The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 4 of 2021

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Comment bills

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

Appropriation Bill (No. 3) 2020-2021

Appropriation Bill (No. 4) 2020-2021

Purpose	Appropriation Bill (No. 3) 2020-2021 provides for annual appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the *Supply Act (No. 1) 2020-2021* and the *Appropriation Act (No. 1) 2020-2021* Appropriation Bill (No. 4) 2020-2021 provides for appropriations from the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government in addition to amounts appropriated through the *Supply Act (No. 2) 2020-2021* and the *Appropriation Act (No. 2) 2020-2021*
Portfolio	Finance
Introduced	House of Representatives on 18 February 2021

Parliamentary scrutiny—appropriations determined by the Finance Minister[1]

1.2 Section 10 of the *Appropriation Act (No. 1) 2020-21* (Appropriation Act No. 1) enables the Finance Minister to allocate additional appropriations for items when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination).

1.3 AFM determinations are legislative instruments, but they are not subject to disallowance or parliamentary scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation. Subsection 10(2) of Appropriation Act No. 1 provides

1 Clause 10 of Appropriation Bill (No. 3) 2020-2021 and Clause 12 of Appropriation Bill (No. 4) 2020-2021. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and 24(1)(a)(v).

that when the Finance Minister makes such a determination the Appropriation Act has effect as if it were amended to make provision for the additional expenditure.

1.4 Subsection 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Act No. 1 at $4 billion. Identical provisions appear in *Appropriation Act (No. 2) 2020-21* (Appropriation Act No. 2), with a separate ($6 billion) cap in that Act. The amount available under the AFM provisions in these Acts—$10 billion—is significantly higher than that available in previous annual appropriation bills.[2] The explanatory memorandum to Appropriation Act No. 1 states that the amount of the AFM 'takes into consideration the evolving nature of the COVID-19 pandemic, allocations that have been made to date, the uncertainty around what may be required as part of the Government's response and the likely need for the Government to act quickly'.[3] The committee notes, however, that the use of the AFM provisions to allocate additional amounts is not limited on the face of the Acts to COVID-19 response measures.

1.5 The committee considers that, in allowing the Finance Minister to allocate additional funds to entities up to a total of $10 billion via non-disallowable delegated legislation, the AFM provisions in Appropriation Acts Nos. 1 and 2 delegate significant legislative power to the executive. While this does not amount to a delegation of the power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[4] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.6 Subclause 10(1) of Appropriation Bill (No. 3) 2020-2021 seeks to provide that any determinations made under the AFM provisions in Appropriation Act No. 1 are to be disregarded for the purposes of the $4 billion cap in subsection 10(3) of that Act. The note to subclause 10(1) clarifies that this means that the Finance Minister would have access to the full $4 billion for the purposes of making AFM determinations under section 10 of Appropriation Act No. 1, regardless of any amounts that have already been determined under that section. Clause 12 of Appropriation Bill (No. 4) 2020-2021 contains identical provisions, which apply to the $6 billion cap in Appropriation Act No. 2.

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2 For example, subsection 10(3) of *Appropriation Act (No. 1) 2019-2020* set a cap of $295 million and subsection 12(3) *Appropriation Act (No. 2) 2019-2020* set a cap of $380 million.

3 Explanatory memorandum to *Appropriation Act (No. 1) 2020-21*, p. 9.

4 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

1.7 In light of the matters raised by the committee in relation to the Advance to the Finance Minister provisions in Appropriation Acts No. 1 and No. 2,[5] the committee draws to the attention of senators the proposal to disregard amounts determined by the Finance Minister under these provisions for the purposes of the $10 billion cap on amounts that may be so determined. The committee notes that the effect of the proposal is that, if amounts are determined under these provisions before the commencement of Appropriation Bills No. 3 and No. 4, additional funds will be available for expenditure via non-disallowable legislative instrument.

5 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2020*, pp. 13-15.

Family Assistance Legislation Amendment (Early Childhood Education and Care Coronavirus Response and Other Measures) Bill 2021

Purpose	This bill seeks to respond to the impacts of the COVID-19 pandemic on the early childhood education and care sector and families, by expanding the circumstances in which the Commonwealth can pay business continuity payments to approved child-care providers
Portfolio	Education
Introduced	17 February 2021

Significant matters in delegated legislation[6]

1.8 Item 17 seeks to insert proposed section 205C into the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act) which would provide for 'business continuity payments' to be made to eligible childcare service providers during periods of emergency or disasters.

1.9 Proposed section 205C provides for a number of matters in relation to administering the provision to be provided for in delegated legislation, including the following:

- proposed paragraph 205C(1)(c) provides for business continuity payments to be made if the Secretary is satisfied of matters, including meeting eligibility criteria (if any), which can be specified in the Minister's rules;
- proposed paragraph 205C(1)(d) provides that the Minister's rules may specify the period of a payment;
- proposed paragraph 205C(1)(e) provides that the amount of payment is prescribed or determined by the Minister's rules;
- proposed subsection 205C(2) provides that what constitutes an 'emergency or disaster' is prescribed in rules or within meanings set out in the *Social Security Act 1991*;
- proposed subsection 205C(3) provides that the Minister's rules may prescribe any other matters relating to business continuity payments.

6 Items 17 and 36. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.10 In addition, item 36, in relation to amounts paid under section 205A of the Administration Act, provides that the Minister may by legislative instrument make rules determining circumstances in which the whole or part of the amount is taken to be a debt due to the Commonwealth under Part 4 of the Administration Act.

1.11 The committee's view is that significant matters, such as rules relating to the manner in which business continuity payments may be made and rules determining the circumstances in which a debt will be due to the Commonwealth, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In relation to the two items above, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.12 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.

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

- **why it is considered necessary and appropriate to leave significant matters such as the manner in which business continuity payments may be made and the determination of circumstances in which a debt will be due to the Commonwealth to delegated legislation;**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Retrospective validation[7]

1.14 Item 38 of the bill seeks to provide that paragraphs 8(1)(h) and (i) and section 47AA of the Child Care Subsidy Minister's Rules 2017 are taken to be, and always to have been, valid exercises of power under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999*.

1.15 In seeking to provide that these provisions are taken to always have been valid exercises of power, item 38 appears to seek to provide retrospective validation to these provisions. The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as this 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.

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7 Item 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

1.16 The explanatory memorandum states that item 38:

> clarifies that paragraphs 8(1)(h) and (i), and section 47AA, of the Minister's Rules are, and always were, valid exercises of the power to make those rules. During the ECEC [early childhood education and care] Relief Package, these provisions gave effect to measures to switch off eligibility for CCS [child care subsidy] and prevent providers from charging fees for care, in return for being paid BCPs.[8]

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 The committee therefore requests the advice of the minister as to:

- **why retrospective validation is sought in relation to paragraphs 8(1)(h) and (i) and section 47AA of the Child Care Subsidy Minister's Rules 2017; and**
- **whether any persons are likely to be adversely affected by the retrospective validation of the provisions, and the extent to which their interests are likely to be affected.**

Broad delegation of administrative powers[9]

1.19 Proposed subsection 221(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act) would allow the secretary to delegate to an official of a non-corporate Commonwealth entity the Secretary's powers under section 85GA of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act). Section 85GA of the Family Assistance Act provides the secretary with a power to enter into, vary and administer written agreements under which the Commonwealth makes one or more grants of money for child care-related purposes.[10]

1.20 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for,

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8 Explanatory memorandum, p. 15.

