with our foreign policy. Without this mechanism, and given many arrangements are not publicly available, the Minister would be restricted in her ability to make decisions about such arrangements, as well as make decisions about new arrangements in context and with a full understanding of their potential impact on a State/Territory entity or on Australia's bilateral relationship. The public would also be deprived of the benefit of the full transparency that the inclusion of pre-existing arrangements on the public register brings. It is necessary and appropriate for the legislation to bring all existing arrangements in scope, to ensure fulfilment of the policy intent to manage and protect Australia's foreign relations and ensure consistency in Australia's foreign policy.

Committee comment

2.37 The committee thanks the minister for this response. The committee notes the minister's advice that capturing arrangements entered into prior to commencement of the bill is necessary for the bill to provide the minister with visibility of existing foreign arrangements, and to enable the minister to consider whether such arrangements are adverse to Australia's foreign relations or inconsistent with foreign policy.

2.38 While noting this advice, the committee reiterates its long-standing concerns about provisions that apply retrospectively, as such an approach challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has particular concerns where legislation will, or might, have a detrimental effect on individuals.

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

Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020

Purpose	This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to facilitate the devolution of environmental approvals to the states and territories, making technical amendments to the existing provisions of the Act relating to bilateral agreements to support the efficient, effective and enduring operation of bilateral agreements
Portfolio	Environment
Introduced	House of Representatives on 27 August 2020
Bill status	Before the Senate

Incorporation of materials as in force from time to time[14]

2.40 The committee initially scrutinised this bill in *Scrutiny Digest 11 of 2020* and requested the minister's advice.[15] The committee considered the minister's response in *Scrutiny Digest 13 of 2020* and requested the minister's further advice.[16] The committee considered the minister's further response in *Scrutiny Digest 15 of 2020* and requested that the minister provide an addendum to the explanatory memorandum to include key information provided by the minister in her responses relating to the incorporation of material into bilateral agreements.[17]

Minister's response[18]

2.41 The minister advised:

> The Senate Scrutiny of Bills Committee has requested that I table an addendum to the explanatory memorandum to the Bill containing the information I have provided to the Committee regarding the types of

14 Schedule 5, item 9, proposed section 48AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2020*, pp. 11-12.

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 27-30.

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 57-58.

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

documents that may be incorporated into a bilateral agreement, and whether those documents will be freely available.

In my view, an addendum to the explanatory memorandum is not necessary. I note my responses to the Committee's questions in relation to this matter are publicly available in the Scrutiny Digest 13/20 and Scrutiny Digest 15/20.

Committee comment

2.42 The committee thanks the minister for this response. The committee notes the minister's advice that responses to the committee's questions in relation to this matter are publicly available in *Scrutiny Digest 13 of 2020* and *Scrutiny Digest 15 of 2020*.

2.43 While noting this advice, the committee emphasises that, where it requests that key information be included in explanatory materials, it does so on the basis that these documents are an important point of access to understanding the law, particularly as they are more directly accessible to persons seeking to understand the law.

2.44 The committee reiterates its request that an addendum to the explanatory memorandum containing the key information provided by the minister in her responses to the committee be tabled in the Parliament as soon as practicable, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Export Market Development Grants Legislation Amendment Bill 2020

Purpose	This bill seeks to establish a grant program which is administered by the Australian Trade and Investment Commission. The grant is provided to Australian small and medium enterprise exporters as a reimbursement for up to 50 per cent of their export-related marketing expenses
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 7 October 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[19]

Merits review[20]

2.45 The committee initially scrutinised this bill in *Scrutiny Digest 15 of 2020* and requested the minister's advice.[21] The committee considered the minister's response in *Scrutiny Digest 17 of 2020* and requested that the minister table an addendum to the explanatory memorandum be tabled in the Parliament as soon as practicable.[22]

Minister's response[23]

2.46 The minister advised:

> An addendum to the Explanatory Memorandum to the Bill to address the issues raised by the Committee in relation to matters in delegated legislation and merits review will be tabled in the House of Representatives when the second reading debate occurs.
>
> I would also like to take this opportunity to inform the Committee that the draft Export Market Development Grant Rules have been publicly released

19 Schedule 1, item 4, definition of 'ready to export', Schedule 1, item 5, proposed sections 10, 11, 15–18, and 21. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

20 Schedule 1, item 10, proposed subsections 102(3) and 102(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 21-24.

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 46-51.

23 The minister responded to the committee's comments in a letter dated 7 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 18 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

for consultation. Their release prior to the second reading debate in the House of Representatives will assist Parliament when considering the Bill.

