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.

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Purpose	This bill seeks to amend the *Fair Work Act 2009* and related legislation to assist Australia's recovery from COVID-19 by improving the operation and usability of the national industrial relations system
Portfolio	Industrial Relations
Introduced	House of Representatives on 9 December 2020

Significant matters in delegated legislation[1]

Model NES interaction term

1.2 Item 42 of Schedule 3 seeks to insert proposed section 205A into the *Fair Work Act 2009* (Fair Work Act) which would require an enterprise agreement to include the 'model NES interaction term'. Proposed subsection 205A(3) provides that the regulations must prescribe this model term, which would explain the provisions of the Fair Work Act that deal with the interaction between the National Employment Standards (NES) and enterprise agreements. The explanatory memorandum explains that the requirements in proposed section 205A replace the process whereby the Fair Work Commission would, in deciding whether to approve an enterprise agreement, need to be satisfied that the terms of the agreement do not contravene section 55 (which governs the interaction between the NES and enterprise agreements).[2]

1.3 The committee's view is that significant matters, such as those relating to the interaction between the NES and enterprise agreements, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification

1 Schedule 3, item 42. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 See Schedule 3, item 36, and explanatory memorandum, p. 47.

regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

Other matters

1.4 The bill also provides for the following significant matters to be prescribed in delegated legislation:

- matters relating to the content or form of a Casual Employment Information Statement that must be provided to new casual employees, and the manner in which employers may give the statement to employees;[3] and
- purposes for which additional agreed hours are to be treated as ordinary hours.[4]

1.5 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.6 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to leave the following matters to delegated legislation:

- **the prescription of the model NES interaction term;**
- **the prescription of matters relating to the content or form of, and manner of providing to employees, a Casual Employment Information Statement; and**
- **other purposes for which additional agreed hours are to be treated as ordinary hours of work.**

Significant matters in non-disallowable legislative instruments[5]

1.7 Item 2 of Schedule 4 seeks to insert proposed section 23B into the Fair Work Act, which provides for the meaning of 'major project' for the purposes of enabling the Fair Work Commission to approve certain greenfields agreements with longer expiry dates. Proposed subsection 23B(2) enables the minister to declare by legislative instrument that a project is a major project. Proposed subsection 23B(5) provides that a declaration under subsection 23B(2) is not subject to disallowance.

3 Schedule 1, item 5, proposed subsection 125A(4).

4 Schedule 2, item 5, proposed paragraph 168Q(4)(e).

5 Schedule 4, item 2. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

1.8 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:

> This is to avoid commercial uncertainty for parties negotiating greenfields agreements and the enterprise bargaining framework generally.
>
> Requiring an employer to wait until the disallowance period had passed before bargaining in reliance of a declaration that would effectively enable a proposed greenfields agreement to include a longer nominal expiry date could unreasonably delay its approval, engagement of new employees and commencement of work on the project. The risk that a declaration could be disallowed could also affect the parties' capacity to bargain consistent with the good faith bargaining requirements in section 228.[6]

1.9 Noting this explanation, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsection 23B(5) which provides that a declaration by the minister that a project is a major project is exempt from parliamentary disallowance.

Procedural fairness—right to a fair hearing[7]

1.10 Item 3 of Schedule 6 seeks to repeal and replace paragraph 607(1)(b) of the Fair Work Act, which currently provides that an appeal or review of a decision may only be conducted by the Fair Work Commission (FWC) without a hearing if persons making submissions in the matter consent. Proposed paragraph 607(1)(b) would enable the FWC to conduct an appeal or review without a hearing, provided it takes into account the views of persons making submissions in the matter as to whether a hearing is appropriate.

1.11 The committee notes that the right to procedural fairness has two basic rules. It requires that decision-makers are not biased and do not appear to be biased, and requires that a person who may be adversely affected by a decision is given an adequate opportunity to put their case before the decision is made. The committee considers that the right to procedural fairness is a fundamental common law right and it expects that any limitation on this right be comprehensively justified in the explanatory memorandum.

1.12 In this instance, the explanatory memorandum provides no justification for the amendment to this provision.

6 Explanatory memorandum, p. 59.

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

1.13 The committee requests the minister's advice as to the justification for the amendments removing the requirement for the consent of parties to conduct an appeal or review of a decision by the Fair Work Commission without a hearing.

Retrospective application[8]

1.14 Item 1 of Schedule 7 seeks to insert new Part 10 of Schedule 1 into the Fair Work Act, providing for application, transitional and savings provisions in relation to the bill. Proposed clause 45 provides a process for resolving uncertainties or difficulties relating to how an enterprise agreement made before the commencement of the bill interacts with the proposed statutory definition of casual employee and the casual conversion provisions in proposed Division 4A of Part 2-2 of the Act. Proposed subclause 45(2) provides that a variation of an enterprise agreement under clause 45 operates from the day specified in the determination, which may be a day before the determination is made.

1.15 Proposed subclause 46(1) provides that section 15A of the amended Act (which establishes a new definition of 'casual employee') applies on and after commencement in relation to offers of employment that were given before, on or after commencement. Subclause 46(7) further provides that section 545A of the amended Act also applies in relation to entitlements that accrue, and loading amounts paid, before commencement.

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

1.17 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.18 In relation to clause 45 the explanatory memorandum states:

> This process may be utilised where it unclear whether an agreement is attempting to define casual employee in a way that does not align with the new statutory definition, or appears to limit the circumstances in which employees are to be employed as casuals. It may also be utilised where it is unclear how a right to request conversion under an agreement interacts

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8 Schedule 7, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

with the new NES obligation on an employer to offer conversion under Division 4A of Part 2-2.[9]

1.19 While noting the explanation, it is not clear to the committee whether this may mean that parties to existing employment relationships might be deprived of entitlements or rights that may have accrued based on the existing law under this process. The committee is therefore concerned about the extent of any adverse impact on individuals.

1.20 In relation to subclause 46(1) the explanatory memorandum states:

> The effect of subclause 46(1) is that existing casual employees in employment relationships that would have met the statutory definition in section 15A at the time of the offer of employment, will be casual employees for the purposes of section 15A on commencement. This provides parties to existing employment relationships with the certainty of the statutory definition. To determine whether an existing casual employee meets the statutory definition will require looking back to the terms of the initial offer and acceptance of employment. As is the case for offers and acceptances of employment after commencement, for the purposes of this clause it is similarly not relevant to the determination of whether there was a lack of the requisite firm advance commitment whether that offer and acceptance were formally or informally given, or reduced to writing or not.

1.21 However, the explanatory memorandum does not discuss the effect of any retrospective application of subclause 46(1). As it appears that clause 46 would operate to give retrospective application to amendments made by the bill, the committee is concerned about the extent of any adverse impact on individuals.

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

- **the necessity of retrospective application for the matters set out in clauses 45 and 46; and**
- **the extent to which this retrospective effect may have any adverse impact on individuals.**

9 Explanatory memorandum, p. 91.

Industrial Chemicals Environmental Management (Register) Bill 2020

Purpose	This bill seeks to establish a national framework to manage the ongoing use, handling and disposal of industrial chemicals, in order to reduce impacts on the environment and limit people's exposure to industrial chemicals
Portfolio	Environment
Introduced	House of Representatives on 3 December 2020

Significant matters in non-disallowable delegated legislation[10]

1.23 The bill provides for a range of matters that are significant to the operation of the proposed new framework for managing industrial chemicals to be set out in non-disallowable legislative instruments:

- subclause 22(1) would allow the minister to establish a register of scheduling decisions for industrial chemicals;
- subclause 23(1) would allow the minister to determine principles to be complied with in making, varying or revoking scheduling decisions; and
- clause 76 would enable the minister to make rules prescribing matters required or permitted by the bill to be prescribed by the rules, or matters that are necessary or convenient to be prescribed for carrying out or giving effect to the bill.[11]

1.24 A note accompanying each of these provisions states:

> Section 42 (disallowance), and Part 4 of Chapter 3 (sunsetting), of the *Legislation Act 2003* do not apply to the instrument: see subsections 44(1) and 54(1) of that Act.

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10 Clauses 22, 23 and 76. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

11 Matters that may be prescribed in the rules include: a kind of decision that will be a 'scheduling decision' (paragraph 11(3)(c)); international agreements and additional matters that the minister must or may have regard to in making scheduling decisions (paragraphs 15(1)(f), 15(1)(i), and 16(1)(h)); information that may be included in register (paragraph 22(2)(c)); functions of the advisory committee and remunerations and allowances for advisory committee members (paragraph 28(b) and subclauses 32(1) and (2)); documents, information and fees for applications for confidential information not to be publicly disclosed (clause 44); collection and recovery of scheduling charges (clause 69).

1.25 The committee's view is that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided.

1.26 Further, the committee expects that any exemption of delegated legislation from the usual disallowance and sunsetting processes should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification. In this instance, the explanatory memorandum explains that the exemptions are because 'the enabling legislation… (being this Bill) facilitates the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more States, and authorises the instrument to be made for the purposes of the scheme.'[12]

1.27 At a general level, the committee does not consider the fact than subsection 44(1) of the *Legislation Act 2003* applies to an instrument is, of itself, a sufficient justification for excluding parliamentary disallowance, particularly in circumstances where a bill relies heavily on delegated legislation to determine the scope and operation of a legislative scheme. The committee expects that the explanatory memorandum to a bill that authorises the making of a legislative instrument that is exempt from disallowance should still specify why the exemption is appropriate in the particular circumstances.

