The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 7 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

Initial scrutiny

1.1 The committee has not considered any new bills introduced into the Parliament, or amendments to bills, since the presentation of the committee's *Scrutiny Digest 6 of 2021* out of sitting on 21 April 2021.

Chapter 2

Commentary on ministerial responses

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

Biosecurity Amendment (Clarifying Conditionally Non-prohibited Goods) Bill 2021

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to clarify the validity of determinations made under the Act in relation to specifying that certain classes of goods are conditionally non-prohibited goods, and specifying the conditions that apply to such goods before they can be brought or imported into Australia
Portfolio	Agriculture
Introduced	Senate on 18 March 2021
Bill status	Received Royal Assent on 31 March 2021

Retrospective validation[1]

2.2 In *Scrutiny Digest 6 of 2021* the committee requested the minister's more detailed advice as to whether any persons are likely to be adversely affected by the retrospective validation of determinations purportedly made under subsection 174(1) of the *Biosecurity Act 2015*, and the extent to which their interests are likely to be affected.[2]

Minister's response[3]

2.3 The minister advised:

> The Bill clarifies the validity of determinations made under subsection 174(1) of the Act that specify that certain classes of goods are

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

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 5–6.

3 The minister responded to the committee's comments in a letter dated 1 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

conditionally nonprohibited goods and specify conditions that apply to such goods before they can be brought or imported into Australia.

The Bill does not retrospectively change the intention of the law. The Bill simply reinstates the legal rights and obligations that arise from determinations made under subsection 174(1) of the Act to the position that was always understood to be the case when the original determinations were enacted. Any persons who were not affected by determinations made under subsection 174(1) of the Act at the time that the original determinations were made will continue to remain unaffected by such determinations after the commencement of the Bill. The Bill therefore does not create any new consequences or obligations for persons who had not previously been affected by such determinations.

Any persons who had been affected by determinations made under subsection 174(1) of the Act at the time that the original determinations were made will continue to be persons who are affected by such determinations after the commencement of the Bill. The Bill therefore confirms that the determinations will continue to operate as they have always been understood to operate.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the bill does not retrospectively change the intention of the law but, rather, provides that the legal rights and obligations that arise from determinations made under subsection 174(1) of the *Biosecurity Act 2015* will be the same as they were intended to be when the original determinations were enacted. The minister has advised that, in this sense, the bill does not create any new consequences or obligations for persons who had not previously been affected by such determinations and that any persons who had been affected by these determinations at the time that the original determinations were made will continue to be affected after the commencement of the bill.

2.5 While noting the minister's advice, the committee reiterates its view that, underlying the basic rule of law principle that all government action must be legally authorised, is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective validation has the potential to undermine these values. The committee considers that where Parliament acts to retrospectively validate decisions which are put at risk it is necessary for Parliament to consider:

- whether affected persons will suffer any detriment by reason of the retrospective changes to the law and, if so, whether this would lead to unfairness; and
- that too frequent resort to retrospective legislation may work to sap confidence that the Parliament is respecting basic norms associated with the rule of law.

2.6 The committee notes that the minister's response does not fully address the committee's questions regarding whether any affected persons would suffer a detriment as a result of the retrospective validation and the extent to which their interests are likely to be affected. In this respect, the committee notes that while the intention of the bill may be to restore the position (and associated legal rights and obligations) that was intended when the original determinations were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified. This is particularly the case in instances where a provision that is the subject of retrospective validation attracts significant penalties or may otherwise impact on individual rights and liberties. For example, in this instance, section 186 of the *Biosecurity Act 2015* provides that a person who contravenes a condition applied to a conditionally non-prohibited good may be subject to imprisonment of up to 10 years. The committee therefore continues to have scrutiny concerns regarding the effect of this retrospective validation and notes that its concerns have not been adequately addressed by the minister.

2.7 Noting the limited explanation provided in the explanatory materials and the minister's response, the committee continues to have scrutiny concerns regarding the provisions of the bill. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021

Purpose	This bill seeks amend the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* to improve the operation of services in the broadcasting sector and simplify regulation by removing redundant and otherwise unnecessary provisions
Portfolio	Communications
Introduced	House of Representatives on 25 March 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[4]

2.8 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the prescription of the 'subscription television captioning scheme' to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding the 'subscription television captioning scheme' on the face of the primary legislation.[5]

Minister's response[6]

2.9 The minister advised:

> The core objectives of the proposed reforms to the captioning requirements for subscription television (STV) licensees are maximising flexibility, simplicity and transparency, while aiming to ensure that the most popular programming attracts the most captioning.
>
> Reform in this area is necessary for the following reasons:
>
> - the existing rules are highly complex to administer and comply with and are opaque to viewers that rely on captions;

4 Schedule 2, item 9. 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 6 of 2021*, pp. 6–7.

6 The minister responded to the committee's comments in a letter dated 5 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest

- consultations have been conducted in relation to the existing captioning regime and the STV industry, consumer representatives and the regulator (the Australian Communications and Media Authority) all support a more simplified and transparent framework;
- The industry has changed significantly as a result of digital disruption since the current arrangements in the *Broadcasting Services Act 1992*, which were introduced in 2012. The introduction of subscription video on demand services (such as Netflix, Stan, Amazon Prime, Disney Plus, Binge and Optus Sport) has led to significantly reduced audiences and revenue for licensed subscription TV services. It is expected that the industry will continue to rapidly evolve; and
- The size and complexity of the existing framework is arguably excessive for an industry sector in decline.

The power to make a legislative instrument for the STV captioning scheme allows flexibility to consult on and respond in a timely and efficient way to new and emerging issues associated with, or changes affecting, subscription TV and the needs and interests of viewers who rely on captions.

Prescription of the scheme though primary legislation could not provide the same level of flexibility and may result in captioning requirements no longer remaining fit for purpose or becoming out of date as time progresses. The delegated legislation approach adopted in the Bill is consistent with good regulatory practice as it will help ensure the scheme remains proportionate to the STV industry's role and remains adaptable to the needs of captioning users.

It is noted that the scheme would be a legislative instrument for the purposes of the *Legislation Act 2003*, and therefore subject to parliamentary scrutiny and the disallowance regime of that Act.

The Bill already sets out at proposed subsection 130ZV(l) a non-exhaustive list of the matters likely to be covered by an STV captioning scheme established by Ministerial determination. The list comprises matters which are familiar elements of the current regime:

- annual captioning targets for subscription television services, including methods for working out the targets;
- applications for partial or total exemptions from annual captioning targets, including who may make such applications, the information or documents that must accompany applications and the making of decisions in relation to applications;
- reporting and record-keeping obligations of subscription television licensees; and

- the publication of information relating to the scheme, including decisions made under the scheme.

Given the objectives for the reforms (which includes flexibility), proposed subsection 130ZV(l) and the scrutiny and disallowance safeguards under the Legislation Act, at this time, I do not consider it necessary to amend the Bill to include guidance regarding the scheme.

I intend to undertake consultation to determine whether the existing annual captioning targets for different categories of content remain appropriate or should be simplified, including whether captioning targets should be subject to annual increases or paused at current levels. I also intend to consult on the introduction of more objective grounds for exemptions, based on audience share for channels and exemptions for racing channels.