9 Item 29. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

10 See explanatory memorandum p. 13.

the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.21 In this instance, the explanatory memorandum states that the power in section 85GA is similar to powers of secretaries to enter into and administer grant agreements under section 23 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and section 32B of the *Financial Framework (Supplementary Powers) Act 2013* (FF(SP) Act). The explanatory memorandum further explains:

> The Australian Government has centralised grant administration in two 'Grants Hubs' [administered by the Department of Social Services and the Department of Industry, Science, Energy and Resources]… Where a grants program established by a portfolio department needs to be administered by a Grants Hub, it is necessary for the Secretary of that department to delegate their powers under section 23 of the PGPA Act or section 32D of the FF(SP) Act to the employees of the Department of Social Services or the Department of Industry, Science, Energy and Resources, as the case requires.
>
> However, under section 221 of the Family Assistance Administration Act, the Secretary of the Department of Education, Skills and Employment is unable to delegate their power under section 85GA of the Assistance Act to employees of the Department of Social Services or the Department of Department of Industry, Science, Energy and Resources. This means that the Grants Hubs are not able to administer grants programs that rely on section 85GA as their source of authority.
>
> Accordingly, items 28 and 29 amend section 221 of the Family Assistance Administration Act to enable the Secretary to delegate his or her powers under section 85GA of the Family Assistance Act to an official of a non-corporate Commonwealth entity (within the meaning of the PGPA Act); and in exercising powers under a delegation, the delegate must comply with any directions of the Secretary.[11]

1.22 While noting this explanation, it is not clear to the committee whether the delegation is broader than what is required for the effective administration of the grant programs. For example, it is not clear why it is necessary to be able to delegate the secretary's power to an official of a non-corporate Commonwealth entity *at any level*.

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

- **why it is necessary to allow the secretary's powers under section 85GA of the Family Assistance Act to be delegated to an official of any non-corporate Commonwealth entity *at any level*; and**

11 Explanatory memorandum, p. 13.

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

Treasury Laws Amendment (Your Future, Your Super) Bill 2021

Purpose	Schedule 1 to this bill seeks to amend the *Superannuation Guarantee (Administration) Act 1992* to limit the creation of multiple superannuation accounts for employees who do not choose a superannuation fund when they start a new job Schedule 2 to this bill seeks to amend the *Superannuation Industry (Supervision) Act 1993* to require the Australian Prudential Regulation Authority to conduct an annual, objective performance test for MySuper products and other products Schedule 3 to this bill seeks to amend the existing best-interests duty to clarify that this duty requires the superannuation trustee to act in the best financial interests of the member
Portfolio	Treasury
Introduced	17 February 2021

Significant matters in delegated legislation

Retrospective application[12]

Stapled funds

1.24 Item 18 of Schedule 1 seeks to insert proposed Division 7 of Part 3A into the *Superannuation Guarantee (Administration) Act 1992* which provides for new 'stapled funds' rules in relation to payment of superannuation by employers to new employees. Proposed section 32Q provides that a fund is the 'stapled fund' for an employee at a particular time if requirements prescribed by the regulations are met in relation to the fund at that time.

1.25 The explanatory memorandum states that the regulations will cover:

- basic requirements that must be satisfied for a fund to be a stapled fund, including the requirement that the fund is an existing fund of the employee;
- tie-breaker rules for selecting a single fund where an employee has multiple existing funds; and
- when a fund ceases to be the stapled fund for an employee.[13]

12 Schedule 1, item 18; Schedule 2, item 9; Schedule 3, items 6, 10 and 14. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

13 Explanatory memorandum, p. 8.

1.26 The committee's view is that significant matters, such as basic requirements about default arrangements for superannuation payments, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states that the regulation-making power is 'appropriate to ensure there is sufficient flexibility for the government to response quickly to evolving industry practices' and that it is anticipated that the regulations will contain significant technical detail.[14]

1.27 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 leaving even the basic requirements that must be satisfied for a fund to be a stapled fund to regulations provides the executive with a broad power to determine and modify matters in relation to these funds in delegated legislation. It is unclear to the committee why at least high-level guidance in relation to these matters, such as the requirement that the fund is an existing fund of the employee, cannot be provided on the face of the bill.

1.28 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.

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

- **why it is considered necessary and appropriate to leave basic requirements for a fund to be a stapled fund for an employee to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these basic requirements on the face of the primary legislation, such as the requirement that the fund is an existing fund of the employee.**

Part 6A – annual performance assessments

1.30 Item 9 of Schedule 2 seeks to insert proposed Part 6A into the *Superannuation Industry (Supervision) Act 1993* which would require APRA to conduct annual performance tests for specified superannuation products. Within the framework set up by proposed Part 6A, numerous matters relevant to operation of the part are proposed to be set out in delegated legislation, including:

- the definition of 'part 6A product' (defined as a MySuper product or class of beneficial interest in a regulated superannuation fund, if that class is identified by regulations);[15]

14 Explanatory memorandum, p. 8.

15 See section 60B.

- the requirements for the annual performance test;[16] and
- requirements for lifting a prohibition on accepting new beneficiaries into a superannuation fund that has received two consecutive failure assessments in relation to the annual performance test.[17]

1.31 The committee has further consistently drawn attention to framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as the scope of the proposed scheme to require superannuation funds to undergo annual performance assessments, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.32 In this instance, the explanatory memorandum does not explain why it is necessary to rely on delegated legislation to determine the scope of the definition of 'Part 6A product', or to determine the requirements for lifting a prohibition on accepting new beneficiaries into a fund.

1.33 In relation to setting the requirements for the annual performance test in regulations, the explanatory memorandum explains:

> The requirements for the annual performance test will be set out in regulations. It is expected that the regulations will be made for this purpose that include, but are not limited to the following matters:
>
> - specifying requirements in respect of investment returns (which may be net of fees and taxes); and
> - specifying requirements that depend on the exercise of a discretion by APRA; and
> - specifying matters that APRA may or must take into account in exercising such a discretion; and
> - allowing APRA to make specified assumptions in exercising such a discretion.[18]

1.34 The explanatory memorandum further explains allowing regulations to specify matters in relation to assumptions relevant to calculating investment return will ensure consistency in applying assumptions and provide transparency and certainty.[19] However, the explanatory memorandum does not provide an explanation for broader

16 See section 60D.

17 See subsection 60F(4).

18 Explanatory memorandum, pp. 19-20.

19 Explanatory memorandum, p. 20.

reliance on delegated legislation to determine the requirements for annual performance assessments.

1.35 The committee further notes that the requirements for the annual performance test may specify that an assessment must consider the performance of a regulated superannuation fund prior to the bill's commencement. For example, Budget documents published by the Treasury state:

> Products that underperform their net investment return benchmark by 0.5 percentage points per year over an eight-year period will be classified as underperforming. For MySuper products that were in place from 1 July 2014, their first performance test will be based on seven years of performance data.[20]

1.36 In this regard, it may be said that the proposed scheme for annual performance assessments may have a retrospective application.