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

- **why it is considered necessary and appropriate to leave each of the above matters to delegated legislation which is exempt from parliamentary disallowance and sunsetting, with particular reference to the details of the intergovernmental arrangements that are established by the bill; and**
- **whether the bill could be amended to provide that these matters are subject to the usual parliamentary disallowance and sunsetting processes.**

12 Explanatory memorandum, pp. 25-26, 28 and 60.

Industrial Chemicals Environmental Management (Register) Charge (Customs) Bill 2020

Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020

Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020

Purpose	This package of bills seeks to complement the Industrial Chemicals Environmental Management (Register) Bill 2020 (the ICEMR Bill) by establishing a cost recovery model to recover the costs of implementing the framework in the ICEMR Bill for making, varying and revoking scheduling decisions for industrial chemicals
Portfolio	Environment
Introduced	House of Representatives on 3 December 2020

Significant matters in delegated legislation[13]

1.29 Each of these three bills seeks to impose a charge as a tax in relation to the amount of charge payable by a registered introducer of industrial chemicals for a registration year. Subsection 8(1) of each bill provides that the amount of the charge payable in each case may be prescribed by the regulations, and the regulations may either set out the amount of the charge payable or a method for working out the amount.

1.30 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[14] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, where there is any possibility that a charge could be characterised as general taxation, the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation. In particular, where

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

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

charges are to be prescribed by regulation the committee considers that, at a minimum, some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.31 In this instance, the explanatory memoranda note a need for flexibility in prescribing the detail of the amount of the charge and that any applicable charge will be determined through a Cost Recovery Implementation Statement and will be consistent with the Australian Government Charging Framework and the Australian Government Cost Recovery Guidelines. The explanatory memoranda also note that this is intended to provide assurance that the amount charged reflects the likely costs to the Commonwealth.

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. 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. 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.

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

- **whether guidance in relation to the method of calculation of these charges and/or a maximum charge can be specifically included in each bill; or**
- **whether the bills could at least be amended to specify that, before the Governor-General makes regulations prescribing an amount of charge, the minister must be satisfied that the amount of the charge is set at a level that is designed to recover no more than the Commonwealth's likely costs in connection with the administration of the framework established by the Industrial Chemicals Environmental Management (Register) Bill 2020.**[15]

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15 For an example of this approach, see subsection 8(2) of the *Recycling and Waste Reduction Charges (General) Act 2020*.

Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020

Purpose	This bill seeks to ensure that the Inspector-General of Intelligence and Security retains oversight of the Australian Federal Police's and the Australian Criminal Intelligence Commission's use of network activity warrants This bill also seeks to amend the *Inspector-General of Intelligence and Security Act 1986* to ensure that the legislation governing the IGIS is adapted to contemporary circumstances, including technical amendments to improve clarity, modernise drafting expressions and removing redundant provisions, as well as amendments to address certain limitations in the Inspector-General of Intelligence and Security's oversight functions and powers in order to improve the flexibility and strengthen the integrity of inquiry processes
Portfolio	Attorney-General
Introduced	House of Representatives on 9 December 2020

Reversal of evidential burden of proof[16]

1.33 Currently, section 41 of the *Intelligence Services Act 2001* provides that it is an offence to identify a person as being or having been an agent or staff member of ASIS (who is not the Director-General of ASIS or such other persons as the determined by the Director-General), or to publish information from which such a person's identity could be inferred or could reasonably lead to the identity of such a person being established. Item 195 of Schedule 1 to the bill seeks to add proposed subsection 41(2) which would provide an exception (offence-specific defence) to this offence if the person identifies the person to an IGIS official, for the purpose of the IGIS official exercising a power or performing a function or duty as an IGIS official. The offence carries a maximum penalty of imprisonment for 10 years.

1.34 The committee also notes that the bill replaces or amends numerous other offence specific defences in the *Intelligence Services Act 2001*, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, *Australian Human Rights Commission Act*

16 Schedule 1, item 195. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1986, *Australian Security Intelligence Organisation Act 1979* and *Taxation Administration Act 1953*.[17]

1.35 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[18] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.36 While in 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 in proposed subsection 41(2) has not been addressed in the explanatory materials.

1.37 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[19]

17 See Schedule 1, items 150, 152, 165-167, 185-193, 203 and Schedule 2, items 28, 32 and 52.

18 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.

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

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Purpose	Schedule 1 to this bill seeks to amend the *National Consumer Credit Protection Act 2009* to improve the flow of credit by reducing the time that it takes consumer and businesses to access credit Schedules 2 to 6 to this bill seek to amend the *National Consumer Credit Protection Act 2009* to enhance the consumer protection framework for consumers of small amount credit contracts and consumer leases, while ensuring that these products can continue to fulfil an important role in the economy
Portfolio	Treasury
Introduced	House of Representatives on 9 December 2020

Significant matters in delegated legislation[20]

1.38 The bill provides for a number of significant matters to be determined in delegated legislation.

1.39 Items 62 to 64 of Schedule 1 seek to amend section 133DB of the *National Consumer Credit Protection Act 2009* (the Credit Act) to provide that licensees must show a consumer a comparison of the consumer's stated expected aged care costs with equity projections before providing credit assistance for a reverse mortgage, entering into a reverse mortgage, increasing the credit limit of a reverse mortgage or making an unconditional representation about the consumer's eligibility. The comparison must be given to the consumer in a way prescribed in the regulations.[21]

1.40 Item 67 of Schedule 1 seeks to insert proposed section 133EA into the Credit Act which would allow the minister to determine non-ADI credit standards by legislative instrument. These standards set requirements for credit licensees who are not 'authorised deposit taking institutions' (ADIs) in relation to their systems, policies and processes relating to non-ADI credit conduct.[22]

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20 Schedule 1, items 63 and 67; Schedule 2, item 12, proposed subsection 133CD(5) and proposed paragraph 133CF(2)(c). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

21 Schedule 1, Item 63, proposed paragraph 133DB(1)(ba).

22 Non-ADI credit conduct relates to credit contracts where the contract is not a small amount credit contract and the credit provider is not an ADI. See explanatory memorandum, pp. 19-20.

1.41 Item 12 of Schedule 2 seeks to insert proposed section 133CD into the Credit Act, which establishes that a licensee must not enter into or offer to enter into a small amount credit contract with a consumer unless the contract provides for equal repayments at equal intervals over the life of the loan, and the interval between the date on which the credit would first be provided and the due date of the first repayment is no more than twice the length of the interval between each repayment.

1.42 Proposed subsection 133CD(5) provides that ASIC may, by legislative instrument, determine conditions whereby repayments that would be required under a small amount credit contract are taken to be equal.

1.43 Item 12 of Schedule 2 also seeks to insert proposed paragraph 133CF(2)(c) which provides that regulations may prescribe circumstances where a communication is taken, or is not taken, to be an unsolicited communication. Unsolicited communications are subject to prohibitions in proposed subsection 133CF(1). Proposed subsection 133CF(2) further provides that the regulations may prescribe that specified kinds of communications are not unsolicited communications to which section 133CF applies.

1.44 Non-compliance with the obligations to provide comparisons of equity projections and aged care costs, to provide equal repayments and intervals, and the prohibition on unsolicited communications is subject to criminal offences in addition to civil penalties.[23] Non-compliance with requirements in the non-ADI credit standards would attract significant civil penalties of at least 5000 penalty units.[24] Failing to comply with requirements in relation to equal repayments and intervals will also be an offence of strict liability, subject to a penalty of 10 penalty units.[25]

1.45 The committee's view is that significant matters, such as obligations where non-compliance attracts significant civil penalties or may constitute a strict liability offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, in relation to non-ADI credit standards, the explanatory memorandum states:

> The content of the non-ADI credit standards being determined by legislative instrument is intended to enable consistency to be achieved on an ongoing basis between the regulation of the provision of credit by both ADIs and non-ADIs (the former of which will be set out in legislative instruments made by APRA). This allows the law to adapt to changes over time.[26]

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23 Subsections 133DB(1) and (2), *National Consumer Credit Protection Act 2009*; Schedule 2, item 12, proposed subsections 133CD(1) and (7) and 133CF(1) and (3).

24 Schedule 1, item 67, proposed sections 133EB to 133ED. See also sections 167A and 167B of the *National Consumer Credit Protection Act 2009*.

25 Schedule 2, item 12, proposed subsection 133CD(8).

26 Explanatory memorandum, p. 20.

1.46 In relation to equal repayment requirements, the explanatory memorandum states:

> These options are designed to give licensees reasonable flexibility where the total amount to be repaid under a small amount credit contract cannot be divided equally, or where there are other circumstances in which ASIC considers that unequal repayments may be appropriate. Any instrument made by ASIC would be subject to parliamentary scrutiny and disallowance.[27]

1.47 In relation to unsolicited communications, the explanatory memorandum explains:

> This adds flexibility and ensures the new prohibition on unsolicited communications can remain responsive to evolving industry practices. This regulation-making power is also consistent with the current arrangements in subsection 133BE(6) of the Credit Act, which provides that the regulations may make provisions that apply to determining whether a communication is a credit limit increase invitation. Any regulations made would be subject to parliamentary scrutiny and disallowance.[28]

1.48 The explanatory memorandum contains no justification regarding why it is necessary to allow matters in relation to the manner of providing comparisons of equity projections and aged care costs to consumers to be set out in delegated legislation.

1.49 While noting these explanations, the committee has generally not accepted a desire for administrative flexibility or consistency with existing provisions 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.

1.50 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.51 In light of the above, the committee requests the Treasurer's detailed advice as to:

- **why it is considered necessary and appropriate to leave these matters to delegated legislation;**
- **whether the bill can be amended to include at least high-level guidance regarding the following matters on the face of the primary legislation:**

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27 Explanatory memorandum, p. 79.