Committee comment

2.47 The committee thanks the minister for this response.

2.48 The committee welcomes the minister's advice that an addendum to the explanatory memorandum will be tabled in the House of Representatives setting out key information in relation to the inclusion of significant matters in delegated legislation, and the availability of merits review. The committee further welcomes the minister's advice that the draft Export Market Development Grant Rules have been publicly released for consultation in advance of the bill's second reading debate in the House of Representatives.

2.49 In light of the minister's advice, the committee makes no further comment on these matters.

Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020

Purpose	This bill is part of a package which seeks to amend the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* in order to strengthen and simplify the foreign investment framework, while continuing to offset the cost of the package by simplifying existing fee arrangements
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2020
Bill status	Passed both Houses on 8 December 2020

Significant matters in delegated legislation[24]

2.50 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to whether guidance in relation to the method of calculation of the fees in proposed section 6, which are imposed as taxes, can be included on the face of the bill.[25]

Treasurer's response[26]

2.51 The Treasurer advised:

> Currently, fee amounts are set in the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and in the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*. The power in proposed subsection 6(2) to place all fee amounts in the regulations is therefore not dissimilar to the current legislation.
>
> This legislative design approach supports the Government's objective to establish a simpler fee framework. Prescribing the amount of a fee in a single piece of legislation (the regulations) creates a more user-friendly experience.
>
> Additionally, allowing the regulations to list the fee amounts will provide the Government with the necessary flexibility to make timely

24 Schedule 1, item 7, proposed sections 5 and 6. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 8-9.

26 The Treasurer responded to the committee's comments in a letter dated 1 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

amendments. However, we note there are protections included in the legislation place appropriate limits on the flexibility provided. For example, once amended, the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* will include a cap to limit the maximum fee that can be set and as the regulations are subject to disallowance parliamentary scrutiny over the regulations remains in place.

Committee comment

2.52 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the approach of providing for fee amounts in the regulations supports the government's objective to establish a simpler fee framework and that prescribing the amount of a fee in a single piece of legislation creates a more user-friendly experience.

2.53 While noting this advice, the committee reiterates its consistent scrutiny view that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this case, the fact that a maximum cap is set in the primary legislation partly addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers. In addition, the committee notes that the objective of prescribing the amount of a fee in a single location could be achieved by setting out the amount of all fees on the face of the primary legislation.

2.54 While the committee welcomes the important limitation in the bill on the proposed power to set the rate of taxation through regulations, the committee reiterates its consistent scrutiny view that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.

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

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

Foreign Investment Reform (Protecting Australia's National Security) Bill 2020

Purpose	This bill is part of a package which seeks to amend the *Foreign Acquisitions and Takeovers Fees Imposition Act* 2015 in order to strengthen and simplify the foreign investment framework
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2020
Bill status	Before the Senate

Significant matters in delegated legislation[27]

2.57 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the definitions of 'national security business' and 'national security land' to delegated legislation;
- whether these definitions can instead be included on the face of the bill or, at a minimum, whether the bill can be amended to include at least high-level guidance regarding what may be covered by these definitions on the face of the primary legislation;
- why it is considered necessary and appropriate for delegated legislation to provide for actions of a specified kind to be exempt notifiable national security actions or reviewable national security actions;
- whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation;
- why it is considered necessary and appropriate to allow delegated legislation to expand the relevant laws in relation to which protected information may be disclosed; and
- whether the bill can be amended to include at least high-level guidance as to the categories of laws that may be determined on the face of the primary legislation.[28]

27 Schedule 1, item 204, proposed subsection 122(4), Schedule 1, item 18, proposed definitions of 'national security business' and 'national security land, Schedule 1, item 72, proposed subsection 55B(3) and section 55G, and Schedule 1, item 80, proposed section 63. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

Treasurer's response[29]

2.58 The Treasurer advised:

Definitions in delegated legislation

The legislation seeks to address the potential risks that may arise from foreign ownership or control of assets and endeavours that are important for Australia's national security. The definitions of 'national security business' and 'national security land' are critical elements of the framework that is used to achieve this. They target the application of the legislative regime so that it focuses on businesses and premises where risks are likely to arise while minimising impact for areas of lower risk. As the risks to Australia's national security change over time, the definitions may also need to change to reflect this.