Finally, I intend to consult in relation to appropriate measures to ensure customers are able to access information about captioning levels in a more timely way.

Committee comment

2.10 The committee thanks the minister for this response. The committee notes the minister's advice that the power to make a legislative instrument for the subscription television (STV) captioning scheme allows flexibility to consult on, and respond in a timely and efficient way to, new and emerging issues associated with, or changes affecting, STV and the needs and interests of viewers who rely on captions.

2.11 The committee notes that the STV captioning scheme would be a legislative instrument for the purposes of the *Legislation Act 2003*, and therefore subject to parliamentary scrutiny and the disallowance regime of that Act.

2.12 The committee also notes the minister's advice that the prescription of the scheme though primary legislation could not provide the same level of flexibility and may result in captioning requirements no longer remaining fit for purpose or becoming out of date as time progresses.

2.13 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.

2.14 The committee welcomes the minister's advice that he intends to undertake consultation in relation to the annual captioning targets, exemptions, and appropriate access to information about captioning levels. However, the committee notes that this consultation could also be undertaken to inform the making of primary legislation.

2.15 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*).

2.16 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the prescription of the 'subscription television captioning scheme' to delegated legislation.

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

Incorporation of external materials existing from time to time[7]

2.18 In *Scrutiny Digest 6 of 2021* the committee requested the minister's advice as to:

- the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 130ZV(5);
- whether these documents will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.[8]

Minister's response

2.19 The minister advised:

> Proposed subsection 130XV(5), which would enable the incorporation of material as in force or existing from time-to-time, is necessary in my view. It will allow the scheme to include references to certain technical and industry specific matters that may change from time to time. For example, the proposed scheme could establish an exemption which had regard to a certain level of audience share as set out in particular written industry reports or data. An example of industry standard data for television audience share data is OzTAM data which is available both online and in bespoke reports which can be commissioned and purchased. However, industry arrangements for measuring audiences may change from time to time, and it would be important that these sources remain relevant if audience share becomes a criterion for captioning exemptions.
>
> Should such information be incorporated into the scheme, I will explore mechanisms for making this material publicly and freely available (such as posted on a website). The mechanisms for making incorporated

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7 Schedule 2, item 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 7–8.

documents publicly available and publicly clarifying their legal status will be an area for consultation before the scheme is made.

Committee comment

2.20 The committee thanks the minister for this response. The committee notes the minister's advice that proposed subsection 130XV(5) will allow the scheme to include references to certain technical and industry specific matters that may change from time to time. In particular, the committee notes the example that the proposed scheme could establish an exemption which had regard to a certain level of audience share as set out in particular written industry reports or data, such as OzTAM data.

2.21 The committee also notes the minister's advice that industry arrangements for measuring audiences may change from time to time, and it would be important that these sources remain relevant if audience share becomes a criterion for captioning exemptions.

2.22 Finally, the committee notes the minister's advice that the minister will explore mechanisms for making any incorporated material publicly and freely available.

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

2.24 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*).

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

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

Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021

Purpose	This bill seeks to establish a scheme that mandates that service and repair information provided to car dealership and manufacturing preferred repairs be made available for independent repairs and registered organisations to purchase at a fair market price
Portfolio	Treasury
Introduced	House of Representatives on 24 March 2021
Bill status	Before the House of Representatives

Tabling of documents in Parliament[9]

2.27 In *Scrutiny Digest 6 of 2021* the committee requested the Assistant Treasurer's advice as to:

- why the requirement for reports associated with the operation of regulatory schemes to be tabled in Parliament is proposed to be excluded; and
- whether documents produced under proposed section 57FB (in addition to reports published under proposed paragraph 57FB(1)(e)) will be made available online (including other legislative provisions, if any, which require the publishing of these documents online).[10]

Assistant Treasurer's response[11]

2.28 The Assistant Treasurer advised:

> The scheme adviser's role is expected to be undertaken by an industry-led organisation. The scheme advisor's annual report is a way to provide advice about the number and type of inquiries and disputes, the appointment of mediators, resolution rates for disputes and anything else relating to the operation of the scheme or requested by the Minister. I do

9 Schedule 1, item 1, proposed subsection 57FB(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 9–10.

11 The Assistant Treasurer responded to the committee's comments in a letter dated 5 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> not consider it necessary to amend the Bill to require these documents be tabled in Parliament. The Bill requires that the annual report be published on the scheme adviser's website. Publication of the annual report on the Scheme Adviser's website will mean that members of the industry, general public and parliamentarians are able to access the report.
>
> The scheme adviser can also provide advice to the Minister or ACCC upon request or on its own initiative. Such advice may identify potential systematic issues with the scheme or make recommendations for amendments. It is not appropriate to publish such advice ahead of consideration by the Minister or the regulator.

Committee comment

2.29 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the annual report will be published on the scheme adviser's website and will therefore be available to members of the industry, the general public and parliamentarians.

2.30 The committee notes the Assistant Treasurer's further advice that information provided by the scheme adviser which may identify potential systematic issues with the scheme or make recommendations for amendments is not appropriate for tabling before Parliament ahead of consideration by the minister or the regulator.

2.31 While noting this advice, the committee reiterates that not providing for reports produced by the scheme adviser to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. From a scrutiny perspective, the committee therefore does not consider that the Assistant Treasurer's response has provided a sufficient justification in relation to tabling of the annual report. In addition, even if it is accepted that it would not be appropriate for other reports produced under proposed section 57FB to be tabled ahead of consideration by the minister or the regulator, the Assistant Treasurer's response does not address why tabling would be inappropriate after such consideration had been given.

2.32 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not requiring the scheme adviser's annual report or other reports produced under proposed section 57FB to be tabled in Parliament.

Privacy

Significant matters in delegated legislation[12]

2.33 In *Scrutiny Digest 6 of 2021* the committee requested the Assistant Treasurer's advice as to:

- why it is considered necessary and appropriate to leave requirements relating to when a person may be considered a fit and proper person, and circumstances in which personal information may be sought or given, to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[13]

Assistant Treasurer's response

2.34 The Assistant Treasurer advised:

> The bill sets out the framework for when a person must meet a fit and proper person test (that is, only when seeking access to safety or security information) and what information can be used to determine this, and provides that the Scheme Rules will provide the detail. The bill also provides for privacy settings designed to protect independent repairers from misuse or mishandling of personal information by data providers which could cause financial or reputational harm. The only sensitive personal information that can be obtained, a repairer's criminal record, is prescribed in the bill. Only non-sensitive personal information, such as qualifications, can be prescribed in rules. It is appropriate that the detailed requirements for the fit and proper person test and access criteria be set out in the scheme rules as it will be technical in nature and may need to be updated regularly and quickly to reflect changes in technology and deal promptly with attempts to frustrate the scheme. Consultation on these detailed requirements is currently underway. The rules will be a legislative instrument and subject to disallowance by either house of the Parliament. I consider that this provides the Parliament with sufficient and appropriate oversight of the detailed rules.