28 Explanatory memorandum, p. 84.

- **the manner of giving a comparison of equity projections and aged care costs to a consumer;**
- **the content of the non-ADI credit standards;**
- **conditions whereby repayments under a small amount credit contract are taken to be equal; and**
- **circumstances in which the regulations may prescribe that specified kinds of communications are not unsolicited communications for the purpose of the prohibition on unsolicited communications in proposed section 133CF.**

Significant matters in delegated legislation

Reversal of legal burden of proof[29]

1.52 Schedule 4 establishes a prohibition on schemes that are designed to avoid the application of the Credit Act in relation to small amount credit contracts and consumer leases. Item 3 of Schedule 4 seeks to insert proposed section 323C which sets up a presumption in relation to civil cases that it is reasonable to conclude that a person entered into or carried out a scheme for an avoidance purpose if the scheme is a scheme prescribed by the regulations or determined by ASIC in a legislative instrument. Proposed subsection 323C(2) provides that the presumption does not apply if the person proves that it would not be reasonable to conclude that there was a relevant avoidance purpose, having regard to matters set out in proposed subsection 323B(1). A legal burden of proof is proposed to be placed on the defendant, ensuring that the defendant would need to prove, on the balance of probabilities, it would not be reasonable to conclude that there was a relevant avoidance purpose.

1.53 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. The inclusion of presumptions in relation to offences interferes with this common law right by placing a legal burden on the defendant to rebut the presumption. The committee expects any provision that places a legal burden of proof of the defendant to be fully justified in the explanatory materials. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that the inclusion of presumptions in relation to offences should be kept to a minimum.[30]

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29 Schedule 4, item 3, proposed sections 323B—323C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

30 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 53.

1.54 The committee also notes that the presumption in proposed section 323C relates to a civil penalty, rather than to a criminal offence. However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny, as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties. This is particularly the case where more significant penalties are imposed. In this instance, a range of civil penalty provisions may apply to a failure to comply with the prohibition, each of which attracts a civil penalty of up to 5000 penalty units.[31]

1.55 Further, the committee's view is that significant matters, such as the prescribing or determination of schemes that will be presumed to contravene the prohibition on avoidance purposes, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.56 The explanatory memorandum explains:

> Placing the legal burden of proof on the person is appropriate as it will be considerably easier for the person to establish that it would not be reasonable to conclude that there was a relevant avoidance purpose, compared with requiring ASIC to disprove that matter. For example, if the scheme in question does have a legitimate (non-avoidance) purpose, that matter would be peculiarly within the knowledge of the person.
>
> Further, the presumption applies only in civil cases (not in criminal proceedings), and any regulations or legislative instrument made to prescribe or determine schemes that are presumed to have the relevant avoidance purpose will be subject to parliamentary scrutiny and disallowance.
>
> The conferral of a regulation-making power and a power for ASIC to make a legislative instrument in this context also reflects historical experience that avoidance schemes tend to proliferate quickly if they are seen by other industry participants to be effective. This flexibility therefore ensures that either the Government or ASIC can respond quickly to evolving practices as needed.[32]

1.57 The committee notes that the *Guide to Framing Commonwealth Offences* (Guide) provides that the considerations relevant to whether a presumption should be included in an offence are the same as those applying to an offence-specific defence.[33]

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31 Schedule 4, item 3, proposed subsections 323A(1), (3), (4) and (5).

32 Explanatory memorandum, p. 125.

33 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 53.

The Guide 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.[34]

1.58 In this case, it is not apparent that matters such as whether it is reasonable to conclude that there was a relevant avoidance purpose, are matters *peculiarly* within the defendant's knowledge, *and* that it would be significantly more difficult or costly for the prosecution to establish the matters. These matters may be matters more appropriate to be included as an element of the civil penalty provision or offence.

1.59 In addition, proposed paragraph 323B(1)(c) provides that matters that are relevant to determining whether it is reasonable to conclude that a scheme has been entered into for an avoidance purpose may be prescribed in the regulations.[35] The explanatory memorandum states:

> The regulation-making power recognises that industry participants may develop new avoidance practices which may require the Government to specify additional matters that must be considered in determining whether the relevant avoidance purpose exists. This flexibility is therefore necessary to ensure the prohibitions remain fit for purpose as entities prepared to engage in avoidance purposes will respond to legislative changes by identifying gaps in its scope and changing their practices accordingly.[36]

1.60 While noting this explanation, and that above in relation to the prescription or determination of avoidance schemes, 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. The committee notes that using delegated legislation to prescribe or determine avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme provides a broad power to expand or restrict the scope of the prohibition established in proposed section 323A. It is unclear to the committee why at least high-level guidance in relation to the schemes that will be presumed to be avoidance schemes cannot be provided on the face of the bill.

1.61 In light of the above, the committee requests the Treasurer's detailed advice as to:

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

35 Schedule 4, item 3, proposed paragraph 323B(1)(c).

36 Explanatory memorandum, p. 124.

- **why it is considered necessary and appropriate to leave the prescription or determination of avoidance schemes and matters relevant to making a conclusion that a scheme is an avoidance scheme to delegated legislation;**
- **whether the bill can be amended to include at least high-level guidance regarding schemes that will be presumed to be entered into for an avoidance purpose on the face of the primary legislation;**
- **why it is proposed to place a legal burden of proof on the defendant by including presumptions in relation to these civil penalty provisions; and**
- **why it is not sufficient to reverse the evidential, rather than legal, burden of proof in this instance.**

1.62 The committee's consideration of the appropriateness of provisions which include presumptions in relation to civil penalty provisions or offences is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[37]

Broad delegation of legislative power—exemption of schemes[38]

1.63 Item 3 of Schedule 4 also seeks to insert proposed section 323D into the Credit Act, which would provide ASIC with a power to exempt a scheme or class of schemes from all or specified parts of the prohibitions on avoidance schemes set out in proposed section 323A by legislative instrument. The explanatory memorandum states:

> This ensures that ASIC is able to provide appropriately deal with a scheme and provide certainty, where the scheme:
>
> - does not cause harm to consumers or regulated industry participants; and
> - has a legitimate (non-avoidance) purpose.[39]

1.64 In the view of the committee, proposed section 323D appears to confer a broad power on ASIC to exempt schemes from the application of the law. This is therefore akin to a Henry VIII clause, which enables delegated legislation to alter or override the operation of primary legislation. The committee has significant concerns with Henry VIII-type clauses, as such clauses have the potential to impact on levels of parliamentary scrutiny and may subvert the appropriate relationship between Parliament and the Executive.

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

38 Schedule 4, item 3, proposed section 323D. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

39 Explanatory memorandum, p. 125.

1.65 In this instance, the committee acknowledges that proposed section 323D does not enable delegated legislation to modify primary legislation, but rather enables ASIC to override the usual operation of the primary legislation in particular circumstances. However, the committee remains concerned about the breadth of the proposed power, and its potential impact on parliamentary scrutiny.

1.66 In light of these matters, the committee would expect a sound justification for the power conferred on ASIC to be provided in the explanatory memorandum. In this instance, the committee considers that the explanatory materials have not sufficiently justified the conferral on ASIC of the broad power to exempt schemes from the operation of the prohibition on avoidance schemes in proposed section 323A.

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

- **why it is proposed to confer on ASIC the broad power to exempt schemes from the operation of the prohibition on avoidance schemes in proposed section 323A; and**
- **whether the bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for ASIC to exempt a scheme from the operation of the avoidance prohibitions.**

Reversal of evidential burden of proof

Significant matters in delegated legislation[40]

1.68 Proposed paragraphs 133DB(1)(ba) and (bb) establish a civil penalty for failure to provide a consumer with a comparison of equity projections and the consumer's expected aged care costs before entering into a reverse mortgage or providing other specified advice or services in relation to a reverse mortgage. Currently, subsection 133DB(2) also makes it an offence to engage in conduct that breaches requirements in subsection 133DB(1). Proposed subsections 133DB(4A) and (4B) provide exceptions (offence-specific defences) to the civil penalty and offence, providing that the offence does not apply if:

- another person has already given the required comparison; or
- circumstances prescribed by the regulations exist.

1.69 The criminal offence carries a maximum penalty of 50 penalty units and the civil penalty provision applies a civil penalty of 5000 penalty units.[41]

40 Schedule 1, item 65. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

41 See subsections 133BD(1) or (2) of the *National Consumer Credit Protection Act 2009*.

1.70 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[42] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.71 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsections 133DB(4A) and (4B) have not been addressed in the explanatory materials.

1.72 The committee also expects that significant matters, such as circumstances that will constitute a defence to an offence or significant civil penalty, to be provided for in primary legislation, unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.73 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[43]

1.74 The committee also requests the Treasurer's detailed advice as to:

- **why it is considered necessary and appropriate to leave to delegated legislation the prescription of circumstances in which it will be a defence to the offence or civil penalty provision of failing to comply with requirements to provide material to a consumer;**
- **whether the bill can be amended to include at least high-level guidance regarding the relevant circumstances that may be prescribed on the face of the primary legislation.**

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42 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.

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

Security Legislation Amendment (Critical Infrastructure) Bill 2020

Purpose	This bill seeks to introduce an enhanced regulatory framework, building on existing requirements under the *Security of Critical Infrastructure Act 2018*
Portfolio	Home Affairs
Introduced	House of Representatives on 10 December 2020

Limitation on judicial review [44]

1.75 Item 1 of Schedule 1 seeks to insert proposed paragraph (dae) into Schedule 1 to the *Administrative Decisions (Judicial Review Act) 1977* (the ADJR Act). This would exempt decisions made under proposed Part 3A of the *Security of Critical Infrastructure Act 2018* from judicial review under the ADJR Act. This is intended to cover decisions made under new Part 3A in response to a 'serious cyber security incident', such as ministerial authorisations made under proposed section 35AB.

