The Senate

Standing Committee for the Scrutiny of Bills

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

Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021

Purpose	This bill seeks to make a number of administrative amendments to improve the operation and clarity of various legislation relating to courts and tribunals
Portfolio	Attorney-General
Introduced	Senate on 23 June 2021

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)[1]

1.2 Item 72 of Schedule 1 to the bill seeks to insert proposed subsection 41(5) into the *Admiralty Act 1988* to provide that the *Legislation Act 2003* applies to the Admiralty Rules 1988, subject to certain exceptions. For example, proposed subsection 41(5) provides that sunsetting provisions within the *Legislation Act 2003* do not apply to the Admiralty Rules 1988. The explanatory memorandum to the bill states that this is necessary because the Admiralty Rules 1988 are rules of court.[2]

1.3 Relatedly, proposed paragraph 41(5)(b) of the bill provides that the *Legislation Act 2003*, as it applies to the Admiralty Rules 1988, is subject to such further modifications or adaptations as prescribed by the regulations.

1.4 Provisions enabling delegated legislation to modify the application of primary legislation, such as proposed paragraph 41(5)(b), are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive, impacting upon Parliament's constitutional role as lawmaker-in-chief. Consequently, the

1 Schedule 1, item 72, proposed paragraph 41(5)(b). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Explanatory memorandum, p. 29.

committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the application of primary legislation. In this instance, the explanatory memorandum does not contain any justification for proposed paragraph 41(5)(b).

1.5 In light of the above, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the *Legislation Act 2003* as it applies to the Admiralty Rules 1988.

Education Services for Overseas Students (Registration Charges) Amendment Bill 2021

Purpose	This bill seeks to amend the *Education Services for Overseas Students (Registration Charges) Act 1997* to update the registration charges to recover the costs for certain regulatory activities under the *Education Services for Overseas Students Act 2000*
Portfolio	Education
Introduced	House of Representatives on 24 June 2021

Broad discretionary power

Significant matters in delegated legislation[3]

1.6 Item 2 of Schedule 1 to the bill seeks to insert proposed sections 5, 6 and 7 into the *Education Services for Overseas Students (Registration Charges) Act 1997*. These new sections provide for three new charges for the recovery of costs for certain regulatory activities in the tertiary education sector. Proposed subsections 5(9), 6(8) and 7(8) would allow the regulations to exempt providers from the relevant charge.

1.7 The committee considers that these provisions provide the minister with broad discretionary powers to exempt providers from the requirement to pay a charge by legislative instrument in circumstances where there is no guidance on the face of the bill as to when these powers may be exercised. The committee expects that the inclusion of broad discretionary powers, and the inclusion of significant matters in delegated legislation, should be thoroughly justified in the explanatory memorandum. In this instance, the explanatory memorandum does not provide a justification as to why it is necessary or appropriate for the exemption power to be left to delegated legislation.

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

- **why it is considered necessary and appropriate to give the minister broad discretionary powers to exempt providers from a charge in delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding when it will be appropriate provide for such exemptions.**

3 Schedule 1, item 2, proposed subsections 5(9), 6(8) and 7(8). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021

Purpose	This bill seeks to give effect to a key measure impacting the rate of child care subsidy (CCS) that Australian families are entitled to receive
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 24 June 2021

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)[4]

1.9 Item 10 of Schedule 2 to the bill seeks to amend paragraph 67CC(2)(b) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Administration Act). Paragraph 67CC(2) currently provides that the Secretary may determine that an individual is no longer eligible for the child care subsidy by fee reduction if the Secretary has made determinations under subsection 67CD(8) for 52 consecutive weeks. The amendment to paragraph 67CC(2)(b) seeks to provide that the Minister's rules may prescribe a different number of consecutive weeks for this purpose.

1.10 Item 11 of Schedule 2 to the bill seeks to insert new paragraph 67CC(2)(d) into the Administration Act to provide that an individual is no longer eligible for the child care subsidy by fee reduction if no sessions of care, as evidenced by reports made under section 204B of the Administration Act, have been provided for the child for at least 26 consecutive weeks. Proposed subparagraph 67CC(2)(d)(ii) provides that the Minister's rules may prescribe a different number of weeks for this purpose.