This essential flexibility to adapt to changing risks is best achieved by placing the definitions in the regulations which may be amended more quickly than primary legislation. The regulations remain subject to the constraints of the primary legislation and the general scope of the current definitions is outlined in the explanatory memorandum to the bill. However, given the manner in which national security risks arise, the regulations are expected to be amended if necessary, but in line with usual government processes will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

The primary legislation will set out the core legal obligations and frameworks for managing the legal risks. The high level guidance is provided in the explanatory memorandum to the bill and further guidance will be provided in the explanatory statement to the regulations.

For the same reason that the detailed definitions need to be included in the regulations (flexibility to be promptly amended in response to evolving national security risks), the primary legislation should not excessively constrain the scope of the potential definitions that may be prescribed by the regulations.

National security notifications in delegated legislation

The exemption certificate mechanism allows foreign investors to apply for an exemption certificate that, if granted, would allow the investor to make investments within the scope of the exemption certificate without needing to notify the Treasurer of each acquisition separately. This allows an

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28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 10-13.

29 The Treasurer responded to the committee's comments in a letter dated 1 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

investor who holds an exemption certificate to undertake programs of acquisitions with only one initial approval.

Alternatively, an investor may use an exemption certificate to seek approval for a proposed transaction so that it may proceed quickly once commercial details are finalised. The availability of an exemption certificate allows investors to be confident that their obligations under the *Foreign Acquisitions and Takeovers Act 1975* to notify the Treasurer before taking an action have been met.

Section 63 of the *Foreign Acquisitions and Takeovers Act 1975* allows regulations to prescribe the types of certificates the Treasurer may grant. Existing subsections 45(3) and 49(2) of the *Foreign Acquisitions and Takeovers Act 1975* expressly authorise regulations to prescribe that certain actions are neither notifiable nor significant actions respectively. This allows the regulations (current Subdivision B of Division 4 of Part 3 of the regulations) to establish an exemption certificate mechanism.

The same approach is taken in subsection 55B(3) and section 55G for notifiable national security actions and reviewable national security actions respectively, not because it is consistent with the approach to notifiable and significant actions under subsections 45(3) and 49(2), but because it is necessary to ensure that the exemption certificate mechanism continues to allow investors to undertake a program of acquisitions with efficiency and certainty while managing risks to Australia's national interest and national security. Importantly, the actual granting of the exemption certificate, will in each case be subject to a review process whereby the risks associated with the proposed exemption certificate are comprehensively assessed.

The introduction of additional notification requirements for notifiable national security actions and potential notification obligations for reviewable national security actions without corresponding exemption certificate provisions would undermine the benefits of the entire exemption certificate mechanism for investors who meet the criteria for receiving the existing exemption certificate. For this reason it is necessary to extend the exemption certificate mechanism to notifiable national security actions and reviewable nationals security actions.

It is not feasible to include guidance on circumstances where an exemption certificate will be granted by the Treasurer in the legislation because each situation will require a separate assessment of the risks associated with the proposed action or program of actions.

Applications will be considered on a case-by-case basis against the criteria for whether an exemption certificate could be granted. The regulations will set out the criteria that must be met in a manner similar to the current Subdivision B of Division 4 of Part 3 of the regulations. The particulars of meeting the criteria will be unique to each application.

Disclosure of protected information in delegated legislation

Currently, section 122 of the *Foreign Acquisitions and Takeovers Act 1975* allows for protected information to be disclosed to a Minister or an accountable authority of a Commonwealth for the purposes of the administration of the prescribed list of Acts and for particular matters. Current paragraph 121(1)(w) of *Foreign Acquisitions and Takeovers Act 1975* allows regulations to be made to prescribe additional Acts. The amendments seek to expand the prescribed list of Acts and add three new matters for the permitted sharing of protected information within the Commonwealth. The amendments also change the regulation making power to an instrument making power.

The amendments largely replicate existing section 122 of the *Foreign Acquisitions and Takeovers Act 1975*, which already prescribes a number of Acts. For example the 'a taxation law (within the meaning of section 995-1 of the Income Tax Assessment Act 1997)' is already listed to ensure protected information under the *Foreign Acquisitions and Takeovers Act 1975* can be disclosed to the Commissioner of Taxation, to allow the Commissioner to ensure applicants are compliant with Australian tax laws.

The Treasurer will have the ability to prescribe any other Acts, by legislative instrument. The change gives the Treasurer flexibility to ensure protected information can be shared in a timely manner to enable other agencies to ensure compliance with their laws, including where the legislation currently does not exist but protected information collected under the *Foreign Acquisitions and Takeovers Act 1975* may be pertinent. Any legislative instrument prescribing new legislation under this section will be tabled in Parliament and open to parliamentary scrutiny.