1.76 Judicial review of these decisions remains available under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the Constitution.[45]

1.77 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:

> The Administrative Review Council (ARC), in their 2012 report *Federal Judicial Review in Australia*, identified a number of reasons that may justify an exemption from review under the ADJR Act. National security considerations were one such reason identified by the ARC as justifying excluding ADJR Act review, particularly where sensitive information is involved which may be publicly disseminated through judicial proceedings.
>
> When making a decision under new Part 3A of the SOCI Act, the Minister must be satisfied that there is a material risk that a 'cyber security incident' …has seriously prejudiced, is seriously prejudicing, or is likely to seriously prejudice, the social or economic stability of Australia or its people, the defence of Australia or national security. Decisions of this nature are likely to be based on sensitive and classified information and deal with the capabilities of intelligence agencies as well as security vulnerabilities. This could include intelligence information and covert investigation methods

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

45 Explanatory memorandum, [22].

> and procedures, the disclosure of which may impact ongoing investigations, compromise intelligence methodologies or other damage Australia's national security and defence. The same applies equally to decisions of the Secretary and the authorised agency under new Part 3A who operationalise the Ministerial authorisations.
>
> For this reason, it is reasonable to exempt decisions made under new Part 3A of the SOCI Act from review under the ADJR Act as the public dissemination of the sensitive information and capabilities that may be used to make decisions under new Part 3A would pose a risk to national security and the defence of Australia.[46]

1.78 The explanatory memorandum explains further that decisions made under proposed Part 3A are also likely to deal with classified and commercially confidential material that is relevant to the operation of assets critical to Australia's economy,[47] and that Part 3A is designed to be used in emergency circumstances such that unnecessary delays in the use of mechanisms provided for in the bill may prejudice the national interest.[48]

1.79 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.

1.80 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 proposed Part 3A of the *Security of Critical Infrastructure Act 2018* from the judicial review under the ADJR Act.

Significant matters in delegated legislation[49]

1.81 The bill seeks to insert a range of powers to prescribe matters in delegated legislation into the *Security of Critical Infrastructure Act 2018*.

1.82 Schedule 1 seeks to insert:

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46 Explanatory memorandum, [13] to [15].

47 Explanatory memorandum, [16].

48 Explanatory memorandum, [18].

49 Schedule 1, items 13, 26, 30-32, 38, 39. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- proposed paragraph (a) and subparagraph (b)(ii) of the definition of ***relevant Commonwealth regulator***;
- proposed paragraph 9(2A)(d) in relation to the prescription of Commonwealth assets as critical infrastructure assets;
- proposed sections 12A to 12E and 12G to 12KA in relation to definitions of various classes of critical infrastructure assets, whereby rules may prescribe specified assets that are critical to specified matters and requirements for those assets to be critical;
- proposed section 12L in relation to responsible entities for critical infrastructure assets;
- proposed paragraph 18A(1)(a) and subsection 18A(3), in relation to the application of Part 2 of the Act to critical infrastructure assets;
- proposed paragraph 30AB(1)(a) and subsection 30AB(3) in relation to the application of proposed Part 2A to critical infrastructure assets;
- proposed paragraph 30AH(1)(c), in relation to requirements for a critical infrastructure risk management program;
- proposed paragraphs 30BC(1)(c) and 30BD(1)(c) in relation to reporting on critical cyber security incidents; and
- proposed paragraphs 30CJ(1)(e), 30CN(1)(f), 30CS(c), 30CY(1)(e) and 30DA(c) in relation to requirements for incident response plans, cyber security exercises, evaluation reports, and vulnerability assessments and reports.

1.83 The committee's view is that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided.

1.84 The committee considers that these matters have not been sufficiently addressed in the explanatory memorandum and that the prescription of so many delegated legislation making powers in the bill has not been adequately justified.

1.85 The committee therefore requests the minister's detailed advice as to why it is considered necessary and appropriate to leave each of the above matters to delegated legislation.

Incorporation of external materials existing as in force from time to time[50]

1.86 Proposed subsection 30AN provides that rules made for the purposes of proposed section 30AH may make provision in relation to a matter by applying,

50 Schedule 1, item 39. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

adopting or incorporating, with or without modification, any matter contained in a standard proposed or approved by Standards Australia as in force or existing from time to time. The explanatory memorandum states:

> This provision may be relied upon to recognise accepted and reputable standards in relation to risk management processes, including as those standards change to accommodate best practice.[51]

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

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

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

1.89 Noting the above comments, the committee requests the minister's advice as to:

- **whether standards incorporated into the rules will be made freely available to all persons interested in the law; and**
- **further detail as to why it is considered necessary and appropriate to apply the standards as in force or existing from time to time, rather than when the instrument is first made.**

Broad delegation of administrative power [52]

1.90 Proposed sections 49A and 49B seek to trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in

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51 Explanatory memorandum, [624].

52 Schedule 1, item 57. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

relation to provisions of the *Security of Critical Infrastructure Act 2018*. Proposed subsections 49A(14) and 49B(12) provide that an authorised person may be assisted by 'other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

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

- **why it is considered necessary and appropriate to confer investigatory powers on any 'other person' to assist an authorised person; and**
- **whether the bill can be amended to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.**

Bills with no committee comment

1.92 The committee has no comment in relation to the following bill which was introduced into the Parliament between 30 November – 10 December 2020:

- Industrial Chemicals Legislation Amendment Bill 2020

Commentary on amendments and explanatory materials

1.93 The committee has not considered any amendments made or explanatory materials since the tabling of the committee's *Scrutiny Digest 1 of 2021* out of sitting on 29 January 2021.

Chapter 2

Commentary on ministerial responses

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

Corporations Amendment (Corporate Insolvency Reforms) Bill 2020

Purpose	This bill seeks to implement government insolvency reforms intended to reduce the cost of external administration for small businesses and the compliance burden for insolvency practitioners
Portfolio	Treasury
Introduced	House of Representatives on 12 November 2020
Bill status	Received Royal Assent 15 December 2020

Reverse evidential burden of proof

Strict liability offences[1]

2.2 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to:

- why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in proposed subsection 453F(4), and whether general defences in the Criminal Code apply to an offence under proposed section 453F or regard was given to providing for a more specific defence than that of a reasonable excuse; and
- the justification for providing, in proposed subsection 453F(3), that the offence is an offence of strict liability.[2]

1 Schedule 1, item 1, proposed section 453F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 3-5.

Treasurer's response[3]

2.3 The Treasurer advised:

Offence-specific defence

Under section 453F of the Bill, a director of a company under restructuring must help the small business restructuring practitioner by attending to them, providing information on the company's business, property, affairs and financial circumstances and giving the practitioner access to inspect and make copies of company books. Failure by a director to do so is an offence of strict liability without reasonable excuse. The penalty for the offence is 120 penalty units.

The new debt restructuring process established in new Part 5.3B of the Corporations Act draws heavily on the established voluntary administration framework, as well as the debt agreements framework in Part IX of the Bankruptcy Act. This provides consistency in the obligations of a director across the external administrative regime. In this way, the defences available under section 453F of the Bill reflect those available under the existing section 530A of the *Corporations Act 2001* (Corporations Act), which requires officers to help liquidators under a winding up.

In addition to this, in accordance with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and-Enforcement Powers* (September 2011) (the Guide), it is appropriate that the defendant bears the evidential burden for providing a reasonable excuse defence as this information would be peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. It is intended to rely on this justification.

This is because the defendant would be better positioned to readily adduce evidence that they had a reasonable excuse not to fulfil the practitioner's requests rather than the prosecution having to adduce evidence to the contrary. In addition to this, the defendant only has an evidential burden which is less onerous than the legal burden.

The defences in Part 5.3 of the Criminal Code do apply to the strict liability offence. While paragraph 4.3.3 of the Guide discourages the use of the reasonable excuse defence where these defences apply, in this instance, allowing for a broad range of defences is necessary to ensure that where there is a good reason that the requests were not fulfilled, that a director may rely on those reasons. Relying on the existing defences of the Criminal Code would not be enough to cover all of the unforeseen situations where the directors cannot fulfil their duties under section 453F.

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3 The Treasurer responded to the committee's comments in a letter dated 16 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> *Strict liability offence*
>
> As pointed out by the Committee, subsection 453F(3) of the Bill provides that where a director does not help the restructuring practitioner without reasonable excuse is an offence of strict liability.
>
> In line with the Guide, the offence of strict liability is appropriate in this instance as non-compliance with a restructuring practitioner's request by a director would undermine the integrity of the restructuring regime. Avoiding a restructuring practitioner's request for information presents a serious detriment for creditors as the restructuring practitioner would not have the information readily available to make an accurate declaration in relation to the proposed restructuring plan. Therefore, the offence significantly enhances the effectiveness of the restructuring process regime in deterring this kind of conduct. In addition to this, in line with Guide, the offence is not punishable by imprisonment.

Committee comment

2.4 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the defences available under proposed section 453F reflect those obligations available under the existing section 530A of the *Corporations Act 2001* which requires officers to help liquidators under a winding up, and that this provides consistency in the obligations of a director across the external administrative regime.

2.5 The committee also notes the Treasurer's advice that it is appropriate that the defendant bears the evidential burden for providing a reasonable excuse defence as this information would be peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.6 In relation to proposed subsection 453F(3), which provides that an offence under proposed section 453F is an offence of strict liability, the committee notes the Treasurer's advice that the offence of strict liability is appropriate in this instance as non-compliance with a restructuring practitioner's request by a director would undermine the integrity of the restructuring regime, and further, that the offence is not punishable by imprisonment.

2.7 The committee notes that it would have been useful had this information been included in the explanatory memorandum.

2.8 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.