1.37 The explanatory memorandum notes that the assessment of whether a product satisfies the annual performance test may involve methods of calculation that relate to periods occurring before regulations are made.[21] However, the committee is concerned that specific information about the annual performance test that was included in the documents published by Treasury, including detail about matters to be included in delegated legislation,[22] was not included in explanatory material to the bill. The committee considers that explanatory memoranda should fully explain the intended operation of any proposed new schemes, noting the importance of explanatory materials as a point of access for parliamentarians and other persons to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

- **why it is considered necessary and appropriate to leave the following matters to delegated legislation:**
  - **the definition of 'part 6A product';[23]**

20 Treasury, *Budget 2020-21: Your Future, Your Super reforms to make your super work harder for you*, October 2020, p. 24. Available at https://treasury.gov.au/publication/p2020-super (accessed 24 February 2020).

21 See explanatory memorandum, p. 20.

22 See, for example, Treasury, *Budget 2020-21: Your Future, Your Super reforms to make your super work harder for you*, October 2020, pp. 22-23, relating to products other than MySuper products that will be subject to annual performance tests from 1 July 2022.

23 Section 60B.

- **the requirements for the annual performance test;[24]**
- **requirements for lifting a prohibition on accepting new beneficiaries into superannuation funds that have received two consecutive failure assessments;[25]**

- **whether the proposed scheme for annual performance assessments may have a retrospective application and, if so, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

1.39 The committee also requests that the explanatory memorandum be amended to include specific information about the intended operation of the annual performance testing scheme, as set out in Budget documents published by the Treasury.

Content of offences and civil penalties in regulations

1.40 Item 6 of Schedule 3 to the bill seeks to insert proposed subsection 34(2A) into the *Superannuation Industry (Supervision) Act 1993* (SIS Act). Current section 34 of the SIS Act provides that a breach of an operating standard is an offence, where the contravention is intentional or reckless. Operating standards are prescribed in regulations made for the purposes of sections 31 to 33 of the SIS Act.[26] Proposed subsection 34(2A) would introduce a strict liability offence for the contravention of an operating standard relating to a record keeping obligation, subject to a maximum penalty of 50 penalty units.

1.41 Items 10 and 14 of Schedule 3 seek to amend paragraphs 52(2)(c) and 52A(2)(c) of the SIS Act in relation to compliance with the proposed amended 'best financial interests' duty. The amendments would allow regulations to be made that prescribe additional requirements that must be complied with by the trustees and directors of trustee companies of registrable superannuation entities. A failure to comply with the specified additional requirements would constitute a contravention of the best financial interests duty, and would be subject to civil and criminal penalties.[27]

1.42 Item 18 of Schedule 3 seeks to insert proposed section 117A into the SIS Act. Proposed subsection 117A(1) would allow regulations to specify that certain payments

24 Section 60D.

25 Subsection 60F(4).

26 See sections 31-33 of the *Superannuation Industry (Supervision) Act 1993* and Superannuation Industry (Supervision) Regulations 1994.

27 See sections 54B, 193 and 202 of the *Superannuation Industry (Supervision) Act 1993*.

or investments made by trustees of registrable superannuation entities are prohibited, or prohibited unless certain conditions are met. Proposed subsection 117A(2) explains that subsection 117A(1) is a civil penalty provision, contravention of which will attract both civil and criminal consequences.

1.43 The committee's view is that significant matters, such as matters that are central to the commission of a strict liability offence or contravention of civil penalty provisions which carry significant penalties or criminal consequences, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.44 In this instance, in relation to the strict liability offence in proposed subsection 34(2A), while the explanatory memorandum explains why it is considered appropriate to apply strict liability to the offence, there is no justification for establishing the offence with reference to requirements set out in delegated legislation.

1.45 In relation to items 10 and 14, and proposed subsection 117A(1), the explanatory memorandum states:

> This regulation-making power is appropriate to ensure there is sufficient flexibility for the Government to respond quickly to evolving industry practices as needed. Any regulations made would be subject to parliamentary scrutiny and disallowance… Consistent with standard practice, the Government [envisages consultation or will consult] before making any regulations under this power…[28]

1.46 In relation to proposed section 117A, the explanatory memorandum further states:

> The power has been drafted to broadly cover any payments and investments from a superannuation entity, including payments relating to expenses associated with running the entity or investments made by the entity.
>
> This ensures that regulations can be made to prohibit certain payments and investments where they are considered to be unsuitable expenditure by trustees in any circumstance…
>
> Payments and investments are not prohibited unless and until regulations specifying such payments and investments are made. However, the civil penalty, criminal offence and the amount of penalties are set out in the SIS Act, reflecting settings considered appropriate for this kind of contravention in the event that such regulations are made. The regulation making power provides flexibility for the Government to respond quickly to prohibit payments and investments that are of concern and allows any such list of prohibited payments and investments to be updated and refined to ensure

28 Explanatory memorandum, pp. 48-49.

> any such prohibition operates as intended. The regulations would provide certainty to trustees of their obligations and potential liability for an offence.[29]

1.47 While noting these explanations, 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 allowing the regulations to set out the matters that must be complied with in order to avoid committing an offence or contravening a civil penalty provision provides the executive with a broad power to determine and modify the scope of these provisions. 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.

1.48 Additionally, while noting the explanation in the explanatory memorandum that the government intends to undertake consultation before making regulations in relation to paragraphs 52(2)(c) and 52A(2)(c), and proposed subsection 117A(1), the committee notes that there is no explicit requirement to undertake consultation on the face of the bill. Where Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that specific consultation obligations (beyond those in the *Legislation Act 2003*) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument.

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

- **why it is considered necessary and appropriate to leave the following significant matters to delegated legislation:**
  - **record keeping standards that must be complied with by trustees of superannuation entities;**
  - **additional requirements in relation to the 'best financial interests' duty that must be complied with by trustees and directors of trustee companies; and**
  - **prohibited payments or investments;**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation; and**
- **whether specific consultation obligations (beyond those in the *Legislation Act 2003*) could be included in the bill (with compliance with such obligations a condition of the validity of regulations made under paragraphs 52(2)(c) and 52A(2)(c) and proposed subsection 117A(1)).**

29 Explanatory memorandum, p. 49.

Bills with no committee comment

1.50 The committee has no comment in relation to the following bills which were introduced into the Parliament between 15 – 18 February 2021:

- Biosecurity Amendment (Strengthening Penalties) Bill 2021
- Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2021
- Health Insurance Amendment (Prescribed Fees) Bill 2021
- Industry Research and Development Amendment (Industry Innovation and Science Australia) Bill 2021
- Migration Amendment (Common Sense for All Visas) Bill 2021
- National Greenhouse and Energy Reporting Amendment (Transparency in Carbon Emissions Accounting) Bill 2021
- Treasury Laws Amendment (2021 Measures No. 1) Bill 2021

Commentary on amendments and explanatory materials

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

- Federal Circuit and Family Court of Australia Bill 2019;[30]
- Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019;[31]
- Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021.[32]

30 On 17 February 2021, the Senate agreed to three Government amendments, the Assistant Minister to the Attorney-General (Senator Stoker) tabled a supplementary explanatory memorandum, and the bill was read a third time. On 18 February 2021, the House of Representatives agreed to the Senate amendments, and the bill finally passed both Houses.