Committee comment

2.35 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that only non-sensitive information, such as a person's qualifications, can be prescribed in the rules for the purpose of the fit and proper person test and that prescribing this kind of

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12 Schedule 1, item 1, proposed subsection 57DB(4), proposed paragraph 57DB(6)(e) and proposed subsection 57DB(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 10–12.

information in the rules is appropriate because it is technical in nature and may need to be updated regularly. The Assistant Treasurer further advised that consultation on the detailed requirements to be prescribed in the rules is currently underway.

2.36 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Assistant Treasurer, including examples of the types of personal information that it is intended may be prescribed in the rules, 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*).

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

Significant penalties[14]

2.38 In *Scrutiny Digest 6 of 2021* the committee requested the Assistant Treasurer's more detailed advice as to the justification for the significant penalties that may be imposed via infringement notice under table item 4 of proposed section 57G of the bill.[15]

Assistant Treasurer's response

2.39 The Assistant Treasurer advised:

> The penalty provisions have been carefully considered and are consistent with provisions for breaches relating to anti-competitive behaviour and failure to comply with consumer protection provisions under the *Competition and Consumer Act 2010*. Infringement notices provide the ACCC with flexibility in enforcement options and enable alleged contraventions to be handled quickly so they do not undermine the scheme's operation or ability of a repairer to access scheme information.
>
> Most infringement notices under the scheme are consistent with the *Guide to Framing Commonwealth Offences*, that is, they do not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate. However, a higher infringement notice penalty amount of 120 penalty units for a natural person or 600 penalty units for a body corporate has been provided where a data provider fails to supply scheme information within the required timeframe (which, in most cases, will be immediately). The *Guide to Framing Commonwealth Offences* notes that if the amount

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14 Schedule 1, item 1, proposed section 57GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 12–14.

payable under an infringement notice is too low it will be an inadequate deterrent and may simply be paid by the guilty and innocent alike as a cost of doing business and that higher penalty amounts can be applied in exceptional circumstances. As most data providers are expected to be large multinational corporations, the penalties are considered to apply in exceptional circumstances and a higher amount is therefore considered to be appropriate and necessary. Also, contraventions of this requirement may significantly undermine the effectiveness of the scheme if independent repairers are not able to access information in a timely way. For example, if repairers cannot obtain information needed to complete a typical car service on the day the vehicle is in their workshop, this substantially hampers their ability to compete with a workshop that can deliver same-day service, and would frustrate the core objectives of the scheme. This higher amount is also consistent with the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*.

Committee comment

2.40 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that, because most data providers are expected to be large multinational corporations, the significant penalties imposed under proposed section 57GB apply in exceptional circumstances and a higher amount is therefore appropriate and necessary. The committee also notes the Assistant Treasurer's advice that if an infringement notice is too low, it will be an inadequate deterrent and that a failure to deter contraventions may significantly undermine the effectiveness of the scheme if it results in independent repairers not being able to access information in a timely way. The Assistant Treasurer further advised that the significant penalties provided under proposed section 57GB are consistent with the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*.

2.41 While noting the Assistant Treasurer's advice, the committee reiterates its expectation that the rationale for the imposition of significant penalties will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk of the application of disproportionate penalties.

2.42 The committee notes that the Assistant Treasurer's advice relates chiefly to the need to deter large multinational corporations from contravening the provisions of the bill. The committee remains concerned that the penalties imposed by proposed section 57GB differ in their treatment of persons who are not body corporates when compared with other comparable provisions, including within the *Competition and Consumer Act 2010*. For example, the penalties imposed via infringement notices under the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* do not exceed 10 penalty units for

persons other than body corporates. Where a higher level of penalty units is imposed upon a natural person, this is not done under an infringement notice scheme.

2.43 The committee remains concerned that a sufficient justification has not been provided in relation to imposing significant penalties upon individuals by way of an infringement notice under proposed section 57GB.

2.44 In light of the above, the committee requests the Assistant Treasurer's further advice as to the justification for the significant penalty (120 penalty units) that may be imposed via infringement notice under table item 4 of proposed section 57G upon persons who are not body corporates.

Mutual Recognition Amendment Bill 2021

Purpose	This bill seeks to amend the *Mutual Recognition Act 1992* to introduce a uniform scheme of automatic mutual recognition, which will enable an individual registered for an occupation in their home State to be taken to be registered to carry on, in a second State, the activities covered by their home State registration
Portfolio	Prime Minister
Introduced	House of Representatives on 18 March 2021
Bill status	Before the House of Representatives

Exemption from disallowance[16]

2.45 In *Scrutiny Digest 6 of 2021* the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate to leave significant matters to delegated legislation which is exempt from parliamentary disallowance and effective parliamentary accountability or oversight at either the Commonwealth or state level.[17]

Minister's response[18]

2.46 The minister advised:

> The Bill facilitates the operation of the Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registration (IGA), which was signed by all jurisdictions, with the exception of the Australian Capital Territory, in December 2020.
>
> The proposed Part 3A provides for the making of determinations or declarations that impose notification requirements or exclude certain occupational registrations from AMR.

16 Schedule 1, item 87. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 30–31.

18 The minister responded to the committee's comments in a letter dated 4 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

This would allow a state or territory Minister to determine or declare by legislative instrument:

- registrations in relation to which a person who intends to carry on the activity covered by the registered occupation must notify the relevant local registration authority before the person begins to carry on the activity;
- registrations that are excluded from automatic deemed registration, if the Minister is satisfied of a significant risk; and
- registrations that are excluded temporarily from automatic deemed registration (for a period ending six months after the commencement of the Bill, which can be extended to 30 June 2022).

These legislative instruments address a key aspect of the IGA which recognises the need for appropriate safeguards to be retained to protect consumers and the health and safety of workers and the public.

By facilitating the operation of an IGA scheme, and authorising a determination or declaration to be made for the purposes of that scheme, the Bill also attracts the operation of subsection 44(1) of the *Legislation Act 2003* so as to exempt from disallowance those determinations and declarations under section 42 of the *Legislation Act 2003*. This is in keeping with current arrangements under the *Mutual Recognition Act 1992* where declarations as to equivalent occupations are similarly not subject to disallowance.

If the instruments in the proposed Part 3A were open to being disallowed under section 42 of the Legislation Act, an essential aspect of the IGA, namely the retention of appropriate safeguards to be determined by jurisdictions, would be called into doubt and this in turn could undermine the effective operation of the scheme more generally.

The implementation of AMR, including exemptions of occupational registrations, will be evaluated as part of an independent review agreed by States and Territories and outlined in the IGA.

Committee comment

2.47 The committee thanks the minister for this response. The committee notes the minister's advice that subsection 44(1) of the *Legislation Act 2003* applies to instruments made under proposed Part 3A, that exemptions from disallowance are consistent with the current arrangements under the *Mutual Recognition Act 1992* and that the Automatic Mutual Recognition scheme will be subject to an independent review. The committee also notes the minister's advice that providing for disallowance by the Commonwealth Parliament would lead to uncertainty in relation to the retention of appropriate safeguards to protect consumers and the health and safety of workers and the public, which will be determined by individual jurisdictions.