1.11 Item 13 of Schedule 2 to the bill seeks to amend Schedule 2 to the *A New Tax System (Family Assistance) Act 1999* to insert proposed paragraph 3B(1)(d) to provide that that sessions of care must have been provided to the 'other child' (i.e. another older child who satisfies the conditions in subclause 3B(2) or (3)), as evidenced by reports under section 204B of the Administration Act, in relation to at least one week in a period of 14 weeks ending at the end of the child care subsidy fortnight. Proposed subparagraph 3B(1)(d)(ii) provides that the Minister's rules may prescribe a different number of weeks for this purpose.

1.12 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make

4 Schedule 2, items 10, 11 and 13, proposed paragraphs 67CC(2)(b), 67CC(2)(d) and 3B(1)(d). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

substantive amendments to primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive, impacting upon Parliament's constitutional role as lawmaker-in-chief. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation. In relation to proposed new paragraph 67CC(2)(d), the explanatory memorandum states:

> The ability to change the period of weeks under new paragraph 67CC(2)(d) is required to ensure any emerging issues following commencement of Schedule 2, Part 1, can be addressed. The appropriateness of the 26 week period will be considered as part of ongoing monitoring and compliance work for the measure.[5]

1.13 While noting this explanation, the committee does not consider that this is a sufficient justification for allowing delegated legislation to alter the operation of the primary legislation. It is unclear to the committee why any proposed changes required following ongoing monitoring or compliance work could not be made in amendments to the primary legislation.

1.14 In light of the above, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to allow the Minister's rules to prescribe different numbers of weeks in relation to proposed paragraphs 67CC(2)(b) and 67CC(2)(d) of the *A New Tax System (Family Assistance) (Administration) Act 1999* and proposed paragraph 3B(1)(d) of the *A New Tax System (Family Assistance) Act 1999*.

5 Explanatory memorandum, p. 14.

Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021

Purpose	This bill seeks to implement recommendation 2.10 of the Financial Services Royal Commission, which recommended the establishment of a single disciplinary body for financial advisers and the requirement that all financial advisers who provide personal financial advice to retail clients be registered
Portfolio	Treasury
Introduced	House of Representatives on 24 June 2021

Strict liability offences[6]

1.15 Item 12 of Schedule 1 to the bill seeks to insert proposed section 171A into the *Australian Securities and Investments Commission Act 2001* (ASIC Act) which would make it an offence for a person to publish evidence given before a Financial Services and Credit Panel where there is a direction restricting the publication of that evidence. The penalty for the offence is 120 penalty units. Proposed subsection 171A(2) provides that the offence is one of strict liability.

1.16 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[7]

6 Schedule 1, item 12, proposed section 171A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

1.17 The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[8]

1.18 In this instance, the explanatory memorandum states:

> The exception is the penalty for publication of evidence or matters contained in documents restricted by a Financial Services and Credit Panel, which imposes a penalty higher than is recommended for strict liability offences in the *Guide to Framing Commonwealth Offences*. This exception is considered necessary and proportionate to ensure the protection of confidential information given for the purposes of the panel's examination of a particular issue. Furthermore, in deciding whether to make a direction restricting publication of evidence or particular matters, the panel must take into account considerations such as public interest and privacy concerns, including protection of the reputation of persons appearing before the panel. This is also justified on the basis that it imposes the same penalty as the existing penalty for publishing restricted evidence or material restricted by ASIC, which ensures consistency across the legislation.[9]

1.19 While noting this explanation, the committee has scrutiny concerns about the application of strict liability to an offence carrying a penalty of 120 penalty units and does not consider that the explanation provided adequately justifies why a penalty that is double the amount recommended in the *Guide to Framing Commonwealth Offences* is required in this instance. The committee has also generally not accepted consistency with existing legislation to be a sufficient justification for applying strict liability in circumstances in which the penalty is inconsistent with the recommendations of the *Guide to Framing Commonwealth Offences*.

1.20 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that the offence relating to the publication of restricted material in proposed section 171A is an offence of strict liability subject to a maximum penalty of 120 penalty units.

Reversal of the evidential burden of proof[10]

1.21 Item 12 of Schedule 1 to the bill seeks to insert proposed section 171D into the ASIC Act to provide that it is an offence for a member or former member of a Financial Services and Credit Panel to use or disclose information obtained in

8 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

9 Explanatory memorandum, p. 37.

10 Schedule 1, item 12, proposed section 171D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

connection with the performance of the panel's functions or exercise of the panel's powers. Proposed subsection 171D(2) provides an exception (offence-specific defence) to the offence in circumstances where the use or disclosure is for certain purposes, such as where the disclosure is to another entity for the performance of their functions or powers.

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

1.23 While, in this instance, the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter),[11] rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum contains no justification as to why it is appropriate to reserve the evidential burden of proof.