31 On 17 February 2021, the Senate agreed to two Government amendments, the Assistant Minister to the Attorney-General (Senator Stoker) tabled a supplementary explanatory memorandum, and the bill was read a third time. On 18 February 2021, the House of Representatives agreed to the Senate amendments, and the bill finally passed both Houses.

32 On 17 February 2021, the House of Representatives agreed to 19 Government amendments, the Minister for Communications, Urban Infrastructure, Cities and the Arts (Mr Fletcher) presented a supplementary explanatory memorandum, and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

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
Bill status	Before the House of Representatives

Significant matters in non-disallowable delegated legislation[1]

2.2 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave matters that are significant to the operation of the proposed new framework for managing industrial chemicals 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.[2]

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

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 6–7.

Minister's response[3]

2.3 The minister advised:

> The Industrial Chemicals Environmental Management (Register) Bill 2020 (ICEMR Bill) facilitates the establishment and operation of an intergovernmental scheme involving the Commonwealth and the states and territories and authorises the Principles, the Register, and the Rules to be made for the purposes of the scheme.
>
> The Principles, Register and Rules are exempt from disallowance and sunsetting because of the operation of the subsections 44(1) and 54(1) of the *Legislation Act 2003* (the Legislation Act) respectively. This is an automatic exemption that applies by force of law for instruments that are made under legislation that facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories and that authorises the instrument to be made for the purposes of the scheme. The explanatory memorandum for the Legislative Instruments Bill 2003, which enacted section 44, describes the rationale for its inclusion as being that 'the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme'. Similarly, the same explanatory memorandum explains the need for subsection 54(1) as being that instruments that are part of a multilateral agreement 'should therefore not be subject to a unilateral sunsetting process which would cause them to cease to exist in only one of the jurisdictions that are party to the agreement'.
>
> The intergovernmental scheme established by the ICEMR Bill is the National Standard for environmental risk management of industrial chemicals (the National Standard). In 2015, Australian environment ministers reviewed options for establishing the National Standard in a Council of Australian Governments Decision Regulation Impact Statement. They agreed to *establish [the National Standard] under Commonwealth legislation with automatic adoption under jurisdictional legislation for implementation and compliance.* The ICEMR Bill delivers on this approach agreed by environment ministers to provide a consistent, nation-wide approach to managing the risks that industrial chemicals may pose to the environment.
>
> *The Principles*
>
> The Principles are a key component of the National Standard. Scheduling decisions for industrial chemicals are required to comply with the Principles, and cannot be made unless the Principles are in force. The intergovernmental agreement provides for the Commonwealth and each

3 The minister responded to the committee's comments in a letter dated 16 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

State and Territory to adopt, implement and enforce the scheduling decisions in their jurisdiction. This is designed to drive national consistency in the management of industrial chemicals through a more streamlined, transparent, efficient and predictable approach to environmental risk management.

The Principles will be developed in collaboration with the states and territories, and in consultation with stakeholders. They will be a technical document, based on the most recent scientific findings regarding the properties of industrial chemicals and their potential environmental impacts. It is appropriate that the Principles be set out in delegated legislation to allow for them to be amended as necessary in response to evolving scientific knowledge. Any time the Principles an made or varied they will be subject to the mandatory consultation processes with states and territories and the public that is set out in the ICEMR Bill.

It is also appropriate that the Principles be exempt from disallowance and sunsetting. The Principles will reflect years of collaboration and input from the states and territories and industry. They will be subject to further public consultation and consultation with state and territory environment ministers before they are made, as required under the ICEMR Bill. Were they to be subject to disallowance and sunsetting, the collaborative interjurisdictional effort that went into the development of the National Standard as a whole, and the Principles in particular, could be undermined. Similarly, the certainty and consistency they provide for scheduling decisions would be jeopardised.

Furthermore, while it is appropriate that the Principles be updated as necessary to reflect scientific and technological advancements, it would undermine the certainty and predictability of scheduling decisions if the whole framework of the Principles were subject to sunsetting. The sunsetting of the Principles would also have the potential to destabilise the rest of the cooperative scheme for the National Standard, as they are a central component of it.

For these reasons, and consistently with Parliament's rationale for including subsections 44(1) and 54(1) in the Legislation Act, it is appropriate that the Principles not be subject to disallowance or sunsetting.

The Register

The Register will record the scheduling decisions made in respect of industrial chemicals and their uses under the ICEMR Bill. It is intended that one or more scheduling decisions will be made for all industrial chemicals considered under the scheme, and that these will be updated as appropriate. Scheduling decisions will be made regularly and may be varied or revoked in response to scientific advancements or technological innovations. For this reason it is appropriate that they be recorded in an instrument that can be readily updated and amended without the need to amend primary legislation.

Recording the scheduling decisions in the Register will also allow States and Territories (and the Commonwealth) to easily adopt those decisions (by adopting the Register as it exists from time to time) so that they can be implemented and enforced by each jurisdiction, as agreed in the intergovernmental agreement.

If the Register were subject to disallowance and sunsetting, this would undermine the certainty that the scheme provides for industry and governments implementing the scheduling decisions made under the ICEMR Bill. Disallowance of the Register would affect the content of State and Territory legislation, which would be inconsistent with the intergovernmental agreement.

Sunsetting would give rise to similar problems in relation to undermining the intergovernmental agreement. In addition, the potential for the hundreds of scheduling decisions that will be recorded in the Register to sunset at the same time would create significant disruption and uncertainty for governments and industry. It would also create significant administrative burden for the Australian Government. In turn, this would increase costs for industry, as the scheme will be fully cost recovered. Provisions in the ICEMR Bill allow for scheduling decisions in the Register to be reviewed and varied or revoked as necessary. It is more appropriate that this be undertaken as needed on a chemical-by-chemical basis in response to relevant technological and scientific advancements, and subject to the rigorous consultation requirements of the ICEMR Bill, rather than *en masse* as a result of sunsetting.

For these reasons, and consistently with Parliament' s rationale for including subsections 44(1) and 54(1) in the Legislation Act, it is appropriate that the Register not be subject to disallowance or sunsetting.

Rules

The Rules will represent a key aspect of the legislative framework that will give effect to the intergovernmental scheme. The purpose of the Rules is to detail additional matters related to processes, functions and relevant information for day-to-day operation of the intergovernmental scheme, including additional matters that should be considered by the Minister when making scheduling decisions, such as relevant international agreements or matters that have arisen in the course of scientific advancements or consultation with other jurisdictions.

The rules require the flexibility to adapt to an evolving scientific landscape to provide continued certainty and relevant up to date information to industry and governments implementing the scheme. Further, it is intended that any rules will reflect the agreed intergovernmental scheme and will be subject to consultation with states and territories, as they will affect the content of scheduling decisions which, in turn, will affect the content of State and Territory laws that adopt and implement the scheduling decisions. If they were subject to disallowance and sunsetting, this could, for the same

> reasons as for the Principles and the Register, undermine the effectiveness of the broader scheme.
>
> For these reasons, and consistently with Parliament's rationale for including subsections 44(1) and 54(1) in the Legislation Act, it is appropriate that the Rules not be subject to disallowance or sunsetting.
>
> On this basis, I consider it appropriate that the matters described above are legislative instruments and are not subject to usual parliamentary disallowance and sunsetting processes.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the intergovernmental scheme established by the bill is the National Standard for environmental risk management of industrial chemicals.