2.48 While the committee notes this point, as set out in the committee's original comments on the bill, the committee's concerns in this instance are heightened by the fact that the power to make these non-disallowable instruments is conferred on state ministers, without any apparent mechanisms to make the exercise of these powers by state ministers reviewable or subject to scrutiny by state parliaments. While noting the minister's advice in relation to the intention to subject the Automatic Mutual Recognition scheme to an independent review, it remains unclear to the committee whether decisions made by state ministers under the scheme will be accompanied by an appropriate level of parliamentary accountability or oversight.

2.49 In light of the above, the committee requests the minister's further advice as to what safeguards are in place to ensure that the exercise of an instrument-making power by a state minister is subject to appropriate accountability or oversight at the state level.

Online Safety Bill 2021

Purpose	This bill seeks to create a modern, fit for purpose regulatory framework that builds on the strengths of the existing legislative scheme for online safety
Portfolio	Communications, Urban Infrastructure, Cities and the Arts
Introduced	House of Representatives on 24 February 2021
Bill status	Before the Senate

Significant matters in delegated legislation[19]

2.50 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2021* and requested the minister's advice.[20] The committee considered the minister's first response in *Scrutiny Digest 6 of 2021* and reiterated its request for the minister's detailed advice as to why it is considered necessary and appropriate to leave matters contained in each of the following provisions to delegated legislation:

- clauses 6 and 7 – in relation to conditions to be met for material to be considered cyber-bullying or cyber abuse material;
- clause 13 – in relation to the definition of 'social media service';
- clause 13A – in relation to the definition of 'relevant electronic service';
- clause 14 – in relation to the definition of 'designated internet service' and 'exempt services';
- clause 27 – in relation to the commissioner's functions, which may include such other functions as are specified in the legislative rules;
- clause 45 – in relation to basic online safety expectations;
- clauses 52 and 59 – in relation to periodic and non-periodic reporting obligations for service providers;
- clause 86 – in relation to exempt provisions of an intimate image;
- clause 108 – in relation to the restricted access system;
- subclause 145(1) – in relation to industry standards;
- clause 151 – in relation to service provider determinations;

19 Clauses throughout the bill as listed. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 17–19.

- clause 152 – in relation to exemptions from service provider determinations; and
- subclause 235(2) – in relation to an exemption of a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of subsection 235(1).

2.51 The committee also requested the minister's detailed advice as to whether the bill can be amended to include at least high-level guidance in relation to the determination by the Commissioner of the following matters on the face of primary legislation:

- the 'restricted access system' under clause 108;
- 'industry standards' under subclause 145(1); and
- 'service provider determinations' under clause 151 and exemptions from such determinations under clause 152.21

Minister's response[22]

2.52 The minister advised:

> I have noted the comments of the committee in its *Scrutiny Digest 6 of 2021* (the Digest) and I provide the attached addendum to the explanatory memorandum of the Bill that responds to 10 of the matters raised at pages 55 to 80.
>
> I have given careful consideration to your request for further information in relation to delegated legislation in the Bill, and your request that the Bill be amended to provide guidance to the Commissioner in relation to a determination under the Bill. Having weighed up these issues, and balanced them up against the importance of the eSafety Commissioner being as effective as possible in protecting Australians against online harms, I have concluded that in my judgement the better course is not to amend the Bill.

Committee comment

2.53 The committee thanks the minister for this response. The committee notes the minister's advice that he has given careful consideration to the committee's requests but has concluded that the better course is not to amend the bill. The minister advised that he has come to this conclusion having weighed the scrutiny issues against the importance of the Commissioner being as effective as possible in protecting Australians against online harms.

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21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 66–68.

22 The minister responded to the committee's comments in a letter dated 4 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

2.54 However the committee notes that the minister's response did not address the committee's request for detailed advice justifying the extensive powers in the bill to make delegated legislation to deal with matters that are significant to the operation of the revised online safety scheme. While noting the minister's above advice, it is unclear to the committee how the effectiveness of the Commissioner would be undermined by the provision of a response to the committee and addendums to explanatory material to the bill so that it includes justification for clauses that delegate legislative power. The committee therefore restates its concern that the bill appears to be non-compliant with the committee's scrutiny principles, in that the bill appears to inappropriately delegate legislative powers.

2.55 The committee reiterates its longstanding views with respect to the importance of explanatory material to bills and the role of these documents in ensuring effective access to and understanding of proposed legislation. The committee considers that the quality of explanatory material is of fundamental importance to ensuring that the Parliament can effectively carry out its legislative function. In this instance, while the committee thanks the minister for preparing an addendum to the explanatory memorandum to the bill, the committee is of the view that the inadequacy of the original explanatory memorandum to the bill has not been resolved by the addendum included with the minister's response. This is particularly the case as the addendum to the explanatory memorandum does not address the committee's concerns with respect to the 15 identified clauses that appear to inappropriately delegate legislative power.

2.56 The committee also takes this opportunity to emphasise the importance of constructive dialogue with legislation proponents to assist the committee in its scrutiny work and thereby assist senators in their consideration of proposed legislation.

2.57 In light of the above, the committee requests that a more comprehensive addendum to the explanatory memorandum be tabled in the Parliament as soon as practicable. The committee makes this request in consideration of 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 Interpretations Act 1901*). The updated addendum should contain detailed justification as to why it is considered necessary and appropriate to leave each of the identified significant matters in each of the following clauses to delegated legislation:

- **clauses 6 and 7 – in relation to conditions to be met for material to be considered cyber-bullying or cyber abuse material;**
- **clause 13 – in relation to the definition of 'social media service';**
- **clause 13A – in relation to the definition of 'relevant electronic service';**
- **clause 14 – in relation to the definition of 'designated internet service' and 'exempt services';**

- **clause 27 – in relation to the Commissioner's functions, which may include such other functions as are specified in the legislative rules;**
- **clause 45 – in relation to basic online safety expectations;**
- **clauses 52 and 59 – in relation to periodic and non-periodic reporting obligations for service providers;**
- **clause 86 – in relation to exempt provisions of an intimate image;**
- **clause 108 – in relation to the restricted access system;**
- **subclause 145(1) – in relation to industry standards;**
- **clause 151 – in relation to service provider determinations;**
- **clause 152 – in relation to exemptions from service provider determinations; and**
- **subclause 235(2) – in relation to an exemption of a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of subsection 235(1).**

2.58 The committee draws its significant scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving a broad range of significant matters in the bill to delegated legislation.