Consistent with the current approach, an Act would not be prescribed unless it was necessary. For example, when decisions are made under different regimes, sharing of protected information will ensure a consistent and whole-of-government approach. Sharing of protected information may also be necessary when new national interest concerns arise.

Committee comment

2.59 The committee thanks the Treasurer for this response. With respect to the definitions of 'national security business' and 'national security land', the committee notes the Treasurer's advice that including these definitions in the regulations provides essential flexibility for the definitions to be promptly amended in response to evolving national security risks. The committee also notes the Treasurer's advice that, for the same reason, the primary legislation should not excessively constrain the scope of the potential definitions that may be prescribed by the regulations.

2.60 With respect to disclosures of protected information to Commonwealth ministers and Commonwealth bodies, the committee notes the Treasurer's advice that the amendment gives the Treasurer flexibility to ensure protected information

can be shared in a timely manner to enable other agencies to ensure compliance with their laws, including where the legislation currently does not exist but protected information collected under *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Act) may be pertinent. The committee also notes the Treasurer's advice that an Act would not be prescribed unless it was necessary.

2.61 While noting the above advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation, such as key definitions or permitting disclosures of protected information.

2.62 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **leaving the definitions of 'national security business' and 'national security land' to be set out in delegated legislation; and**
- **allowing delegated legislation to expand the relevant laws in relation to which protected information may be disclosed.**

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

2.64 With respect to proposed subsection 55B(3) and section 55G, the committee notes the Treasurer's advice that the existing exemption certificate mechanism established by the regulations is authorised through existing section 63 of the Act, which allows regulations to prescribe the types of certificates the Treasurer may grant, and existing subsections 45(3) and 49(2) which authorise regulations to prescribe that certain actions are neither notifiable nor significant actions respectively.

2.65 The Treasurer advises that the approach taken in proposed subsection 55B(3) and proposed section 55G, allowing regulations to provide that certain actions are not notifiable national security actions or reviewable national security actions, is necessary to ensure that the existing exemption certificate mechanism continues provide efficiency and certainty while also managing risks to Australia's national interest and national security.

2.66 The committee also notes the Treasurer's advice that the actual granting of the exemption certificate will in each case be subject to a review process, and that it is not feasible to include guidance on circumstances where an exemption certificate will be granted by the Treasurer in the legislation because each situation will require a separate assessment of the risks associated with the proposed action or program of actions.

2.67 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister relating to exemption certificates be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to

understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Broad delegation of administrative power

Broad discretionary power

Privacy[30]

2.69 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to provide the Treasurer and their delegates with a broad discretionary power to issue directions and interim directions;
- the appropriateness of amending the bill to provide that a person must be given an opportunity to respond and make submissions before a direction is made or varied;
- whether the threshold for engagement of the power to give a direction or interim direction of 'reason to believe' is a different threshold than 'reasonably believes';
- why it is necessary to allow the Treasurer's powers to give directions and interim directions to be delegated to any APS employee at any level within the Treasury or the ATO;
- whether the bill can be amended to provide some legislative guidance as to the categories of people to whom the power to give directions and interim directions might be delegated; and
- whether any limits or safeguards apply to personal information about individuals which may be published as part of a direction.[31]

Treasurer's response

2.70 The Treasurer advised:

> The approach by Treasury to managing compliance has evolved over recent years as the nature and type of acquisitions has changed.

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30 Schedule 1, item 132, proposed sections 79R and 79V. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (i).

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 13-16.

It has become increasingly clear that community expectations and those of Members of Parliament are that Treasury is able to do more in the compliance space. An example of this are the comments made to and questions asked of Treasury on 15 May 2020 at the public hearings of the Senate Economics References Committee Inquiry into foreign investment proposals.

The purpose of the amendments is to enhance and expand Treasury's enforcement and compliance toolkit. The FIR Bill brings the compliance and enforcement tools available to Treasury in line with other regulators, including those in the Treasury portfolio. The discretion in issuing directions and interim directions reflects the variety of actions covered by the *Foreign Acquisitions and Takeovers Act 1975*, different practices of businesses and entities, and allowing flexibility to effectively and efficiently respond to future business and industry practices.

Procedural fairness and the opportunity for a person to engage with Treasury prior to enforcement action being taken is inherent in the approach taken to administer Australia's foreign investment screening regime. It has been a longstanding practice of Treasury to work with a foreign investor to achieve compliance where non-compliance is identified. To include a requirement for Treasury to meet its procedural fairness obligations on the face of the Bill would create doubt elsewhere in the *Foreign Acquisitions and Takeovers Act 1975* about where and how procedural fairness obligations apply.