2.5 The committee also notes the minister's advice that the exemptions in sections 44 and 54 of the *Legislation Act 2003* are automatic exemptions, and that, at the time of enactment, the rationale for including these exemptions for instruments made under national schemes focused on concerns about unilateral actions of one party to an agreement affecting the operation of multi-jurisdictional schemes.

2.6 While noting this advice, the committee maintains its scrutiny view that delegated legislation should be subject to parliamentary oversight, with only very limited exceptions, and that it does not consider the fact that subsection 44(1) of the *Legislation Act 2003* applies to an instrument, is, of itself, a sufficient justification for excluding parliamentary disallowance. In this regard, the committee further notes the minister's advice in relation to the appropriateness of exempting from disallowance the below categories of delegated legislation made under the bill.

Principles

2.7 The committee notes the minister's advice that the principles will be a technical document, developed in collaboration with the states and territories, and that there are mandatory consultation obligations in place for making and varying the principles. The minister advised that setting the principles out in delegated legislation allows for amendments to be made in response to evolving scientific knowledge and that subjecting the principles to disallowance may undermine the collaborative interjurisdictional effort that went into their development. The minister also advised that the sunsetting of the principles my undermine the certainty and predictability of scheduling decisions.

The Register

2.8 The committee notes the minister's advice in relation to the role of the register to record scheduling decisions made in respect of industrial chemicals and their uses under the bill, and that these decisions will be made regularly and may be varied or revoked in response to scientific advancements or technological innovations. The minister advised that if the register were subject to disallowance and sunsetting, this

would undermine the certainty provided by the scheme in relation to implementing scheduling decisions and that disallowance would affect the content of State and Territory legislation, which would be inconsistent with the intergovernmental agreement.

2.9 The minister also advised that sunsetting of the instrument would create significant disruption and uncertainty for governments and industry and that it is more appropriate for scheduling decisions to be reviewed as needed, in response to relevant technological and scientific advancements and subject to the consultation requirements in the bill.

Rules

2.10 The committee notes the minister's advice that the purpose of the rules is to detail additional matters related to processes, functions and relevant information for day-to-day operation of the intergovernmental scheme. The minister advised that it is intended that the rules will reflect the agreed intergovernmental scheme and will be subject to consultation with states and territories, as they will affect the content of scheduling decisions which, in turn, will affect the content of State and Territory laws that adopt and implement the scheduling decisions.

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

2.12 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving matters which are significant to the operation of the legislative scheme established by the bill, including principles to be complied with when making scheduling decisions and rules prescribing a wide range of matters, to delegated legislation which is exempt from parliamentary disallowance and sunsetting.

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
Bill status	Before the House of Representatives

Significant matters in delegated legislation[4]

2.13 In *Scrutiny Digest 2 of 2021* the committee requested the minister's advice as to:

- whether guidance in relation to the method of calculation of 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. [5]

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

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2021*, pp. 8-9.

Minister's response[6]

2.14 The minister advised:

> The *Australian Government Charging Framework* and the *Australian Government Cost Recovery Guidelines* require that there must be alignment between the expenses of an activity (in this case, the costs of the administration of the scheme) and corresponding revenue (income generated through charges in relation to the scheme).
>
> The explanatory memorandum for the Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020, the Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020, and the Industrial Chemicals Environmental Management (Register) Charge (Customs) Bill 2020 (collectively referred to as the ICEMR Charges Bills) provides that any charges set out in the regulations will be consistent with the *Australian Government Charging Framework* and the *Australian Government Cost Recovery Guidelines*. This was intended to provide assurance that the amounts charged would reflect the likely costs to the Commonwealth of services provided in relation to industrial chemicals under the ICEMR Bill, such as matters relating to assessing industrial chemicals (and their uses) for the purposes of making, varying or revoking scheduling decisions.
>
> Consistent with Australian Government policy, the amount of any applicable charge will be determined through a Cost Recovery Implementation Statement (CRIS). All government cost recovered activities must be documented in a CRIS before charging regulations are made and charging can begin. The CRIS will be released for public consultation and include the method of calculation of the charges which will be discussed with stakeholders. Therefore, the method of calculation of charges or the maximum charge will not be able to be included in the bills themselves before this process is completed.
>
> In addition, the Department of Finance must be satisfied that the charge is set at a level that is designed to recover no more than the full and efficient costs of the administration of the framework. The Finance Minister must also agree to the final CRIS. Financial performance of the cost recovery arrangement will be monitored on an ongoing basis and the CR1S may be updated annually as required to show the actual expense and cost recovery revenue.
>
> On this basis and considering the rigorous processes already in place to ensure the appropriateness of cost recovered charges, I do not consider it necessary to amend the bills.

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6 The minister responded to the committee's comments in a letter dated 16 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.15 The committee thanks the minister for this response. The committee notes the minister's advice that the amount of any applicable charge will be determined through a Cost Recovery Implementation Statement (CRIS) and that this CRIS will be released for public consultation and include the method of calculation of the charges which will be discussed with stakeholders. The minister advised that, for these reasons, the method of calculation of charges or the maximum charge will not be able to be included in the bills themselves before this process is completed.

2.16 The committee also notes the minister's advice that the Department of Finance must be satisfied that the charge is set at a level that is designed to recover no more than the full and efficient costs of the administration of the framework and that the Finance Minister must agree to the final CRIS.

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

2.18 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the rate of charges in relation to the scheduling of industrial chemicals to be set in delegated legislation.

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

Regulatory Powers (Standardisation Reform) Bill 2020

Purpose	This bill seeks to amend various Acts in order to implement the *Regulatory Powers Act (Standard Provision) Act 2014*, in order to simplify and streamline regulatory powers across the Commonwealth statute book and represent best practice regulation
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020
Bill status	Before the House of Representatives

Privacy

Coercive powers[7]

2.20 In *Scrutiny Digest 1 of 2021* the committee requested the Attorney-General's further advice as to the justification for expanding the application of the monitoring powers in the *Regulatory Powers (Standard Provisions) Act 2014* to allow them to be exercised in relation to 'a matter'.[8]

Attorney-General's response[9]

2.21 The Attorney-General advised:

> The Committee has requested advice as to the justification for expanding the application of the monitoring powers in the Regulatory Powers Act to allow them to be exercised in relation to 'a matter'.
>
> Currently, monitoring powers under the Regulatory Powers Act are confined to determining compliance with a provision or the correctness of information given in compliance with a provision. The proposed change would allow Regulatory Powers Act monitoring powers to be exercised in relation to other matters. As the Regulatory Powers Act only has effect where Acts are drafted or amended to trigger its provisions, this expanded scope will only apply where provisions in triggering Acts nominate particular

7 Schedule 1, item 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 24-25.

9 The Attorney-General responded to the committee's comments in a letter dated 16 February 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

matters subject to monitoring. As such the amendments have no automatic effect in existing regulatory regimes.