2.59 In addition, the committee draws to the attention of senators its significant scrutiny concerns with respect to the broad discretionary power granted to the Commissioner by provisions in the bill that leave significant matters to delegated legislation. In particular, the committee leaves to the Senate as a whole the appropriateness of leaving the following significant matters to delegated legislation in circumstances where there is limited guidance on the face of the bill to constrain or guide the Commissioner's discretionary powers in relation to them:

- **the 'restricted access system' under clause 108;**
- **'industry standards' under subclause 145(1); and**
- **'service provider determinations' under clause 151 and exemptions from such determinations under clause 152.**

2.60 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Treasury Laws Amendment (2020 Measures No. 4) Bill 2021

Purpose	Schedule 1 to this bill seeks to amend the income tax law to ensure that no tax is payable on refunds of large-scale generation certificate shortfall charges Schedule 2 to this bill seeks to facilitate the closure of the Superannuation Complaints Tribunal and any associated transitional arrangements Schedule 3 to this bill seeks to enable the government to establish a more effective enforcement regime to encourage greater compliance with the franchising code by increasing the maximum civil pecuniary penalty available for a breach of an industry code, and increasing the civil pecuniary penalties for breaches of the franchising code accordingly Schedule 4 to this bill seeks to extend the operation of a temporary mechanism put in place during the coronavirus pandemic, to respond to the ongoing challenges posed by social distancing measures and restrictions on movement and gathering in Australia and overseas
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[23]

2.61 The committee previously commented on this bill in *Scrutiny Digest 16 of 2020*,[24] and *Scrutiny Digest 1 of 2021*.[25] On 25 March 2021, the Assistant Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum, the House of Representatives agreed to three Government amendments, and the bill was read a third time.

2.62 In *Scrutiny Digest 6 of 2021*, regarding these amendments, the committee requested the Assistant Treasurer's advice as to why it is considered necessary and

23 Schedule 3, items 1 and 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2020*, pp. 25–28.

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2021*, pp. 75–77.

appropriate to allow provisions with civil penalties of up to $500,000 for a person who is not a body corporate to be included in delegated, rather than primary legislation.[26]

Assistant Treasurer's response[27]

2.63 The Assistant Treasurer advised:

> Schedule 3 to the Treasury Laws Amendment (2020 Measures No. 4) Bill 2020 amends the *Competition and Consumer Act 2010* to increase the maximum amount of penalty units that can be included in regulations that prescribe an industry code from 300 to 600 penalty units. The Committee has requested my advice as to why it is considered necessary and appropriate to allow provisions with civil penalties of up to $500,000 for a person who is not a body corporate to be included in delegated, rather than primary, legislation.
>
> Section 51 AE(2) of the *Competition and Consumer Act 2010* allows penalties to be prescribed by regulations. This penalty provision was inserted in 2014 in order to penalise contraventions of key provisions of an industry code (which are prescribed in regulations). Treasury Laws Amendment (2020 Measures No. 4) Bill 2020 increases the maximum penalties that can be prescribed by regulations.
>
> The industry code provisions are aimed at regulating the conduct of corporations and businesses engaged in trade and commerce. The new maximum penalty of $500,000 for persons other than corporations would only apply to persons engaging in trade and commerce within the franchising industry, as regulated by the Franchising Code of Conduct. For corporations, the new maximum penalty is the greater of: $10 million; three times the value of the benefit gained from the contravention; or 10 per cent of the annual turnover of the corporation. These maximum penalty amounts – for both corporations and non-incorporated persons – are in line with other penalty provisions in the *Competition and Consumer Act 2010*.
>
> These increased maximum penalties have been included following the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the operation and effectiveness of the Franchising Code of Conduct. The Committee's report recommended that the quantum of penalties available for a breach of the Franchising Code be significantly increased to align with penalties under the Australian Consumer Law and ensure the penalties are a meaningful deterrent for non-compliance. Poor

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26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, p. 38.

27 The Assistant Treasurer responded to the committee's comments in a letter dated 5 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> conduct in the franchising industry has led to serious harm to franchisees. This amendment enables regulations to prescribe penalties that will deter persons from serious and egregious breaches of the franchising code. As the Franchising Code is the key piece of legislation regulating behaviour between franchisors and franchisees, the regulations are the most appropriate place for these increased penalties to be included.
>
> Any regulations made under the new provision will be a legislative instrument and subject to disallowance by either house of the Parliament. I consider that this provides the Parliament with sufficient and appropriate oversight of the regulation making process.

Committee comment

2.64 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the increased penalties have been prescribed following a recommendation from the Parliamentary Joint Committee on Corporations and Financial Services that penalties within the Franchising Code of Conduct be increased to align with penalties under the Australian Consumer Law. As a result, the proposed new penalties are comparable with other penalty provisions in the *Competition and Consumer Act 2010*.

2.65 The Assistant Treasurer further advised that poor conduct within the franchising industry has previously led to serious harm to franchisees and that implementing the recommendation of the Parliamentary Joint Committee on Corporations and Financial Services will ensure there is a meaningful deterrent to this kind of conduct occurring again in the future. The Assistant Treasurer advised that the regulations are the most appropriate place to include these increased penalties because the Franchising Code of Conduct is the key piece of legislation regulating behaviour between franchisors and franchisees.

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

Treasury Laws Amendment (2021 Measures No. 2) Bill 2021

Purpose	Schedule 1 to this bill seeks to amend the *Income Tax Assessment Act 1997* to require a fund, authority or institution to, as a precondition for deductible gift recipient endorsement, be a registered charity, an Australian government agency, or operated by either of these entities Schedule 2 to this bill seeks to amend Australia's offshore banking unit (OBU) regime to remove the concessional tax treatments for OBUs, remove the interest withholding tax exemption, and close the regime to new entrants by removing the Minister's ability to declare or determine an entity to be an OBU
Portfolio	Treasury
Introduced	House of Representatives on 17 March 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Broad discretionary power[28]

2.67 In *Scrutiny Digest 6 of 2021* the committee requested the Assistant Treasurer's advice as to:

- why it is considered necessary and appropriate to provide the minister with a broad power to determine the criteria and matters that the Commissioner must be satisfied of and have regard to when assessing a request for an extended application date;
- why it is considered necessary and appropriate to leave these matters to delegated legislation; and
- whether the bill can be amended to include additional guidance regarding the relevant criteria and matters, and the exercise of the power by the minister, on the face of the primary legislation.[29]

28 Schedule 1, subitem 16(7). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 34–35.

Minister's response[30]

2.68 The minister advised:

> Schedule 1 to the Treasury Laws Amendment (2021 Measures No. 2) Bill 2021 inserts a new requirement for non-government deductible gift recipients to be a registered charity. The transitional arrangements in Schedule 1 to the Treasury Laws Amendment (2021 Measures No. 2) Bill 2021 generally provide that affected entities have 15 months after Royal Assent to comply with the new requirements about receiving endorsement as a deductible gift recipient (DGR). Entities that need a longer period to comply with the new requirements can apply to the Commissioner of Taxation for an extended application date. If an extended application date is granted, the entity has an additional three years after the 15 month period to comply with the new requirements.
>
> Before granting an extended application date to an entity, the Commissioner of Taxation must consider whether the prescribed criteria in relation to the application are satisfied and have regard to the prescribed matters in relation to the application. Subitem 16(7) allows the Minister to prescribe the criteria and matters for this purpose by legislative instrument.
>
> The entities that are likely to require an extended application date are generally those with complex structures and arrangements. However, it may not be immediately clear to some of these entities whether they need an extended application date, particularly given the relatively long transitional period of 15 months and the nature of the entities (which are not-for-profit organisations). Therefore, I consider it is necessary and appropriate to leave the criteria and matters to delegated legislation, to ensure they can remain flexible and quickly respond to the needs of affected entities.
>
> I also note the instrument setting out the prescribed matters and criteria is a legislative instrument that is subject to disallowance. Therefore, Parliament will still have the opportunity to scrutinise any criteria and matters that the Commissioner must be satisfied of and have regard to when assessing a request for an extended application date. Additionally, the *Legislation Act 2003* requires the rule-maker to be satisfied that there has been appropriate consultation and that a summary of that consultation is included in the explanatory statement to the instrument.
>
> For the above reasons, I consider it is necessary and appropriate to provide the relevant Minister with the power to determine the relevant criteria and matters. In my view, this power is not broad as it is necessarily

30 The minister responded to the committee's comments in a letter dated 5 May 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

limited by the fact that it relates to transitional arrangements. In other words, the scope of the power is confined such that it must relate to criteria and matters that are about giving entities more time to comply with the amendments, where reasonable.