The term 'reason to believe' is not intended to create a lower or different bar to the term 'reasonably believes'.

Given the volume of work undertaken by Treasury and the Commissioner of Taxation, being able to delegate our powers is necessary to effectively and efficiently administer the regime. Consistent with Australian Government policy, these officials will have suitable training and experience to properly exercise these powers. The Government does not consider that it is necessary to include any guidance in the Bill as to how these powers will be delegated.

There are no prescribed limits or safeguards about the information that may be published as part of a direction. As noted in the Explanatory Memorandum to the Bill, there are strong public interest grounds in requiring directions to be published to increase public confidence that appropriate steps are being taken to ensure compliance with the *Foreign Acquisitions and Takeovers Act 1975*. However, the Bill recognises that there may be circumstances when publishing the direction would be contrary to Australia's national interest. Similar to the overall administration of the *Foreign Acquisitions and Takeovers Act 1975*, the decision to withhold information will be made on a case-by-case basis.

Committee comment

2.71 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the bill will bring the tools available to Treasury for compliance and enforcement in line with other regulators, including those in the Treasury portfolio. The Treasurer further advised that the discretion in issuing directions and interim directions reflects the variety of actions covered by the Act, as well as different practices of businesses and entities, and allows flexibility to respond to future business and industry practices.

2.72 The committee also notes the Treasurer's advice that it is a longstanding practice for Treasury to work with a foreign investor to achieve compliance where non-compliance is identified, and that to include a requirement for Treasury to meet its procedural fairness obligations on the face of the bill would create doubt elsewhere in the Act about where and how procedural fairness obligations apply.

2.73 In relation to the threshold for engagement of the power to give a direction or interim direction, the committee notes the Treasurer's advice that the term 'reason to believe' is not intended to create a lower or different bar to the term 'reasonably believes'.

2.74 In relation to the delegation of the Treasurer's powers to give directions and interim directions, the committee notes the Treasurer's advice that these delegations are necessary, given the volume of work undertaken by Treasury and the Commissioner of Taxation, and that the relevant officials will have suitable training and experience to properly exercise these powers, consistent with government policy. While noting this advice, the committee reiterates its concern that requirements for delegates to have suitable training and experience are not included on the face of the bill.

2.75 The committee further notes the Treasurer's advice that while there are no prescribed limits or safeguards about the information that may be published as part of a direction, the bill recognises that there may be circumstances when publishing the direction would be contrary to Australia's national interest, and that the decision to withhold information will be made on a case-by-case basis.

2.76 The committee reiterates its scrutiny view that proposed sections 79R and 79V provide the Treasurer with broad discretionary powers to issue directions and interim directions in circumstances where the Treasurer only needs to have a reason to believe, or reasonably believes, that a contravention has occurred, is occurring or will occur. The committee's concerns in this regard are heightened by the fact that the breach of a direction may amount to a criminal offence which may give rise to significant penalties, and that the power to make such directions and interim directions may be delegated to a broad class of persons, with minimal safeguards on the face of the bill in relation to procedural fairness or privacy of any individual subject to a direction.

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

2.78 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **providing the Treasurer with a broad discretionary power to give directions and interim directions, with minimal safeguards on the face of the bill in relation to procedural fairness or privacy, and**
- **allowing this power to be delegated to a person engaged under the *Public Service Act 1999* employed in the Treasury or Australian Taxation Office.**

Adequacy of parliamentary oversight

Privacy[32]

2.79 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice regarding why it is considered necessary and appropriate to allow protected information to be provided to foreign governments in circumstances where limited safeguards are provided on the face of the bill, including to ensure that an international agreement contains sufficient safeguards regarding the circumstances in which protected information can be disclosed.

2.80 The committee also requested the minister's advice as to whether the bill can be amended to:

- set out minimum protections and safeguards related to privacy that must be included in international agreements; and
- specify that international agreements must be tabled in the Parliament.[33]

Treasurer's response

2.81 The Treasurer advised:

> ***Provision of protected information to foreign governments***
>
> The amendments provide that protected information under the *Foreign Acquisitions and Takeovers Act 1975* may be shared with foreign

32 Schedule 1, item 205, proposed section 123B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v) and (i).

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 17-19.

governments in limited circumstances where national security risks may exist, where it is not contrary to the national interest and subject to any agreements in place between the Commonwealth and the foreign government.