Reverse evidential burden of proof[4]

2.9 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to whether proposed subsections 453L(2) and (3) provide for offence-specific defences which reverse the evidential burden of proof, and if so, why this is necessary and appropriate.[5]

Treasurer's response

2.10 The Treasurer advised:

> As the Committee has pointed out, section 453L of the Bill provides that a person who is a director of a company contravenes this section if the company is under restructuring and the company purports to enter into a transaction or dealing affecting the property of the company and the director approves that action is also a contravention for a director of a company under restructuring to purport to enter into a transaction or dealing affecting the property of the company on behalf of the company. Subsections 453L(2) and (3) provide for specific circumstances in which there will not be a contravention of section 453L.
>
> In a proceeding against a director in relation to section 453L, the defendant will bear the evidential burden that these specific circumstances occurred. The reversal of the evidential burden in this instance is limited to reliance on the exceptions.
>
> The Guide 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.
>
> Obtaining information about an organisation's detailed transactional information, and whether this is covered by the exception, or information about relevant consent or court orders where obtained may require the prosecution to undertake lengthy and difficult investigative exercises that would require obtaining large amount of potentially confidential information from the company. It would also be significantly more difficult and costly for the prosecution to have to disprove that these exceptions didn't exist than it would be for the defendant to provide or point to evidence that suggests a reasonable possibility that a matter exists.
>
> In this way, it is considered appropriate and necessary for subsection 453L(2) and (3) to be offence-specific defences.

4 Schedule 1, item 1, proposed subsections 453L(2) and (3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 5-6.

Committee comment

2.11 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that subsections 453L(2) and (3) provide for specific circumstances in which there will not be a contravention of section 453L; and that in a proceeding against a director in relation to section 453L, the defendant will bear the evidential burden that these specific circumstances occurred. The reversal of the evidential burden in this instance is limited to reliance on the exceptions.

2.12 The committee also notes the Treasurer's advice that this proposed offence-specific defence is in line with the *Guide to Framing Commonwealth Offences*, noting in particular that it would be significantly more difficult and costly for the prosecution to have to disprove that these exceptions didn't exist than it would be for the defendant to provide or point to evidence that suggests a reasonable possibility that a matter exists.

2.13 The committee notes that it would have been useful had this information been included in the explanatory memorandum.

2.14 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.

Reverse evidential burden of proof[6]

2.15 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to:

- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed section 456B; and
- how the fact that a person is a registered liquidator is peculiarly within the knowledge of the defendant in light of the fact that this information appears to be publicly available on the ASIC website.[7]

Treasurer's response

2.16 The Treasurer advised:

> *Use of offence-specific defences*
>
> Section 456B of the Bill provides that only a registered liquidator can consent to be appointed, and act as, a small business restructuring practitioner. It is an offence of strict liability where a person is not a registered liquidator and they consent to an appointment. In proceedings brought against the person, the person bears an evidential burden in

6 Schedule 1 item 1 proposed section 456B. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 6-7.

> proving that they were a registered liquidator. The penalty for the offence is 50 penalty units. This is consistent with current requirements under existing voluntary administrative provisions under Part 5.3A of the Corporations Act.
>
> In line with the Guide, it is appropriate for the defendant to bear the evidential burden as the registered liquidator can quickly adduce evidence proving that they are a registered liquidator. This is already within the knowledge of the defendant and therefore, if requested, the defendant would have the information available to quickly provide to the regulator to show that they possess the requisite qualifications, knowledge and experience necessary to support a distressed small business through the debt restructuring process and to develop a debt restructuring plan to put to creditors.
>
> *Publicly availably knowledge peculiarly within the knowledge of the defendant*
>
> As the Committee is aware, the Bill establishes a new formal debt restructuring process. In this process, a small business restructuring practitioner supports the company to develop a debt restructuring plan and review its financial affairs, certifies the plan to 'creditors, and manages disbursements once the plan is in place. A restructuring practitioner must be a registered liquidator.
>
> This key information would reside with the person and evidence relating to this would be readily available by the person. While, it would not be expected that the prosecution would not begin proceedings without sufficient concerns that the person was not a registered liquidator. It would not be particularly onerous for the person to produce evidence to show their registration. In addition to this, it may not always be the case that the evidence would be readily available that a restructuring practitioner is a registered liquidator. With the establishment of the new formal debt restructuring process, there is an expected increase in the number of the applications for registered liquidators. This may cause delay in uploading relevant information onto the public register, thereby the information may not be so readily available. Where this occurs, it is quicker for the defendant to quickly adduce evidence that they are a registered liquidator rather than the prosecution proving information to the contrary.

Committee comment

2.17 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that proposed section 456B is consistent with current requirements under existing voluntary administrative provisions under Part 5.3A of the Corporations Act. Further, the committee notes the Treasurer's advice that it is appropriate for the defendant to bear the evidential burden as the defendant can quickly adduce evidence showing that they are a registered liquidator.

2.18 The committee also notes the Treasurer's explanation that there may be a delay in the Australian Securities and Investments Commission (ASIC) uploading relevant information about registered liquidators onto the public register.

2.19 The committee considers that the information above explains that, in some circumstances, the defendant may be in a position to more quickly provide information about whether they are a registered liquidator; however, the explanation does not adequately justify that this information is peculiarly within the knowledge of the defendant.

2.20 The committee remains of the view that it does not consider whether a defendant is a registered liquidator to be information that is peculiarly within the knowledge of the defendant.

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.

Significant matters in delegated legislation[8]

2.22 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to why it is necessary and appropriate to leave each of the above matters to delegated legislation.[9]

Treasurer's response

2.23 The Treasurer advised:

> As the Committee has pointed out, the Bill establishes a framework for the new formal debt restructuring process with amendments to be made to associated delegated legislation (including regulations amending the *Corporations Regulations 2001* and rules amending the *Insolvency Practice Rules (Corporations) 2016* made under the Corporations Act). The amendments to these instruments are necessary to fully implement the regime.
>
> The primary legislation provides power for delegated legislation to specify further details of the reforms. These powers are appropriate and necessary to deal with situations where the operation of the Bill may produce unintended or unforeseen results that are not consistent with the policy intention for the new regime. As the Committee is aware, the reforms will assist to safeguard against the impacts of the COVID-19 pandemic which is expected to see an increase in the number of companies that move into external administration. Therefore, it remains appropriate and necessary to

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8 A range of items in schedule 1, 2 and 3. 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 17 of 2020*, pp. 7-9.

> provide specificity in regulations as it allows the process to respond quickly to developments that occur from the expected increase in the number of insolvencies. This ensures that the regime remains fit-for-purpose and is adaptable to the changing economic environment to best reflect the needs of small businesses.
>
> Therefore, although it may be desirable to place all of the details in primary legislation, I consider that it is necessary and appropriate to place specificity in delegated legislation as, given the nature of the reforms, this retains the ability to respond to unforeseen issues that could have constrained the ability for the industry to properly use the streamlined regimes.

Committee comment

2.24 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the reforms contained in the bill will assist to safeguard against the impacts of the COVID-19 pandemic which is expected to see an increase in the number of companies that move into external administration. The committee also notes the Treasurer's advice that it is appropriate and necessary to provide specificity in regulations as it allows the process to respond quickly to developments that occur from the expected increase in the number of insolvencies.

2.25 However, the committee maintains that it does not consider administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

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

2.27 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.

Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

Purpose	This bill seeks to enhance Defence's capacity to provide assistance in relation to natural disasters and other emergencies
Portfolio	Defence
Introduced	House of Representatives on 3 September 2020
Bill status	Received Royal Assent on 17 December 2020

Parliamentary scrutiny[10]

2.28 The committee initially scrutinised this bill in *Scrutiny Digest 13 of 2020* and requested the minister's advice.[11] The committee considered the minister's response in *Scrutiny Digest 15 of 2020* and requested that an addendum to the explanatory memorandum relating to coercive powers and the use of force be tabled in Parliament. The committee also requested the minister's further advice as to:

- which parliamentary scrutiny mechanisms apply to a call out order made under proposed subsection 28(1) and to a direction relating to the provision of Defence assistance made under proposed subsection 123AA(2) as currently drafted; and
- whether the bill can be amended to:
  - provide that call out orders made under proposed subsection 28(1) must be tabled in both Houses of the Parliament, noting that the tabling of documents in Parliament provides opportunities for debate that are not available where documents are only published online;
  - provide that an annual report on the use of directions made under proposed subsection 123AA(2) must be included in the Defence annual report prepared by the secretary and given to the minister under section 46 of the Public Governance, Performance and Accountability Act 2013; and
  - provide at least high level guidance on the scope of powers that may be exercised by reservists subject to a call out order under proposed subsection 28(1) and protected persons subject to a direction relating to

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10 Schedule 1, item 2, proposed subsection 28(1); Schedule 2, item 4, proposed section 123AA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 9-10.

the provision of Defence assistance under proposed subsection 123AA(2), including clarifying on the face of the bill that these orders and directions do not authorise the use of force or coercive powers beyond what is available to members of the community.[12]

Minister's response[13]

2.29 The minister advised:

> Ahead of debate of this Bill in the Senate, I tabled a replacement explanatory memorandum which included:
>
> - Clarification that the Bill does not alter, expand or otherwise change the Government's existing legal authorities to deploy the ADF
> - Clarification that the operative provisions of the Bill, including the proposed immunity provision, relate to Defence Assistance to the Civil Community and do not authorise the use of force (beyond self-defence)
> - Examples of 'other emergencies' referred to in the immunity provision
> - Clarification that the requirement for a direction by the Minister under s 123AA(2) is intended to provide a check on the proposed immunity and does not grant a new authority to the Minister to direct the deployment of Defence personnel.
>
> The Committee has sought advice about which parliamentary scrutiny mechanisms apply to a Reserve call out order made under subsection 28(1) and to a direction relating to the provision of Defence assistance made under subsection 123AA(2). There are a range of mechanisms available to the Parliament to scrutinise decisions of Government, including decisions to call out the Reserves or to deploy the ADF in response to a natural disaster or other emergency. This includes (but is not limited to):
>
> - Notices of motion by Members of Parliament
> - Inquiries by Parliamentary committees
> - Senate estimates processes
> - Question time.

12 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 51-54.