Committee comment

2.69 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that it is both necessary and appropriate to leave to delegated legislation the criteria and matters that the Commissioner must be satisfied of, and have regard to, when assessing a request for an extended application date, on the grounds that it would ensure the criteria and matters can remain flexible and can quickly respond to the needs of affected entities. The Assistant Treasurer has advised that this flexibility is needed because affected entities generally have complex structures and arrangements.

2.70 The committee notes the Assistant Treasurer's further advice that the minister's power to determine relevant criteria and matters is constrained because any decision made by the minister must relate to criteria and matters that are about giving entities more time to comply with the amendments, where reasonable.

2.71 While noting this explanation, the committee reiterates its consistent scrutiny view that a desire for administrative flexibility is unlikely to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. Moreover, it is unclear to the committee where, on the face of the bill, the minister is constrained to only determining criteria or matters which relate to a reasonable need for entities to be granted an extension to comply with the amendments. The committee therefore remains concerned in relation to the broad discretionary power granted to the minister, particularly given that the power to prescribe criteria in subitem 16(7) is itself discretionary; that is, the minister 'may', rather than 'must', prescribe criteria.

2.72 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Assistant Treasurer 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*).

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

- **providing the minister with a broad power to determine the criteria and matters that the Commissioner must be satisfied of and have regard to when assessing a request for an extended application date (that is, a request that the amendments set out in Schedule 1 apply to an entity at a later time than the standard 'transitional application date'); and**
- **leaving these matters to delegated legislation.**

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.

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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*.

Chapter 4

Review of exemption from disallowance provisions in the *Biosecurity Act 2015*

4.1 In 2020 and 2021 the Senate Standing Committee for the Scrutiny of Delegated Legislation (**SDLC**) conducted an inquiry into the exemption of delegated legislation from parliamentary oversight. This inquiry had a particular focus on delegated legislation made in response to the COVID-19 pandemic, including instrument-making provisions within the *Biosecurity Act 2015* (**Biosecurity Act**).

4.2 As a result of that inquiry, the SDLC tabled the *Interim report: Exemption of delegated legislation from parliamentary oversight*[1] (**Interim Report**) in December 2020 and the *Final report: Exemption of delegated legislation from parliamentary oversight*[2] (**Final Report**) in March 2021.

4.3 One of several recommendations within the Interim Report was that:

> … the Senate Standing Committee for the Scrutiny of Bills or another independent body or person conduct a review of the appropriateness of the delegation of legislative powers in the *Biosecurity Act 2015*, including the appropriateness of provisions which exempt delegated legislation made pursuant to these powers from parliamentary oversight.[3]

4.4 This chapter takes up the recommendation of the SDLC and comprises commentary on the appropriateness of provisions within the Biosecurity Act which provide powers to make delegated legislation that is not subject to parliamentary disallowance. The committee draws these provisions to the attention of senators pursuant to Senate Standing Order 24(1)(a)(iv).

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1 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report>.

2 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report>.

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

Exemption from disallowance – constitutional context and the importance of parliamentary scrutiny

4.5 Section 1 of the Constitution vests legislative power in the Federal Parliament. Legislative scrutiny, including scrutiny of delegated legislation made by the Executive, is a core component of this central law-making role of Parliament. Moreover, the system of responsible and representative government established by the Constitution requires the Parliament, as the representative branch of government, to hold the Executive to account.[4] Exemptions from disallowance undermine the ability of Parliament to properly undertake its scrutiny functions and, therefore, have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions. While it is well-established that Parliament may delegate its legislative functions to the Executive, and that this delegated legislation may be exempt from disallowance in certain exceptional cases, any exemption from disallowance should be considered in the context of its interaction with these twin considerations.

4.6 As a result, and in accordance with the committee's remit set out in standing order 24, the committee has consistently drawn attention to bills that seek to limit or remove appropriate parliamentary scrutiny. The committee considers that the default position should be that parliamentary oversight remains available for all delegated legislation unless there is a very strong reason for exempting a particular instrument or class of instruments from scrutiny.

4.7 The usual parliamentary disallowance process allows a House of the Parliament to disallow delegated legislation within 15 sitting days of it being tabled in that House.[5] As this process is one of the primary means by which Parliament exercises control of its delegated legislative power, the committee expects the explanatory memorandum to a bill which includes an exemption from the usual disallowance process to address the exceptional circumstances that justify that exemption.

Exemptions from disallowance within the Biosecurity Act

4.8 The Biosecurity Act provides the regulatory framework to manage the risk of pests and diseases entering Australian territory and causing harm to animal, plant and human health. The committee commented on the Biosecurity Bill 2014 when it was before Parliament,[6] as well as on an earlier iteration of the bill in 2013.[7] The committee

4 See, for example, *Williams v Commonwealth* (2012) 248 CLR 156 and *Williams v Commonwealth* (2014) 252 CLR 416.

5 *Legislation Act 2003,* section 42.

6 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 2 of 2015*.

7 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 1 of 2013*.

also provided comments on the Biosecurity Act in a submission to the SDLC's inquiry into the exemption of delegated legislation from parliamentary oversight.[8] A number of subsequent amendments to the Biosecurity Act have also attracted committee comment.[9]

4.9 The committee has identified 30 provisions which exempt delegated legislation made under the Biosecurity Act from the usual parliamentary disallowance process. The following provisions provide that various legislative instruments made under the Biosecurity Act are non-disallowable:

- subsection 42(3);
- subsection 44(3);
- subsection 45(3);
- subsection 49(2);
- subsection 50(2);
- subsection 51(4);
- subsection 110(3);
- subsection 112(3);
- subsection 113(7);
- subsection 173(5);
- subsection 174(5);
- subsection 182(6);
- paragraphs 228(a) and (b);
- paragraphs 234(a) and (b);
- subsection 256(3);
- subsection 365(4);
- subsection 384(4);
- subsection 395(4);
- subsection 398(1);
- subsection 443(2);
- subsection 444(2);

8 Senate Standing Committee for the Scrutiny of Bills, Submission 4: Inquiry into exemption of delegated legislation from parliamentary oversight, June 2020.

9 See, for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2020*, pp. 1-2.

- subsection 445(2);
- subsection 475(2);
- subsection 476(2);
- subsection 477(2);
- subsection 524A(4);
- subsection 543(1); and
- subsection 618(7).