The information may be disclosed in performing the person's functions or duties or exercise of the person's powers under the *Foreign Acquisitions and Takeovers Act 1975* and the person must be satisfied the disclosure will assist the foreign government in the performance or exercise of their functions, duties, or powers under their law.

The information sharing with foreign governments may be necessary for the Commonwealth to obtain a 'full picture' of the applicant, as the applicant may be making similar investments in other countries. This would allow the Treasurer to tap into the knowledge and experience of other countries. Being able to draw on the knowledge and experience from other countries would better allow the Treasurer to assess any potential national security risks and make an assessment on cases related to national security. Such an assessment could materially assist in protecting Australia's national security.

The Government recognises that much of this information required to assess an application will be commercially sensitive or of a private or confidential nature. As such information sharing will not be permitted unless there is an agreement in place between the Commonwealth and the foreign government. Paragraph 123B(1)(e) stipulates the sharing would not occur unless the foreign government undertakes not to use or further disclose the information in accordance with the agreement or otherwise as required or authorised by law. Additionally, if further constraints or protections are required when the information is shared, paragraph 123B(3) allows the Treasurer to impose conditions in relation to the information to be disclosed.

In line with its obligations under the *Privacy Act 1988*, the Government would seek to include privacy related protections in the agreements, as appropriate to prevent any unnecessary release of information. However, as any information proposed for sharing will relate to national security risks, and therefore possible law enforcement actions, the receiving agencies should be able to receive sufficient information to identify persons or entities of interest for further inquiries. This approach is consistent with exceptions under the *Privacy Act 1988*, which exempts the applications of the Australian Privacy Principles for appropriate action relating to suspected unlawful activity or serious misconduct.

The Commonwealth would need to negotiate individual agreements with foreign governments setting out mutually agreed standards for handling personal and commercially sensitive information and that the information can only be used for the purpose shared.

For example, an agreement could stipulate specific arrangements for disclosure to the foreign entity; what the disclosed information can be

used for; the categories of personal information that may be disclosed under the agreement; and that the foreign government must take reasonable steps to destroy or de-identify personal information where the overseas recipient no longer needs the information.

Potential amendments

On the basis of the explanation above, the Government does not consider that further amendments are required to the Bill. Agreements in place will set mutually agreed standards for handling personal and commercially sensitive information.

The design of subsection 123B(2), specifying that protected information may be shared with foreign governments subject to agreements in place, is modelled on section 45 of the *Australian Border Force Act 2015*.

The Government has not yet commenced negotiating any international agreements under section 123B. Where the negotiations result in a treaty level agreement, then in accordance with established practice, any agreement proposed to be entered into by the Government will be tabled in Parliament and subject to scrutiny by the Joint Standing Committee on Treaties.

The Joint Standing Committee on Treaties would be able to review the appropriateness of the international agreement and provide adequate oversight and scrutiny on any proposed agreements between the Commonwealth and foreign governments.

Committee comment

2.82 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that information sharing and being able to draw on the knowledge and experience from other countries will better allow the Treasurer to assess an applicant and assess potential national security risks.

2.83 The committee also notes the Treasurer's advice that information sharing will not be permitted unless there is an agreement in place between the Commonwealth and the foreign government, and that the government would seek to include privacy related protections in the agreements, as appropriate to prevent any unnecessary release of information. While noting this advice, the committee remains concerned that safeguards requiring the inclusion of privacy related protections in these agreements are not included on the face of the bill.

2.84 While the committee also acknowledges the Treasurer's advice in relation parliamentary oversight of agreements at the treaty level, it is not clear that all relevant agreements would be made at the treaty level. It therefore appears to the committee that at least some of these agreements may not be subject to review by the Joint Standing Committee on Treaties, or otherwise be subject to parliamentary oversight.

2.85 The committee reiterates its concerns that the provisions as currently drafted have the potential to significantly trespass on a person's rights and liberties, particularly in circumstances where access to protected information may be given to foreign jurisdictions whose governance structures are not underpinned by respect for the rule of law and the separation of powers.

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

2.87 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing protected information to be provided to foreign governments in circumstances where limited safeguards are provided on the face of the bill.