The power to monitor matters supports the operation of effective, robust monitoring schemes as it extends monitoring beyond direct compliance with particular legislative provisions, to facilitate better regulator awareness of developing situations and potential risks. The expansion would allow for the monitoring of whether a circumstance exists, for example adherence to performance standards or incidents or patterns of incidents that may indicate a failure to comply with regulatory obligations. The ability to monitor circumstances or matters that may indicate non-compliance with underlying legislative requirements supports effective and robust regulatory action by ensuring the efficient direction of resources and allowing early intervention and graduated enforcement to support continued compliance.

The only matter that will become subject to monitoring on passage of the Bill is set out in the proposed amendments to the ESOS Act. Item 12 of Part 1 of Schedule 3 of the Bill inserts new section 130 into the ESOS Act. New subsection 130(3) provides that determining whether a registered provider might not be able to continue to meet its obligations to accepted students is a matter subject to monitoring under Part 2 of the Regulatory Powers Act.

The "matter" referred to here relates to the key objective of the tuition protection scheme in the ESOS Act. The tuition protection obligations that providers are subject to, and the powers that the Tuition Protection Director has, under the ESOS Act are triggered when a provider "defaults". A provider defaults (section 46A) where the provider fails to start to provide a course to a student at a location on the agreed starting day, or the course ceases to be provided to the student at the location at any time after it starts, but before it is completed, and the student has not withdrawn. Under section 46D of the ESOS Act, providers, on default, are obliged to arrange for an alternative course or to provide a refund. Providers are likely to default due to financial difficulty, but could also default for other reasons.

Where a provider does not discharge its obligations, the Tuition Protection Director has powers (sections 49 and 50A) to arrange for a replacement course or to call on a special account administered by the Director to arrange a refund.

Noting this, the matter that is subject to monitoring in proposed subsection 130(3) is designed to ensure that the relevant ESOS agency is able to exercise monitoring powers in circumstances where it is likely that a provider will default. This recognises the importance of ensuring providers meet their obligations upon default and enables effective tuition protection, consistently with the existing objectives of the tuition protection scheme in the ESOS Act.

Any further expansion of Regulatory Powers Act monitoring powers to matters will require legislative amendment to define the matters in

question, and should be accompanied by appropriate explanation and justification in the accompanying explanatory memoranda.

Committee comment

2.22 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the proposed power to monitor 'matters' will support and facilitate better awareness by regulators of developing situations and potential risks, including by allowing for the monitoring of whether a circumstance exists, which may include monitoring of adherence to performance standards, or monitoring of incidents that may indicate non-compliance with regulatory obligations. The Attorney-General advised that such monitoring would support early intervention and graduated enforcement.

2.23 The Attorney-General also advised that the only matter to become subject to monitoring under this bill would be in relation to the *Education Services for Overseas Students Act 2000* (ESOS Act), as proposed subsection 130(3) provides that determining whether a registered provider might not be able to continue to meet its obligations to accepted students is a matter subject to monitoring under Part 2 of the Regulatory Powers Act. The Attorney-General advised that the provision is designed to ensure that the relevant ESOS agency is able to exercise monitoring powers in circumstances where it is likely that a provider will default.

2.24 While noting the above advice, the committee remains concerned that allowing the monitoring powers in the Regulatory Powers Act to be exercised in relation to a 'matter' provides for potentially significant coercive or intrusive powers to be exercised in a much wider range of circumstances than is currently provided for in the legislation. The committee therefore expects that the explanatory material to any proposed legislation seeking to trigger these powers in relation to a 'matter' should explain:

- why it is considered appropriate for the bill to confer coercive or intrusive powers;
- whether there are safeguards and appropriate limitations on the powers included on the face of the bill;
- who may exercise the powers, and whether they are required to possess specific skills or qualifications; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.

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

2.26 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the application of the monitoring powers in the *Regulatory Powers (Standard Provisions) Act 2014* to allow them to be exercised in relation to 'a matter'.

Strict liability offences[10]

2.27 In *Scrutiny Digest 1 of 2021* the committee requested the Attorney-General's advice as to the justification for the proposed amendment to section 93 of the *Fisheries Management Act 1991* (FMA), to provide that the offence will be a strict liability offence, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[11]

Attorney-General's response

2.28 The Attorney-General advised:

> The Committee has requested advice as to the justification for the proposed amendment to section 93 of the FMA, to provide that the offence will be a strict liability offence, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.
>
> Subsection 93(1) of the FMA currently provides that a holder of a fish receiver permit must not refuse or fail to give a return or information that the person is required to give under- section 92 or under regulations made for the purposes of that section. The fault element of intention applies to the conduct (being the refusal or failure to give the return or information), while strict liability applies to the circumstance that the return or information is required under section 92 or the regulations. Subsection 93(2) provides that subsection (1) does not apply if the person has a reasonable excuse. The offence carries a maximum penalty of imprisonment for 6 months.
>
> The Bill will amend the Act to make section 93 a strict liability offence. The effect of the amendments are to remove all fault elements from the offence, replace the defence of reasonable excuse with the defence of honest and reasonable mistake of fact and replace the penalty of 6 months imprisonment with a pecuniary penalty of 30 penalty units.
>
> The amendments to section 93 in the Bill will support the legislative objective of ensuring the exploitation of fisheries resources is consistent with the principles of ecologically sustainable development (section 3 of the FMA). The return or information required under section 92 or under

10 Schedule 4, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, p. 25.

regulations assists in monitoring catch of fish against the allocated quota of permitted catch. Imposing strict liability in relation to the provision of this information emphasises the positive obligations that apply to those who undertake commercial fishing in specified fisheries, and encourages active engagement and proactive compliance by holders of fish receiver permits. This upholds the integrity of fishery and maintains the on-going sustainability of fisheries resources.

The amendments also bring section 93 into line with commensurate offences in subsection 95(5) of the FMA. Under subsection 95(5) the breach of a licence or permit condition, involving the provision of certain information, is subject to a pecuniary penalty instead of a penalty of imprisonment and is an offence of strict liability.

The Bill will also align the penalty in section 93 with other Commonwealth legislation where breaches of conditions are offences of strict liability and subject to a pecuniary penalty.

Application of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide)

The amendments in the Bill are consistent with paragraph 4.3.3 of the Guide, which notes that "an offence-specific defence of 'reasonable excuse' should not be applied to an offence" as it is too open-ended and difficult to rely on. Instead, defences of general application in Part 2.3 of the Criminal Code should be used. The Bill would replace the existing defence of reasonable excuse in section 93 with one of reasonable mistake or ignorance of fact - a general defence available under the *Criminal Code Act 1995*. This amendment modernises section 93, to make it consistent with the Guide.

The amendments to the penalty in section 93 are consistent with the Guide's statements on punitive consequences in strict liability offences - in particular, that strict liability offences should not be punishable by imprisonment, and should apply a fine no more than 60 penalty units for an individual (Paragraph 2.2.6). The amendments in the Bill will apply a maximum penalty of 30 penalty units, the standard equivalent to a 6 month imprisonment penalty under subsection 4 B(2) of the *Crimes Act 1914*. This lessens the severity of the maximum punishment available for the offence and would make the penalty proportionate to the level of offending and less intrusive on a person's rights and liberties.