4.10 Non-disallowable instruments to which these provisions relate deal with either human biosecurity risks or other forms of biosecurity risk. Human biosecurity risks are the responsibility of the Health Minister, while other biosecurity risks are managed by the Agriculture Minister. Each instrument-making power identified above can be further categorised into instruments dealing with emergency biosecurity situations and other more 'routine' instruments. Provisions exempting these instruments from disallowance are justified on a variety of grounds. Some provisions also raise scrutiny concerns in addition to exemptions from disallowance.

Instruments which deal with significant matters, confer broad discretion, or interact with personal rights and liberties

4.11 The committee will generally have heightened concerns in relation to provisions exempting instruments from disallowance where the effect of those instruments would be to confer broad discretion on a decision-maker, would deal with significant matters, or would unduly impact on an individual's personal rights or liberties.

4.12 The committee considers that a number of provisions within the Biosecurity Act raise these issues. As a result, the committee considers that the circumstances in which it may be appropriate to constrain parliamentary scrutiny in relation to these provisions is even further limited than outlined in the 'default position' above.

4.13 Several provisions within the Biosecurity Act would allow for instruments to be made which may place limitations on personal rights and liberties. For example, the implications of a biosecurity emergency being declared under section 443 include that a biosecurity officer may, in certain circumstances, enter a premises without a warrant or without consent.[10] Another implication of such a declaration is that a person is not entitled to seek merits review of certain decisions, including decisions relating to the destruction of goods, conveyances or premises.[11]

4.14 A number of other provisions within the Biosecurity Act are broadly framed and provide a high level of discretion to the decision-maker. For example, section 51

10 *Biosecurity Act 2015*, section 470.

11 *Biosecurity Act 2015*, section 469.

allows the Health Minister to ban or restrict a 'behaviour or practice', require a 'behaviour or practice', require a specified person to provide a report or keep specified records, or require a person to conduct specified tests on specified goods. Similarly, sections 44 and 45 allow the Health Minister to determine requirements for individuals entering Australian territory at a prescribed point of entry or to determine requirements for individuals leaving Australian territory. There is no limit on the requirements that the Health Minister may set out in a determination under sections 44 or 45, other than that it must not include measures that may be included in a human biosecurity control order.

4.15 In a number of cases, the making of certain instruments is a precondition to enliven other provisions which may attract significant penalties, including imprisonment. For example, determinations made under sections 173, 174 and 182 may variously set out that goods are prohibited, conditionally non-prohibited or suspended from being brought or imported into Australian territory. Under section 185, a person who brings or imports suspended or prohibited goods into Australian territory may be subject to a penalty, including imprisonment of up to ten years. Similarly, a person who contravenes a condition applied to a conditionally non-prohibited good may be subject to imprisonment of up to ten years. Other provisions within the Biosecurity Act allow for the making of instruments that may directly provide for higher penalties, including within infringement notices.[12]

4.16 Where the implications of the making of an instrument include such significant matters as imprisonment, limiting rights to review, the abrogation of a person's right to consent, or else provide broad discretionary powers to the Executive, the committee considers that the default position is that Parliament should have full scrutiny over the instrument. The circumstances in which parliamentary scrutiny should be restricted in relation to such provisions are limited.

4.17 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021 provides a recent example of an instrument which the committee considers would be more appropriately subject to parliamentary scrutiny. The instrument is made under subsection 477(1) of the Biosecurity Act and is exempt from disallowance as per subsection 477(2). The instrument provides that passengers, including both citizens and non-citizens, cannot enter Australia if they have been in India within the previous 14 days. A failure to comply with a requirement in relation to subsection 477(1), or a direction given under section 478 for the purposes of giving effect to such a requirement, is an offence punishable with up to 5 years imprisonment or 300 penalty units, or both.[13] Subsection 477(5) provides that a requirement determined under subsection 477(1) applies despite any provision of any other

12 *Biosecurity Act 2015*, section 524A.

13 *Biosecurity Act 2015*, section 479.

Australian law. The making of this instrument demonstrates the kind of significant matters which may be prescribed in non-disallowable instruments made under the Biosecurity Act, including impacting upon personal rights and liberties. The committee considers that significant requirements such as preventing citizens from entering Australian territory should be subject to the usual disallowance process and an appropriate level of parliamentary scrutiny.

4.18 The remainder of this chapter considers the appropriateness of provisions allowing for the exemption of delegated legislation from disallowance in light of the justifications provided in the explanatory memorandum to the Biosecurity Bill 2014 and in other relevant explanatory material.

Justification 1: Disallowance would be inappropriate because the relevant considerations are scientific and technical

4.19 The exemption of instruments made under the Biosecurity Act from disallowance has been justified on the grounds that they are based on technical or scientific decisions and therefore need to be shielded from the political process. For example, the explanatory memorandum to the Biosecurity Bill 2014 provides the following general justification for provisions in the bill which exempt legislative instruments from disallowance:

> [Exemption from disallowance] is justified because it is more appropriate for Parliament to delegate the power to make determinations that involve technical and scientific decisions about the management of biosecurity risk to the Director of Biosecurity. An implication of these decisions being disallowed is that political considerations will play a role in what should be a technical and scientific decision making process. This has the potential to frustrate the risk management processes and lead to the inadequate management of biosecurity risks. This approach is consistent with the current arrangements in the *Quarantine Proclamation 1998*.[14]

4.20 In addition to this general explanation, the majority of exemption provisions are specifically justified on similar grounds. For example, in relation to section 45 of the Biosecurity Act, which empowers the Health Minister to determine requirements for individuals or operators of overseas passenger vessels or aircraft exiting Australia, the explanatory memorandum states:

> The decision to determine, vary or revoke an exit requirement determination is a technically and scientifically based decision making process incorporating whether the human biosecurity risk is able to be satisfactorily managed. Subjecting these determinations to disallowance could undermine the technically and scientifically based decision making process and frustrate risk management processes. In addition, disallowance

14 Explanatory memorandum, p. 17.

> of a determination made under this clause could lead to inadequate management of risks to human health.[15]

4.21 The committee agrees with the position of the SDLC, as expressed in the Final Report, that the mere fact that a decision may be based on scientific and technical grounds is not, of itself, a sufficient justification for an exemption.[16] As noted above, parliamentarians are the directly elected representatives of the people and parliamentary scrutiny is a key aspect of this democratic element of government. An exemption from the disallowance process must therefore be justified on the basis of significant and exceptional circumstances, over and above the fact that the decision is of a scientific or technical nature.

4.22 It is not clear to the committee why parliamentarians would be unable to properly take into account scientific and technical evidence in considering the appropriateness of a particular instrument. The committee does not agree that subjecting an instrument to disallowance, and therefore to a higher degree of parliamentary scrutiny, would necessarily undermine decision-making or frustrate risk management processes.

4.23 Moreover, the committee considers that decisions which can be characterised as purely scientific and technical are rare. More often, decisions which are made on a scientific or technical basis will also be influenced by non-scientific or non-technical considerations. As noted in the Final Report, it is rare that a matter of great public importance has no political implications.[17] Even when a decision may be said to be of a purely scientific or technical nature, the potential consequences of the decision will often have more expansive implications. In cases where the consequence of a decision will have a significant impact on the rights or liberties of individuals, the decision-making process itself may be influenced by political factors as a result.