Merits review[34]

2.88 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to how an applicant's right to a fair hearing will be protected in proceedings for merits review before the Administrative Appeals Tribunal.[35]

Treasurer's response

2.89 The Treasurer advised:

> The applicant's right to a fair hearing is protected in so far as it is possible to do so in the circumstances where the disclosure of particular information to the applicant may itself increase the risks to Australia's national security. An example of this may be a situation where the applicant would be able to infer from the information the technological means that were used to obtain the information or the reasons why a particular business or location is critical to national security.
>
> Proposed Division 4 of Part 7 is closely modelled on the existing mechanism for the review of ASIO's security assessments by the Security Division of the AAT because it is likely that national security issues that arise in the review of applications under the *Foreign Acquisitions and Takeovers Act 1975* will be as sensitive as those in ASIO's security assessments and would require a comparable level of care and management. For this reason, the mechanism in the *Foreign Acquisitions*

34 Schedule 1, item 207, proposed Division 4 of Part 7. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 19-20.

and Takeovers Act 1975 adopts the same approach to balancing the applicant's rights against national security concerns.

Committee comment

2.90 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that proposed Division 4 of Part 7 is closely modelled on the existing mechanism for review of ASIO's security assessments by the Security Division of the AAT, as it is likely that national security issues that arise in the review of applications under the Act will be as sensitive as those in ASIO's security assessments and would require a comparable level of care and management.

2.91 While noting this advice, the committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to full and independent merits review unless a sound justification is provided. In this instance, the committee reiterates its scrutiny concerns with respect to provisions which affect an applicant's rights to a fair hearing in proceedings for review of a decision of the Treasurer that a national security risk exists in relation to an action.[36]

2.92 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of limits placed on certain AAT proceedings which may impact an applicant's right to full and independent merits review, including the right to a fair hearing.

Retrospective application[37]

2.93 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to whether the retrospective application of the transitional provisions in item 247 of Schedule 1 will have a detrimental effect on any individuals, and if so, the number of individuals that may be affected.[38]

36 Proposed section 130G provides that proceedings are to be held in private and that the Treasurer can certify that certain evidence should not be disclosed on national security grounds. If such a national security certificate is given the applicant must not be present when the relevant evidence is adduced, and the applicant's representative may only be present with the consent of the Treasurer.

37 Schedule 1, item 247. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

38 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 20-21.

Treasurer's response

2.94 The Treasurer advised:

> Item 185 (together with items 182 and 183) of the FIR Bill provide that a person is liable to pay a fee if the Treasurer makes an order or no-objection notification about an action the person took, if the person did not notify the Treasurer before taking the action (and the person was not called in by the Treasurer). The fee applies regardless of whether the person notified the Treasurer after taking the action (known as a retrospective application) or never notified the Treasurer.
>
> However, the Treasurer has no powers to make an order or no-objection notification about actions that are notifiable but not significant. Therefore, item 185 does not allow a fee to be charged if a person notifies retrospectively about an action that is notifiable but not significant.
>
> Item 247 extends the fee liability to persons who notify the Treasurer of a retrospective action that is notifiable but not significant, and was taken between 1 December 2015 and 31 December 2020 inclusive.
>
> Currently, section 81 of the *Foreign Acquisitions and Takeovers Act 1975* requires a person to notify the Treasurer before taking a notifiable action. Failing to give this notice is an offence under existing section 84. Item 247 only applies to people who are notifying after taking an action that is notifiable but not significant. That is, item 247 only applies to a person who is in breach of the *Foreign Acquisitions and Takeovers Act 1975*.
>
> Had the person followed the law and notified the Treasurer prior to taking the action, they would have been charged a fee under table item 3 of subsection 113(1). Without item 247, the bill provides a financial incentive to break the law. Item 247 has been drafted to make sure that the fee amount a person pays is what they should have paid had they notified at the time they were required to notify (that is before taking the action), rather than the new (and potentially higher) fee being implemented by under the reforms.

Committee comment

2.95 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that item 247 only applies to a person who is in breach of the Act, and that the item has been drafted to make sure that the fee amount a person pays is what they should have paid had they notified at the time they were required to notify, rather than the new (and potentially higher) fee being implemented by under the reforms.

2.96 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic

material to assist with interpretation (see section 15AB of *the Acts Interpretation Act 1901*).

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

Significant matters in delegated legislation

Broad delegation of powers[39]

2.98 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to allow the registrar to delegate powers and functions under Parts 4 and 5 of the *Regulatory Powers (Standard Provisions) Act 2014* and Part 7A of the Act to the broad class of persons specified by the bill, which appears to include any APS employee at any level as well as any person specified by regulations; and
- the appropriateness of amending the bill to provide at least high-level guidance as to the appropriate skills, experience and training required of persons who will exercise these delegated powers and functions.[40]

Treasurer's response

2.99 The Treasurer advised:

> The Government considers the powers of the Registrar to delegate their powers necessary and appropriate to facilitate efficient management of the new Register of Foreign Owned Australian Assets. Consistent with Australian Government policy and current practice, the relevant officials will have suitable training and experience to properly exercise these powers.