13 The minister responded to the committee's comments in a letter dated 17 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

The Committee has also sought advice on whether the Bill can be amended in several ways:

- To provide that Reserve call out orders must be tabled in both Houses of Parliament.

As outlined above, even without tabling a Reserve call out order in Parliament, there are numerous opportunities for members of Parliament to consider such an order and debate it.

- Provide that Defence's annual report include information about any directions made under subsection 123AA(2).

Defence's annual report will generally include information about any significant Defence Assistance to the Civil Community that has occurred (see for example page *5* of the 2019-2020 Defence Annual Report).

- Provide high level guidance on the scope of powers that may be exercised by Reserve members who are subject to a Reserve call out order, and protected persons subject to a direction relating to the provision of assistance under subsection 123AA(2), including clarifying that these orders and directions do not authorise the use of force or coercive powers beyond what is available to members of the community.

Reserve members who are subject to a Reserve call out order have exactly the same scope of powers as a Permanent member of the ADF or a Reserve member who has volunteered for service. If the Reserve call out is in relation to Defence Assistance to the Civil Community, this would not include use of force or coercive powers. A protected person subject to a direction relating to the provision of assistance under subsection 123AA(2) has exactly the same scope of powers as an ADF member providing assistance of that sort without the benefit of this provision. This would not include power to use force or coercive powers. The replacement explanatory memorandum makes this position explicit.

Committee comment

2.30 The committee thanks the minister for this response. The committee welcomes the minister's advice that a replacement explanatory memorandum has been tabled which clarifies that Reserve members subject to a Reserve call out order have the same scope of powers as a permanent ADF member. The minister advised that Reserve call out orders in relation to defence assistance to the civil community do not authorise the use of force or coercive powers, and that similarly a protected person subject to a direction relating to assistance under subsection 123AA(2) does not have the power to use force or coercive powers, and that this information is included in the replacement explanatory memorandum.

2.31 The minister also advised that there are numerous opportunities for Parliament to consider and debate call-out orders even if the orders are not tabled,

and that the defence annual report will generally include information on significant defence assistance to the civil community.

2.32 While noting the above information in relation to parliamentary scrutiny of orders and directions made under the bill, the committee reiterates its scrutiny concerns that call out orders made under proposed subsection 28(1) and directions relating to the provision of Defence assistance under proposed subsection 123AA(2) are not subject to disallowance or tabling in the Parliament.

2.33 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.

Immunity from civil and criminal liability[14]

2.34 The committee initially scrutinised this bill in *Scrutiny Digest 13 of 2020* and requested the minister's advice.[15] The committee considered the minister's response in *Scrutiny Digest 15 of 2020* and requested the minister's further advice as to

- why it is considered necessary and appropriate to provide protected persons with both civil and criminal immunity; and
- whether the bill can be amended to:
  - include an inclusive definition of the term 'other emergency' (or, at a minimum, whether the explanatory memorandum can be amended to include examples of what may constitute an 'other emergency'); and
  - clarify that the immunity in proposed section 123AA does not extend to the Commonwealth as a whole.[16]

Minister's response

2.35 The minister advised:

> The Committee has sought advice as why it is considered necessary and appropriate to provide protected persons with both civil and criminal immunity.
>
> The range of criminal offences to which this provision would be relevant is narrow. However, it is important to include criminal offences, so that ADF members and other protected persons who are providing assistance in good faith performance of their duties, including in high risk situations, are able to take appropriate action without fear of prosecution.

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14 Schedule 2, item 4, proposed section 123AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2020*, pp. 10-11.

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 55-56.

I also note that inclusion of immunity from criminal liability was recommended by the Royal Commission into National Natural Disaster Arrangements (recommendation 7.3).

The Committee has also sought advice as to whether the Bill can be amended to:

- Include an inclusive definition of the term 'other emergency'.

The term 'other emergency' takes its ordinary meaning. The replacement explanatory memorandum includes a further explanation of this term at paragraph 34.

- Clarify that the immunity in section 123AA does not extend to the Commonwealth as a whole.

The immunity provision only applies to 'protected persons', which are named as being ADF members, APS employees in the Department, and certain other persons authorised by the CDF or Secretary. It does not include the Commonwealth. This position is further emphasised in the explanatory memorandum.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that the replacement explanatory memorandum clarifies that the term 'other emergency' takes its ordinary meaning for the purposes of the bill. The minister also advised that the range of criminal offences to which immunity from criminal liability applies is narrow and is important to protect ADF members and protected persons performing their duties in good faith. The minister further advised that the immunity in proposed section 123AA does not extend to the Commonwealth as a whole.

2.37 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.

Financial Sector Reform (Hayne Royal Commission Response) Bill 2020

Purpose	This bill seeks to implement a number of recommendations of the Financial Services Royal Commission and additional commitments made by the Government to improve consumer protections and strengthen financial regulators
Portfolio	Treasury
Introduced	House of Representatives on 12 November 2020
Bill status	Received Royal Assent 17 December 2020

Significant matters in delegated legislation[17]

2.38 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave exceptions to anti-hawking offences to delegated legislation, especially in light of the fact that it appears the government has already formulated one additional exception; and
- whether the bill can be amended to include this additional exception on the face of the primary legislation.[18]

Treasurer's response[19]

2.39 The Treasurer advised:

> The Committee raised a concern about why it is considered necessary and appropriate to leave exceptions to anti-hawking offences to delegated legislation, especially in light of the fact that it appears the government has already formulated one additional exception and whether the bill can be amended to include this additional exception on the face of the primary legislation.
>
> The use of delegated legislation provides a flexible, timely mechanism to change exemptions over primary legislation, and its use in the hawking

17 Schedule 5, item 2, proposed subsections 992A(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 13-14.

19 The minister responded to the committee's comments in a letter dated 16 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> prohibition reflects the broad scope of financial products in relation to which the hawking prohibition applies. Given the large number of financial products, the technical nature of many of those products and the dynamic nature of the industries effected by the prohibition, it is desirable that some exceptions are provided for in delegated legislation. Parliament will retain the ability to disallow the delegated legislation.
>
> Additionally, I expect that the exceptions which will be provided for in delegated legislation will directly reference other provisions in the Corporations Regulations. It would not be appropriate for the primary law to directly reference concepts or provisions in delegated legislation. Where an exception references a provision in the Act, such as the exception for persons who are providing personal advice and are subject to the best interests duty, that exception has been included in the Bill.
>
> Accordingly I consider it appropriate that the remaining exceptions to the anti-hawking offences be left to delegated legislation. I do not think that the primary law should be amended to include the exception for offers, requests and invitations in relation to the renewal of insurance products.

Committee comment

2.40 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the use of delegated legislation to set out exemptions to anti-hawking offences is appropriate as it provides for greater flexibility to reflect the broad scope of financial products in relation to which the hawking prohibition applies, the technical nature of those products and the dynamic nature of the industries in which they operate. The committee further notes the advice that it may be inappropriate to include the exemptions in primary legislation, noting that it is expected that the exemptions may directly reference concepts or provisions in delegated legislation.

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

2.42 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 non-disallowable delegated legislation[20]

2.43 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to

- why it is considered necessary and appropriate to leave directions about the performance or exercise of APRA or ASIC's powers or functions to delegated legislation which is exempt from disallowance and sunsetting; and
- whether the bill can be amended to:
  - provide that these directions are subject to disallowance and sunsetting; and
  - provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.[21]

Treasurer's response

2.44 The Treasurer advised:

> The Committee has also raised a concern about why it is considered necessary and appropriate to leave directions about the performance or exercise of the Australian Prudential Regulation Authority's (APRA) or Australian Securities and Investments Commission's (ASIC) powers or functions to delegated legislation which is exempt from disallowance and sunsetting and whether the bill can be amended to provide that these directions are subject to disallowance and sunsetting and provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.
>
> Under the existing section 6(3) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), the Minister may give APRA or ASIC directions about the performance or exercise of its functions or powers under the SIS Act. Item 1 of Schedule 9 to the Bill amends this direction rule so that the Minister must use a legislative instrument to direct APRA or ASIC.
>
> As the Explanatory Memorandum to the Bill outlined, Item 1 of Schedule 9 to the Bill updates the existing requirement that the Minister publish such directions in the Gazette. This is consistent with other existing law in respect of directions provided to APRA and ASIC by the Minister. This allows for appropriate certainty to the regulator that they may begin to undertake the Minister's direction in a timely manner. Executive control is intended in these instances as the directions are intended to be remain in place until revoked by the relevant Minister.

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20 Schedule 9, item 1, proposed subsection 5(9). The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

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

> In order for the directions power to be sufficiently broad, I do not consider that it is appropriate for guidance regarding what such directions may encompass to be provided in the primary law. However, I will note that the directions power only pertains to the Minister giving APRA or ASIC directions about the performance or exercise of their functions or powers under the SIS Act and it is expected that this will only occur in exceptional and limited circumstances.

Committee comment

2.45 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it is appropriate to leave directions about the performance or exercise of APRA or ASIC's powers or functions to delegated legislation which is exempt from disallowance and sunsetting as this is consistent with other existing laws with respect to ministerial directions given to APRA and ASIC.

2.46 The committee further notes that the Treasurer does not consider it appropriate to provide high-level guidance regarding what may be included in the directions on the face of the primary legislation to ensure that the directions powers are sufficiently broad.

2.47 While noting this advice, the committee does not generally consider consistency with an existing regime to be a sufficient justification to include such matters in delegated legislation which is not subject to disallowance or sunsetting. In this regard, the committee reiterates its longstanding scrutiny view that significant matters, such as measures relating to the performance of APRA and ASIC powers and functions, should be included in primary, rather than delegated, legislation or at least delegated legislation subject to parliamentary disallowance.