4.24 In light of the above, it is not clear to the committee why instruments made under each provision listed at paragraph 4.9 of this chapter should be exempt from disallowance simply because a decision is based on scientific or technical grounds.

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15 Explanatory memorandum, p. 100.

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, pp. 43–46.

17 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report: Exemption of delegated legislation from parliamentary oversight*, March 2021, p. 46.

Justification 2: Exemptions are appropriate because they are consistent with existing arrangements

4.25 The explanatory memorandum to the Biosecurity Bill states that exempting certain instruments from disallowance is consistent with the *Quarantine Proclamation 1998*.

4.26 Similarly, the explanatory memorandum to the Biosecurity Amendment (Traveller Declarations and Other Measures) Bill 2020 states in relation to section 524A that the exemption from disallowance is similar in nature to other provisions within the Biosecurity Act.[18]

4.27 The committee does not consider that consistency with existing provisions is a sufficient justification for exempting an instrument from disallowance. Rather, each exemption must be justified on its own merits.

Justification 3: Disallowance would be inappropriate because it would prevent the Commonwealth from taking fast and urgent action

4.28 Many of the exemptions from disallowance in the Biosecurity Act are justified on the basis that urgent action is needed to adequately manage biosecurity risks. For example, the explanatory memorandum states in relation to section 443, which empowers the Governor-General to declare that a biosecurity emergency exists, that:

> If an emergency declaration was disallowed, nationally significant biosecurity risks could go unmanaged and the Commonwealth would be unable to take the fast and urgent action necessary to manage a threat or harm to Australia's local industries, economy and the environment.[19]

4.29 In relation to the declarations by the Governor-General of a biosecurity emergency under section 443 or a human biosecurity emergency under section 475, the committee is particularly concerned that the emergency periods can be extended for up to three months, with no limit on the number of extensions, and that such extensions are not subject to disallowance. In this regard, the committee notes that the current human biosecurity emergency period relating to the COVID-19 pandemic has been in force since 18 March 2020 without the opportunity for parliamentary oversight through the disallowance process.

4.30 The explanatory memorandum continually emphasises the importance of adequate and timely management of biosecurity risks and that failure to properly

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2020*, pp. 1–2.

19 Explanatory memorandum, pp. 274–275.

manage these risks could have a significant impact on the economy,[20] or to human, plant, animal, or environmental health.[21]

4.31 The committee does not consider that a need for urgency is a sufficient justification for the removal of the usual parliamentary disallowance process. In this regard the committee notes the observations of the SDLC in the Interim Report that:

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

4.32 The committee agrees with the SDLC's statement in the Interim Report that:

> delegated legislation made during emergencies must be subject to parliamentary oversight with minimal exceptions. This approach ensures respect for Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.[23]

4.33 As such, the committee does not consider that a need to take urgent regulatory action is a sufficient justification for exempting disallowance.

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20 See, for example, explanatory memorandum, p. 244.

21 See, for example, explanatory memorandum, p. 355.

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

23 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim Report: Exemption of Delegated Legislation from Parliamentary Oversight*, December 2020, p. xiii.

Justification 4: Disallowance would be inappropriate because it would have a significant impact on decision-making and the management of regulatory risks

4.34 The explanatory memorandum justifies exempting instruments from disallowance on the basis that the disallowance of an instrument would have a significant impact on decision-making, the risk management process and the broader management of biosecurity risk. For example, in relation to section 618, which allows the Director of Biosecurity and Director of Humans Biosecurity to jointly make declarations in relation to goods moving between parts of Australian territory, the explanatory memorandum states that:

> disallowance of a declaration made under this clause could lead to inadequate management of the biosecurity risks posed to human, plant and animal health, Australia's local industries, the environment and the economy. If these declarations were to be disallowed, goods and conveyances that pose a biosecurity risk would be able to move freely to all parts of Australian territory.[24]

4.35 The committee acknowledges the importance of the regulatory function of the Biosecurity Act and the significant implications of failure to adequately manage biosecurity risks for the Australian economy and for environmental and human health. However, the committee does not consider that the potential for 'significant impacts' is a sufficient justification for exemption of an instrument for disallowance.

4.36 Far from presenting a circumstance in which exemptions from disallowance are justified, the committee considers that legislation which is intended to deal with emergency situations will more often require parliamentary scrutiny, due to the increased chance that emergency related legislation will impact on personal rights or liberties, or have other significant implications. The following comment from the SDLC in the Interim Report is particularly relevant in this regard:

> …arguments against making emergency related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. This need is particularly pronounced in times of emergencies, where legislative measures implemented in response to emergencies may be more likely to trespass on personal rights and liberties than those implemented in nonemergency periods.[25]

4.37 As noted above, many of the provisions listed at paragraph 4.9 may allow for legislative measures which have the potential to trespass on personal rights and liberties and include such significant matters as imprisonment, limiting rights to

24 Explanatory memorandum, p. 357.

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

review, and the abrogation of a person's right to consent. The committee's concerns in relation to these provisions are heightened, rather than diminished, due to the significance of the regulatory matters at hand.

4.38 Moreover, it is not clear how providing for the usual disallowance process to apply would 'have a significant impact on decision-making, the risk management process and the broader management of biosecurity risks'. In this regard, the committee notes that disallowances rarely occur, and that the risk that the Parliament would disallow a determination well-supported by technical and scientific advice is extremely low. In addition, the committee notes that instruments made under the Biosecurity Act could come into effect immediately after the instrument is registered on the Federal Register of Legislation.

Concluding remarks

4.39 It is important to remember that exempting an instrument from disallowance directly interferes with democratic oversight of Commonwealth law and with the constitutionally conferred role of Parliament as the seat of legislative power. Any exemption from disallowance should be weighed against these twin considerations of representative government and parliamentary supremacy. The committee's consistent scrutiny view, that exemptions from disallowance are only justified in exceptional and limited circumstances, must be understood in this context.

4.40 This default position will be further reinforced in circumstances where the effect of exempted delegated legislation would be to confer broad discretion on a decision-maker, would deal with significant matters, or would interact with an individual's personal rights or liberties. Emergency-related legislation is more likely to attract these concerns than legislation which deals with more 'routine' regulatory matters.

4.41 Justifying exempting delegated legislation from disallowance on the basis that the relevant decisions are of a scientific or technical nature, are consistent with current arrangements, that urgent action needs to be taken, or that significant consequences would result from disallowance is not sufficient to ensure the automatic justification of these exemptions. Rather, the committee expects the explanatory memorandum to a bill which includes an exemption from the usual disallowance process to address the exceptional circumstances that justify that individual exemption, noting that an assessment of those circumstances must include consideration of the significance of abrogating or limiting Parliament's fundamental scrutiny role.

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

- **the exceptional circumstances that are said to justify the exemption of each of the instruments made under the provisions listed at paragraph 4.9 from disallowance; and**
- **whether the Act can be amended so that instruments made under the provisions at paragraph 4.9 are subject to the usual parliamentary disallowance process.**

Senator Helen Polley

Chair