Committee comment

2.100 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the government considers the powers of the registrar to delegate their powers are necessary and appropriate to facilitate the efficient management of the new Register of Foreign Owned Australian Assets.

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39 Schedule 2, item 19, proposed subsection 99(2BA), item 29, proposed subsection 100(4BA), and Schedule 3, item 8, proposed section 130ZX. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 21-23.

2.101 While also noting the Treasurer's advice that the relevant officials will have suitable training and experience to properly exercise these powers, the committee notes that this is not a requirement on the face of the bill.

2.102 The committee reiterates its preference that delegations of administrative power be confined to holders of nominated officers or members of the Senior Executive Service or, alternatively, that a limit is set on the scope and type of powers that may be delegated.

2.103 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the registrar to delegate powers and functions under Parts 4 and 5 of the *Regulatory Powers (Standard Provisions) Act 2014* and Part 7A of the Act to the broad class of persons specified by the bill, which appears to include any APS employee at any level, as well as any person specific by the regulations.

Significant penalties[41]

2.104 In *Scrutiny Digest 16 of 2020* the committee requested the Treasurer's advice as to the justification for the significant criminal and civil penalties that may be imposed under the bill, by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.[42]

Treasurer's response

2.105 The Treasurer advised:

> The design of the civil penalty amounts and quantum of the penalty is consistent with other legislation in the Treasury portfolio, including the *Corporations Act 2001* and the *Competition and Consumer Act 2010*.
>
> The maximum penalty amounts proposed under the Bill are increased significantly above the amounts currently included in the *Foreign Acquisitions and Takeovers Act 1975*. The penalty amounts are not in all instances consistent with the *Guide to Framing Commonwealth Offences* but are considered appropriate.
>
> These maximum penalty amounts are appropriate given the high value acquisitions captured by the foreign investment review framework, the potential resulting benefits and profits that may be derived from non-compliance with the *Foreign Acquisitions and Takeovers Act 1975* and potential risks to Australia's national interest and national security from that non-compliance. While Treasury can make submissions to the court

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

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 23-24.

> on the penalty to be imposed, having significant maximum penalty amounts enables the courts to impose proportionate penalties in light of the circumstances of the contravention. It is important that the penalty regime acts as a sufficient deterrent and that the penalties reflect the seriousness of potential non-compliance, particularly in relation to investors with access to substantial funding where smaller maximum penalty amounts may be insignificant in contrast to the potential benefits and profits. The penalty amounts align with community standards and expectations.
>
> Acquisitions and investments are generally only subject to screening under Australia's foreign investment screening regime if the acquisition is valued at more than $275 million or $1.125 billion for FTA partner countries. These are high value acquisitions which could have broad economic impacts or pose national security risks if not notified and considered by the Treasurer before being taken.
>
> Similarly, a failure to meet any conditions imposed by the Treasurer to address any risks to the national interest, including national security, that may be posed by the acquisition could have a significant impact on Australia's economy or national security.
>
> Therefore, by linking the calculation of the maximum penalty to a proportion of the value of the investment or acquisition, the penalty better reflects the benefit that could be obtained from the breach and acts as a deterrent rather than a 'cost of doing business'. The increased penalties available to a court are intended to neutralise any financial benefits or gains obtained from illegal behaviour.
>
> As the Committee would be aware, the civil penalty amounts are maximum penalties and where appropriate a smaller penalty may be sought. The *Guide to Framing Commonwealth Offences* lists certain factors that would typically be considered by a court in deciding to set the maximum penalty. Paragraph 3.127 of the Explanatory Memorandum to the Bill recognises that these factors will be a consideration by a court when deciding to impose a penalty.

Committee comment

2.106 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the design of the civil penalty amounts and quantum of the penalty is consistent with other legislation in the Treasury portfolio. The committee also notes the Treasurer's advice that while the maximum penalties are not always consistent with the *Guide to Framing Commonwealth Offences*, these maximum penalties are appropriate given the high value acquisitions captured by the foreign investment review framework, the potential resulting benefits and profits that may be derived from non-compliance with the Act and potential risks to Australia's national interest and national security from that non-compliance.

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

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

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