2.48 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[22]

2.49 In *Scrutiny Digest 17 of 2020* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the kinds of conduct which do not constitute the provision of a superannuation trustee service to delegated legislation; and

22 Schedule 9, item 43, proposed subsection 766H(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

- whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.[23]

Treasurer's response

2.50 The Treasurer advised:

> The Committee has raised a potential concern as to why it is considered necessary and appropriate to leave the kinds of conduct which do not constitute the provision of a superannuation trustee service to delegated legislation and whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.
>
> The regulation-making power, which provides for regulations to prescribe conduct that does not constitute the provision of a superannuation trustee service, is justified in recognition of the breadth and complexity of conduct by a registrable superannuation entity. Under these circumstances, the regulation-making power provides for the regime to respond to changes in industry practice. The power is also consistent with existing flexibility in the *Corporations Act 2001,* for example under section 766E(3)(e), for what constitutes the provision of a custodial or depository service, which in tum is also a financial service.
>
> Further, it is expected that the regulation-making power would only be used in limited and exceptional circumstances. Any regulations made under the provisions in the Bill would also be subject to appropriate parliamentary scrutiny, and would be subject to the consultation requirements set out in the *Legislation Act 2003* before any regulation is made.

Committee comment

2.51 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it is necessary and appropriate to leave the kinds of conduct which do not constitute the provision of a superannuation trustee service to delegated legislation, as this provides for sufficient flexibility to adapt to changes to industry practice. The committee also notes that inclusion of such matters in delegated legislation is consistent with existing practice with regard to other financial services.

2.52 The committee further notes that Treasurer's advice that it is expected that the regulation-making power will be used in limited and exceptional circumstances and the relevant regulations will be subject to parliamentary scrutiny if and when they are made.

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

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23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, p. 18.

2.54 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.

Privacy

Significant matters in delegated legislation[24]

2.55 In [Scrutiny Digest 17 of 2020](#) the committee requested the Treasurer's advice as to

- why it is considered necessary and appropriate to leave significant matters, such as what personal information can be published by ASIC online, to delegated legislation, noting the potential impact on a person's privacy; and
- whether the bill can be amended to set out the information that can be published by ASIC online on the face of the primary legislation.[25]

Treasurer's response

2.56 The Treasurer advised:

> As the Committee is aware, the amendments in Schedule 11 to the Bill would require ASIC to publish breach reporting information about licensees. This has the legitimate purpose of enhancing accountability in the financial services and credit sector and would allow consumers to identify licensees that are involved in significant breaches of the law.
>
> Under these amendments, the information published by ASIC must include any information prescribed by the regulations, including personal information within the meaning of the *Privacy Act 1988* (Privacy Act) in relation a financial services licensee or a credit licensee who is an individual.
>
> The Explanatory Memorandum to the Bill outlines that the regulation-making power may be exercised to allow ASIC to publish the names of credit licensees where the licence is held in the name of an individual. Since many licensees hold licences in their own name, not allowing publication of this information would mean consumers may not be able to access breach reporting information about licensees that are individuals. To ensure that there is transparency in relation to all licensees, it would be necessary to publish the names of these licensees, which is personal· information under the Privacy Act.
>
> The amendments in Schedule 11 do not limit the personal information that may be published to the name of the licensee. This reflects that the

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24 Schedule 11, item 5, proposed subsection 912DAD(2) and item 15 proposed subsection 50D(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 19-20.

> information that will be collected is to be specified in a form approved by ASIC, and is still subject to consultation with industry. This information may change over time as industry practices and forms change.
>
> I therefore consider that on balance it is necessary and appropriate that these matters are dealt with in delegated legislation because:
>
> - The types of information ASIC collects may change over time, so the publishing of information by ASIC should be flexible and able to respond to these changes.
> - Although ASIC collects the relevant information, I will be the rule-maker for the purposes of making regulations which would allow personal information to be published. This would ensure that there is an appropriate Government-led policy process before any regulations are made.
> - Regulations are legislative instruments, which are subject to disallowance and Parliamentary scrutiny, so Parliament will still have the opportunity to scrutinise any requirement that personal information collected in breach reports is published.
> - Before regulations can be made which would require personal information to be published, the *Legislation Act 2003* requires me to be satisfied that there has been appropriate consultation, and that a summary of that consultation is included in the explanatory statement to the instrument. This will enable effective Parliamentary scrutiny.
>
> I also do not consider it necessary to amend the primary legislation to restrict the types of information that can be published, as that would limit the flexibility of the regime to adapt to changes in information ASIC collects, which may be necessary to publish for transparency and the public interest.

Committee comment

2.57 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it is appropriate to determine what personal information can be published by ASIC online via delegated legislation as this practice allows for greater flexibility for the regime to adapt to changes in information ASIC collects, which may be necessary to publish for transparency and the public interest. The committee further notes that the Treasurer considers that there are appropriate accountability mechanisms in place to ensure appropriate oversight of the type of information that will be prescribed via such delegated legislation.

2.58 While noting this advice, the committee reiterates its view that significant matters, such as the type of personal information that may be published online by ASIC, should be in the primary legislation. There is nothing on the face of the bill which would prevent further sensitive or personal information about persons being prescribed and then published by ASIC under this provision. While noting that the delegated legislation will be subject to some parliamentary oversight, the potential

disclosure of personal information regarding such credit licensees will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

2.60 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.

Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020

Purpose	This bill seeks to allow for the extension of temporary Coronavirus supplements, and to modify provisions and discretionary powers in relation to the Government's legislative framework responding to the COVID-19 pandemic
Portfolio	Social Services
Introduced	House of Representatives on 12 November 2020
Bill status	Received Royal Assent on 17 December 2020

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)

Retrospective application

Significant matters in delegated legislation[26]

2.61 In *Scrutiny Digest 17 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate for proposed section 1262 to provide for the modification of primary legislation by delegated legislation, particularly in circumstances where regular parliamentary sittings have recommenced; and
- why it is considered necessary and appropriate to specify that a determination may provide that a person is taken to have done a specified thing on a day before the determination commences, including whether any persons are likely to be adversely affected by this provision and the extent to which their interests are likely to be affected.[27]

26 Schedule 1 item 44 proposed section 1262. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 21-22.

Minister's response[28]

2.62 The minister advised:

> *Modification of primary legislation by an instrument during parliamentary sittings*
>
> The instrument-making power specified in section 1262 is a much narrower power than item 40A of Schedule 11 to the *Coronavirus Economic Response Package Omnibus Act 2020* (item 40A), which is automatically repealed on 31 December 2020. Section 1262 only allows certain specified provisions of social security law to be modified, if it is appropriate to respond to future impacts of COVID-19. Item 40A provides a far wider power encompassing unspecified modifications to the social security law, in response to COVID-19 impacts. I intend to use the new power under section 1262 to continue those beneficial measures currently in place under instruments made under item 40A, by making a new disallowable legislative instrument commencing on 1 January 2021. This instrument would give effect to the temporary extensions of COVID-19 measures announced by the Prime Minister and myself on 10 November 2020.
>
> The future impacts of COVID-19 are unpredictable and, while the Parliament has returned to a normal sitting pattern, the Government considers that it is prudent to retain a power such as section 1262 until the end of March 2021. The Parliament is not sitting in January 2021 and it is unlikely that any new primary legislation could be passed until mid-February 2021, at the earliest. Section 1262 will assist the Government to respond to any COVID-19 circumstances early in 2021. The Government accepts that the duration of this power should be strictly limited, which is why the Bill provides for the power to cease after 31 March 2021.
>
> *Allowing a determination before commencement*
>
> Subsection 1262(5) has been included in the Bill to ensure that there is flexibility available for a determination to be drafted in the way that is most appropriate to deliver beneficial measures.
>
> It has been necessary for some 40A instruments to regulate events or actions that occurred before those instruments commenced, for the benefit of those affected. For example, the Social Security (Coronavirus Economic Response—2020 Measures No. 11) Determination 2020 applies from 22 June 2020 to ensure that people who cease to be payable due to employment income can continue to access certain ancillary benefits (such as concession cards). This determination deems eligible individuals to be receiving a social security payment for the period 22 June 2020 to 31 December 2020 (inclusive). As the instrument has been amended, the

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28 The minister responded to the committee's comments in a letter dated 18 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> amendments have applied to nil rate periods that were in place on 22 June 2020 (and later) so that people who actually stopped receiving their payment can continue to be treated as 'receiving' their payment going forward, for the purposes of the social security law.
>
> By way of further example, the Social Security (Coronavirus Economic Response—2020 Measures No. 10) Determination 2020 applies to people who arrive in Australia during the period 11 March 2020 to 31 December 2020 (inclusive). This instrument, among other things, ensures the Secretary can make determinations that treat certain Age Pension recipients and Disability Support Pension recipients as eligible for a higher rate of payment despite the recipient otherwise exceeding the standard overseas payment portability requirements for their payment. This instrument had a period of retrospective operation to benefit some people, as it was made after 11 March 2020 but applies to a person whose standard portability period ended on that date (or a later date).
>
> Proposed subsection 1262(5) is intended to allow beneficial temporary modifications to be made to the social security law that may require a person to be deemed to have done something prior to commencement of a section 1262 determination to better adapt the temporary modification to the concepts and structure of social security law. However, the subsection is not intended to permit determinations to have any form of retrospective effect that disadvantages or imposes any liabilities as a result of a person being deemed to have done something prior to the commencement of the determination.

Committee comment

2.63 The committee thanks the minister for this response. The committee notes the minister's advice that, in contrast with item 40A of Schedule 11 to the *Coronavirus Economic Response Package Omnibus Act 2020*, which provided a broad power to make unspecified modifications to the social security law, proposed section 1262 only allows for certain specified provisions of social security law to be modified, if it is appropriate to respond to future impacts of COVID-19. The committee also notes the minister's advice that it is intend the new power under section 1262 will be used to continue those beneficial measures currently in place under instruments made under item 40A.