Restructuring the offence to be one of strict liability is consistent with the Guide and is appropriate in achieving the policy goals of the FMA. Consistent with paragraph 2.2.6 of the Guide, the amendments support the integrity of the regulatory regime and place the holders of fish receiver permits on notice to guard against the possibility of contravention.

The amendments to section 93 also have the consequence that the offence is one that is appropriate for an infringement notice scheme. The use of infringement notices in this context aligns with paragraph 6.2.1 of the

Guide, which provides that infringement notice schemes should only apply to minor offences with strict or absolute liability, and where a high volume of contraventions is expected. This change also satisfies the Regulatory Powers Act requirement that only strict liability offences be made subject to infringement notices.

Committee comment

2.29 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the imposition of strict liability in relation to this offence emphasises the positive obligations that apply to commercial fishing in specified fisheries and encourages proactive compliance by holders of fish receiver permits. The Attorney-General also advised that the amendments are commensurate with other offences in the FMA and align with other Commonwealth legislation where breaches of conditions are offences of strict liability and subject to a pecuniary penalty.

2.30 The committee also notes the Attorney-General's advice that the amendment modernises section 93 to make it consistent with the *Guide to Framing Commonwealth Offences*, including by replacing the existing defence with one of reasonable mistake or ignorance of fact, and by applying a maximum penalty of 30 penalty units.

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

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

Use of force[12]

2.33 In *Scrutiny Digest 1 of 2021* the committee requested the Attorney-General's advice as to:

- the training, qualifications or experience of the various 'authorised officers' who are authorised to used force against things under the bill;

12 Schedule 2, item 2, proposed subsection 101ZAB(12) of the *Defence Force Discipline Act 1982*; Schedule 3 item 12, proposed subsections 130(14) and 131(12) of the *Education Services for Overseas Students Act 2000*; Schedule 7, item 4, proposed subsection 51A(11) of the *Tobacco Plain Packaging Act 2011*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

- why it is necessary to confer powers to use force against things on any 'other person' to assist an authorised person; and
- whether the bill can be amended to require that all persons authorised to use force must have appropriate expertise and training.[13]

Attorney-General's response

2.34 The Attorney-General advised:

> The Bill provides for the use of force during monitoring and/or investigation with regard to the DFDA [*Defence Force Discipline Act 1982*], ESOS Act [*Education Services for Overseas Students Act 2000*], and TPPA [*Tobacco Plain Packaging Act 2011*]. The questions posed by the Committee regarding the use of force are answered with reference to these Acts.
>
> Training, qualifications or experience of authorised officers
>
> *DFDA [Defence Force Discipline Act 1982]*
>
> For the purposes of Part 3 of the Regulatory Powers Act, within Defence authorised officer functions will ordinarily be carried out by trained and qualified Military Police or Inspector General - ADF investigators. The Joint Military Policing Unit will continue to work with civil law enforcement agencies to develop best practice training and accreditation for the exercise of investigative powers.
>
> *ESOS Act [Education Services for Overseas Students Act 2000]*
>
> For the purposes of Parts 2 and 3 of the Regulatory Powers Act, an authorised officer of the ESOS agency for a registered provider is an authorised person for the purposes of exercising the use of force provisions in the ESOS Act amendments in the Bill.
>
> Section 6A of the ESOS Act sets out who is an authorised officer of an ESOS agency for a registered provider, and the criteria for that must be met for their appointment. This includes criteria that the person is required to have appropriate training, qualifications and experience for the role in which they undertake as an authorised officer.
>
> Where the ESOS agency for a registered provider is the Secretary of the Department, the criteria are:
>
> (a) the person is an APS employee in the Department; and
>
> (b) the person holds or performs the duties of an APS 5 position or higher, or an equivalent position; and
>
> (c) the agency is satisfied that the person has suitable qualifications and experience.

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 26-27.

Where the ESOS agency for a registered provider is the Tertiary Education Quality Standards Agency (TEQSA), an authorised officer is a Commissioner (within the meaning of the TEQSA Act), the Chief Executive Officer of TEQSA or an 'authorised officer' appointed under section 94 of the TEQSA Act. Under section 94 of the TEQSA Act,

TEQSA must not appoint a person as an authorised officer unless:

(a) the person holds the classification of APS Executive Level 1 or higher, or an equivalent classification; and

(b) TEQSA is satisfied that the person has suitable qualifications and experience to properly exercise the powers of an authorised officer.

Where the ESOS agency for a registered provider is the National VET Regulator (known as the Australian Skills Quality Authority (ASQA)), an authorised officer is a Commissioner (within the meaning of the Nation.al Vocation.al Education. and Training Regulator Act 2011 (NVETR Act)) or an authorised officer appointed under section 89 of the NVETR Act. Section 89 of the NVETR Act describes the criteria to appoint an authorised officer, and the ASOA Authorised Officer Requirements 2012 legislative instrument describes the specific experience, training and qualification requirements for authorised officers under the NVETR Act.

If the ESOS agency for a registered provider is another entity, that agency may only appoint a person as an authorised officer if the person is an employee or constituent member of the agency and the agency is satisfied that the person has suitable qualifications and experiences for the appointment.

TPPA [Tobacco Plain Packaging Act 2011]

Under subsection 81(2) of the TPPA, the Secretary must be satisfied that a person has suitable qualifications, training or experience to be appointed as an authorised officer.

Generally, the types of qualifications, training or experience required for authorised officers to be appointed will require the officer to hold a Cert IV or Diploma of Government Investigations. In accordance with Australian Government Investigation Standards, the authorised officer leading an investigation or executing a warrant will hold those relevant qualifications. The appropriate use of force and preparation for investigations or warrant executions are taught through the Cert IV of Government Investigation training for field-based officers. This knowledge and applied experience is a basic part of the skill set of investigators, and more specifically, appointed authorised officers.

<u>Conferral on any 'other person' of power to use force against things</u>

DFDA

On occasion, an authorised person exercising investigation powers may encounter an unanticipated need for physical assistance or an unanticipated need for specialist assistance (i.e. IT support, bomb disposal, classified

material handling). Situations here such assistance may be required include handling heavy or fragile objects, discovery of dangerous or classified evidentiary material or specialised access of electronic data from a computer server.

ESOS Act

A person assisting the authorised person may be required to use force to - access further secure locations within or on the premises (for example, a safe or where access is through a locked door). In these situations, this provision means that the authorised person is able to have the assistance of another person with relevant experience, training or qualifications in using force against things.

For example, a locksmith would be an 'other person' who may be required to assist an authorised person who encountered a locked cabinet or room. Their use of force may be necessary in order to urgently secure documents and things specified under a warrant, and avoid circumstances where evidence may be destroyed if they are required to leave and return at a later time.

TPPA

Situations may arise in the exercise of monitoring and investigation powers under the TPPA where professional skilled assistance is required, such as the use of a locksmith for locked doors or IT forensic experts for recovering data from locked electronic devices.

In each case, the person assisting the authorised person may only use such force against things as is necessary and reasonable in the circumstances (new paragraph 101ZAB(12)(b) of the DFDA, new paragraph 130(12)(b) of the ESOS Act, new paragraph 51A(ll)(b) of the TPPA) and remains subject, at all times, to directions given by the authorised person (paragraphs 23(2)(d) and 53(2)(d) of the Regulatory Powers Act). The authorised person is responsible for any powers exercised by the person assisting, and any power exercised, or function or duty performed, is taken to be exercised or performed by the authorised person (subsections 23(3)-(4) and 53(3)-(4).