2.64 In relation to the retrospective application of determinations made under proposed subsection 1262(5), the committee notes the minister's advice that proposed subsection 1262(5) is intended to allow beneficial temporary modifications to be made to the social security law that may require a person to be deemed to have done something prior to commencement of a section 1262 determination to better adapt the temporary modification to the concepts and structure of social security law.

2.65 The committee also notes the minister's advice that subsection 1262(5) is not intended to permit determinations to have any form of retrospective effect that

disadvantages or imposes any liabilities as a result of a person being deemed to have done something prior to the commencement of the determination.

2.66 The committee notes, however, that information relating to the intended beneficial nature of any modifications to the social security law is not included on the face of the bill or in the explanatory memorandum.

2.67 The committee remains of the view that significant matters, such as modifications to the social security law to address the consequences of a national pandemic, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. However, in this regard, the committee notes the minister's advice that the bill provides for the power to cease after 31 March 2021, acknowledging that the duration of such a power should be strictly limited.

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

2.69 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.

Territories Legislation Amendment Bill 2020

Purpose	This bill seeks to amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling Islands) and the Jervis Bay Territory
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representatives on 7 October 2020
Bill status	Received Royal Assent on 17 December 2020

Significant matters in delegated legislation

Privacy[29]

2.70 The committee initially scrutinised this bill in *Scrutiny Digest 15 of 2020* and requested the minister's advice.[30] The committee considered the minister's response in *Scrutiny Digest 17 of 2020* and requested the minister's further advice as to whether the bill can be amended to provide that the minister must consult with the Office of the Australian Information Commissioner before making an instrument to exempt a body, office or appointment for the purposes of proposed paragraphs 6(1)(ca) or 6(1)(ea) of the definition of 'agency' in the *Privacy Act 1988* (the Privacy Act).[31]

Minister's response[32]

2.71 The minister advised:

> The Bill will amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling) Islands and the Jervis Bay Territory. I note that the Bill was passed by the Parliament during its recent Spring sittings and is currently waiting assent by the Governor-General. At the conclusion of the second reading debate in the House of Representatives, I tabled an addendum to the explanatory memorandum to the Bill in response to a request by the Committee in its *Scrutiny Digest 17 of 2020* (2 December 2020).

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29 Schedule 3, item 60, proposed subsection 6(5A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2020*, pp. 46-47.

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2020*, pp. 78-80.

32 The minister responded to the committee's comments in a letter dated 17 December 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> The Committee has also sought further advice as to whether an amendment could be made in the Bill to the Minister's power to exempt a small category of external territory public bodies from the operation of the *Privacy Act 1988* (the Privacy Act). In particular, the Committee suggests that an express requirement be included in the Bill for the Minister to be obliged to consult the Office of the Australian Information Commissioner before exercising this exemption power.
>
> The Government has decided that an amendment to the Bill along these lines is not necessary. As explained in my previous correspondence to the Committee, any legislative instrument made by the Minister pursuant to new subsection 6(5A) of the Privacy Act is disallowable by a single House of Parliament acting alone, and subject to the usual parliamentary scrutiny, including by the Senate Standing Committee for the Scrutiny of Delegated Legislation.
>
> The Minister will also be obliged under the *Legislation Act 2003* to justify the making of the instrument in its explanatory statement, as well as recording any consultation undertaken. In making this assessment, the Minister would consult relevant stakeholders, including the Office of the Australian Information Commissioner. Accordingly, the proposed amendment would not have a substantive effect on the process that would be undertaken if this exemption power was to be used in the future.
>
> However, acknowledging the views of the Committee, the Department of lnfrastructure, Transport, Regional Development and Communications will continue to carefully monitor these arrangements in the future.

Committee comment

2.72 The committee thanks the minister for this response. The committee welcomes the minister's advice that an addendum to the explanatory memorandum was tabled in the House of Representatives in response to the committee's scrutiny concerns.

2.73 The committee notes the minister's advice that any instrument made by the minister under new subsection 6(5A) of the Privacy Act is subject to disallowance by a single House of Parliament, and to standard parliamentary scrutiny including by the Senate Standing Committee for the Scrutiny of Delegated Legislation. The committee further notes the minister's advice that the minister is required to justify the making of an instrument in its explanatory statement, which would involve consultation of relevant stakeholders including the Office of the Australian Information Commissioner.

2.74 While noting this advice, the committee reiterates its scrutiny concerns that the minister will be able to create exemptions from the requirements of the Privacy Act in delegated legislation without explicit consultation requirements set out on the face of the bill, or elsewhere in the Privacy Act.

2.75 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.

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

Purpose	Schedule 1 to 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
Bill status	Received Royal Assent on 17 December 2020

No-invalidity clause[33]

2.76 In *Scrutiny Digest 18 of 2020* the committee requested 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.[34]

33 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).

34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 28-29.

Assistant Treasurer's response[35]

2.77 The Assistant Treasurer advised:

> The no-invalidity clauses for procedural requirements were included to provide certainty on the validity of the consumer data rules for the benefit of all consumer data right (CDR) participants and consumers.
>
> The no-invalidity clauses reflect the general position set out in section 19 of the *Legislation Act 2003* that the validity or enforceability of a legislative instrument is not affected by a failure to consult. Recognising the importance of consultation given the broad rule-making power, the consumer data rules are subject to considerably stricter consultation requirements than those in the *Legislation Act 2003*. This sets significantly higher expectations in respect of the CDR than standard legislative processes.
>
> However, the importance of thorough consultation was balanced against the need for certainty and consumer protection once the consumer data rules are made. The absence of a no-invalidity clause in relation to consumer data rules could risk their validity through challenge on the basis of, for example, the quality of consultation undertaken or adequacy of the consideration of submissions.
>
> The lack of a no-validity clause would also create perceived and actual risk for the validity of the consumer data rules, even where all the procedural requirements have been followed. The rules create rights for consumers and explain bow the privacy safeguards for consumers' data will be applied once data has been shared under the rules. As a result it is not desirable from a consumer protection perspective for the rules to be subject to challenge on the basis of the quality of consultation undertaken.
>
> Importantly, given that the consumer data rules are legislative instruments within the meaning of section 8 of the *Legislation Act 2003*, they will always be subject to the full Parliamentary scrutiny and disallowance processes applicable to such instruments.

Committee comment

2.78 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the no-invalidity clauses were included to provide certainty in relation to the validity of the consumer data rules. The committee further notes the Assistant Treasurer's advice that, from a consumer

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35 The Assistant Treasurer responded to the committee's comments in a letter dated 22 January 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

protection perspective, it is not considered desirable for the rules to be subject to challenge on the basis of the quality of consultation.

2.79 The committee thanks the Assistant Treasurer for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum.

2.80 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.

Reverse evidential burden of proof[36]

2.81 In *Scrutiny Digest 18 of 2020* the committee requested 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*.[37]

Assistant Treasurer's response

2.82 The Assistant Treasurer advised:

> The Committee sought advice as to why it was proposed to use an offence specific defence in relation to the new provision being inserted into the *Taxation Administration Act 1953* that will allow officers of the Australian Taxation Office to disclose protected information to the new Commonwealth Registrar so as to assist the Registrar in the performance of the Registrar's new functions and powers.
>
> Consistent with the Government's commitment to simplify its interactions with business to support growth, innovation and employment, the *Commonwealth Registers Act 2020* (and related Acts) facilitated a modern government registry regime that is flexible, technology neutral and governance neutral.
>
> Item 143 of Schedule 4 of the *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* supports those amendments by making a consequential amendment in section 355-67 of the *Taxation Administration Act 1953* to provide for the sharing of information by the Commissioner of Taxation to the Registrar where the disclosure relates to the performance of the Registrar's functions, or the exercise of the Registrar's powers. This amendment, which provides for a new authorised disclosure, is consistent

36 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).

37 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 29-30.

with information previously shared under Commonwealth law by the Commissioner of Taxation to the Australian Business Register and Australian Securities and Investments Commission.

The *Taxation Administration Act 1953* prohibits the disclosure of information about the tax affairs of all taxpayers except in specified circumstances. Those exceptions are designed having appropriate regard to the principle that disclosure of taxpayer information should be permitted only if the public benefit derived from the disclosure outweighs the entity's right to privacy. It achieves this by creating offences in relation to the making of records, or the disclosing of information, about an entity's tax affairs.

The new authorised disclosure to the Registrar, like all other authorised disclosures under the *Taxation Administration Act 1953*, is an offence specific defence to the general prohibition (or offence) on disclosure. The authorised disclosures are set out as offence specific defences as the evidence needed to prove the defence is peculiarly within the knowledge of the defendant, that is, the taxation officer making the disclosure. It is only the taxation officer who knows the basis on which they made a decision to record or disclose protected taxpayer information and it would be significantly more difficult and costly for the prosecution to disprove than for the taxation officer to establish the matter.

The taxation confidentiality provisions have been developed in accordance with the relevant principles set out in the Guide to Framing Commonwealth Offences. *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* does not alter the structure of the confidentiality framework or the offence provisions within it. The amendments introduced by the Act simply added a further ground for authorised disclosure which will assist the new Commonwealth Registrar to undertake their new functions in relation to the modernised and centralised Commonwealth Business Register.

Committee comment

2.83 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the authorised disclosures are set out as offence specific defences as the evidence needed to prove the defence is peculiarly within the knowledge of the defendant, in this instance, the tax officer making the disclosure. This is because only the taxation officer would know the basis on which they made a decision to record or disclose protected information and it would be significantly more difficult and costly for the prosecution to disprove than for the taxation officer to establish the matter.

2.84 The committee thanks the minister for providing this further information and notes that it would have been useful had this information been included in the explanatory memorandum.

2.85 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.

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 has not considered any new bills introduced into the Parliament, or amendments to bills, since the presentation of the committee's *Scrutiny Digest 1 of 2021* out of sitting on 29 January 2021.

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*.