Not allowing for this assistance from other persons would also require the experts mentioned above to be appointed as authorised officers and named on warrants, despite not necessarily being Commonwealth employees and potentially only being required on an ad hoc basis.

<u>Whether the bill can be amended to require that all persons authorised to use force must have appropriate expertise and training</u>

Authorised persons

The potential for use force to be a necessary part of the exercise of their functions is a relevant consideration in determining who should be appointed as an authorised person. As such the requirement that such appointments only be made where the appointer is satisfied that the officers in question have suitable qualifications, training or experience

(DFDA new subsections 101ZAD(3)-(4), ESOS Act section 6A, TPPA section 81) necessarily extends to qualifications, training or experience relevant to the use of force. The use of force authorised by the Bill must always be necessary and appropriate. What is necessary and appropriate will differ across the various policy contexts dealt with by the amended Acts and particular situations that may be encountered in their administration.

Persons assisting

As noted above, a person assisting an authorised person remains subject, at all times, to directions given by the authorised person, and their actions are taken to be those of the authorised person. The assistance may only be provided where it is necessary and reasonable. When determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons in relation to the Regulatory Powers Act, it is intended that regard will be had to any skills, training or relevant experience that should be required of that other person. The authorised person is responsible for any powers exercised by the person assisting, and any function or duty performed is taken to be performed by them. The qualifications, training or experience of the authorised person will provide context and guidance for who they seek assistance from, as well as the directions they give, and the assistance they request from, those other persons.

The assistance required from other persons will often be unanticipated, and limited in duration and purpose to that which the authorised person requires to safely and effectively carry out exercise of their powers. It is not anticipated that other persons will be routinely used or required on an ongoing basis. Prescribing set training requirements and standards of expertise would be impracticable in these circumstances and would limit the flexibility intended to be provided by the 'person assisting' provisions.

Committee comment

2.35 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice in relation to the requirements for appointment of authorised officers under the *Defence Force Discipline Act 1982* (DFDA), *Education Services for Overseas Students Act 2000* (ESOS Act), and *Tobacco Plain Packaging Act 2011* (TPPA). The Attorney-General also advised that, generally, appointed authorised officers will be required to hold a certificate or diploma of Government Investigations, that the training for such a certificate includes training in the appropriate use of force and preparation for investigations or warrant executions, and that the potential for use of force to be a necessary part of the exercise of their functions is a relevant consideration in determining who should be appointed as an authorised person.

2.36 The committee also notes the Attorney-General's advice in relation to examples of situations where it may be necessary to confer on 'other persons' a power to use force against things, including specialists and skilled professionals such as locksmiths. The Attorney-General advised that not allowing for this assistance would require such persons to be appointed as authorised officers and named on warrants,

despite not necessarily being Commonwealth employees and potentially only being required on an ad hoc basis.

2.37 In relation to requiring training for persons assisting who are authorised to use force against things, the Attorney-General advised that the need for assistance will often be unanticipated, and limited in duration, and that prescribing set training requirements and standards of expertise would be impracticable and limit flexibility intended to be provided by the 'person assisting' provisions.

2.38 The committee notes the Attorney-General's advice that persons assisting will remain subject to directions given by the authorised person and their actions are taken to be those of the authorised person. The Attorney-General also advised that when determining if it is necessary and reasonable for an authorised person to be assisted in relation to the Regulatory Powers Act, it is intended that regard will be had to skills training or experience that should be required of the person assisting. In addition, the qualifications, training or experience of the authorised person will provide context and guidance for who they seek assistance from, as well as the directions they give, and the assistance they request from, those other persons.

2.39 While noting the above advice, from a scrutiny perspective, the committee remains concerned that the above safeguards are predominantly within the discretion of the authorised persons, rather than being requirements on the face of the bill.

2.40 The committee reiterates its consistent scrutiny position that coercive and intrusive powers should generally only be conferred on government employees with appropriate training.

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

2.42 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring powers to use force against things on any 'other person' assisting an authorised person in circumstances where there is no legislative guidance requiring such persons to have appropriate expertise and training.

Broad delegation of investigatory powers[14]

2.43 In *Scrutiny Digest 1 of 2021* the committee requested the Attorney-General's advice as to:

- why it is considered necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers; 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.[15]

Attorney-General's response

2.44 The Attorney-General advised:

> The Bill provides for assistance from any 'other person' during monitoring and/or investigation with regard to the DFDA, ESOS Act, TEQSA Act [*Tertiary Education Quality and Standards Agency Act 2011*], TAPA [*Tobacco Advertising Prohibition Act 1992*] and TPPA.
>
> As outlined above in relation to the use of force, an authorised person may on occasion encounter a need for additional or specialist assistance in order to effectively and efficiently discharge their functions. The required assistance (whether it be specialist IT support, bomb disposal, classified material handling, opening of locked cabinets and doors or physical and administrative assistance with sorting and transport of evidential material) is likely to be of limited duration and require specialist skills or capacity not available within the administering agency's cohort of authorised persons.
>
> Assistance from other persons supports the exercise of functions and powers under the DFDA, ESOS Act, TEQSA Act, TAPA, and TPPA. to be performed efficiently and effectively by those most adept and qualified to do so.
>
> The protections noted above in relation to the selection, expertise and training of persons assisting who may be authorised to use force apply equally to their provision of other forms of assistance including that a person assisting an authorised person remains subject, at all times, to

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14 Schedule 2, item 2, proposed subsection 101ZAB(11), *Defence Force Discipline Act 1982*; Schedule 3, item 12, proposed subsections 130(13) and 131(11), *Education Services for Overseas Students Act 2000*; Schedule 5, item 12, proposed subsections 115(12) and 116(11) *Tertiary Education Quality and Standards Agency Act 2011*; Schedule 6, item 2, proposed subsection 25C(11), *Tobacco Advertising Prohibition Act 1992*; Schedule 7, item 4, proposed subsection 51A(12) *Tobacco Plain Packaging Act 2011*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 27-28.

directions given by the authorised person, and any assistance may only be provided where it is necessary and reasonable.

Committee comment

2.45 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that an authorised person may on occasion require additional or specialist assistance in order to effectively and efficiently discharge their functions and that this assistance is likely to be of limited duration and require specialist skills or capacity not available within the administering agency's cohort of authorised persons.

2.46 The Attorney-General also advised that the protections noted in his response in relation to allowing other persons to use force against things also apply to the provision of other forms of assistance, including that a person assisting an authorised person is subject to directions given by the authorised person and that any assistance may only be provided where it is necessary and reasonable.

2.47 While noting this advice, the committee reiterates its above comments that the above safeguards are predominantly within the discretion of the authorised persons, rather than being requirements on the face of the bill. The committee reiterates its consistent scrutiny position that coercive and intrusive powers should generally only be conferred on government employees with appropriate training.

2.48 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, s*Interpretation Act 1901*).

2.49 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing any 'other person' to assist an authorised person in exercising monitoring and investigatory powers in circumstances where there is no legislative guidance requiring persons assisting an authorised person to have expertise appropriate to the function or power being carried out.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

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