1.24 The committee notes that the *Guide to Framing Commonwealth Offences*[12] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[13]

1.25 In this case, it is not apparent that matters such as whether the disclosure of information is to another government entity for the performance of that entity's functions, are matters *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

1.26 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considers that it may be appropriate if the bill was amended to

11 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

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

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

incorporate the matters in proposed subsection 171D(2) as elements of the offence and seeks the minister's advice regarding this matter.

Broad discretionary power

Significant matters in delegated legislation[14]

1.27 Item 45 of Schedule 1 to the bill seeks to insert proposed section 921E into the *Corporations Act 2001* to provide that the minister may, by legislative instrument, make a Code of Ethics. Proposed subsection 921E(3) provides a relevant provider must comply with the Code of Ethics. A provider who fails to comply with the Code of Ethics may be subject to a restricted civil penalty. There is no guidance on the face of the bill as to what matters may be included in the Code of Ethics.

1.28 The committee considers that this provision provides the minister with a broad discretionary power to mandate a Code of Ethics in circumstances where there is no guidance on the face of the bill as to how the power should be exercised. Additionally, the committee's consistent scrutiny view is that significant matters, such as the contents of an enforceable Code of Ethics, should be contained in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum contains no justification as to why there is no detail regarding the matters to be included in the Code of Ethics on the face of the primary legislation. It is unclear to the committee why at least high-level guidance regarding the types of matters that may be included in the Code of Ethics cannot be included on the face of the primary legislation.

1.29 The committee's concerns are heightened in this instance by the fact that a provider who fails to comply with the Code of Ethics may be subject to a restricted civil penalty of 5,000 penalty units or three times the benefit derived or detriment avoided because of the contravention.[15]

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

- **why it is considered necessary and appropriate to provide the minister with a broad discretion to create a Code of Ethics by legislative instrument, without any guidance as to the matters that may be included in the Code on the face of the bill; and**
- **whether the bill can be amended to provide at least high-level guidance on as to the matters that may be included in a Code of Ethics.**

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14 Schedule 1, item 45, proposed section 921E. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

15 Explanatory memorandum, p. 30.

No-invalidity clause[16]

1.31 Item 49 of Schedule 1 to the bill seeks to into insert proposed section 921K into the *Corporations Act 2001* to provide that a Financial Services and Credit Panel may make instruments of a kind specified in proposed section 921L in relation to a relevant provider in certain circumstances, for example, if the provider becomes insolvent or is convicted of fraud. Proposed section 921L provides that the types of instruments include directions to undertake training or specified counselling as well written orders suspending or cancelling a provider's registration. Proposed section 921M provides that if an instrument is made under proposed section 921K, the Financial Services and Credit Panel must give a copy of the instrument to the provider, ASIC and any relevant financial services licensee. The instrument must be accompanied by a statement of reasons for the decision to make the instrument. The Financial Services and Credit Panel must also give the provider a notice informing them of their right to apply to have the instrument revoked or varied. Proposed subsection 921M(3) provides that a failure to comply with these requirements does not affect the validity of the instrument.

1.32 A legislative provision that provides that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum to the bill. In this instance, the explanatory memorandum does not contain a justification for the inclusion of a no-invalidity clause in proposed section 921M.

1.33 The committee therefore requests the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 921M(3) in relation to requirements for notifying providers about instruments made against them.

16 Schedule 1, item 49, proposed section 921M. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

Ransomware Payments Bill 2021

Purpose	This bill seeks to establish a mandatory reporting requirement for Commonwealth entities, State or Territory agencies, corporations, and partnerships who make ransomware payments in response to a ransomware attack
Sponsor	Mr Tim Watts MP
Introduced	House of Representatives on 21 June 2021

Reverse evidential burden of proof[17]

1.34 The bill seeks to require entities who make a ransomware payment to notify the Australian Cyber Security Centre (ACSC), part of the Australian Signals Directorate, key details of the attack, the attacker, and the payment.[18] Subclause 9(4) of the bill provides that the ACSC may disclose the information contained in notifications to a Commonwealth entity, or a state or territory, or an agency of a state or territory, for purposes relating to law enforcement. Subclause 9(5) provides that a person commits an offence if information is disclosed to the person under subclause 9(4) and the person discloses any of the information. The maximum penalty for this offence is 500 penalty units.

1.35 Subclause 9(6) provides an exception (offence-specific defence) where the information is disclosed in certain circumstances, for example to a court. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Subsection 13.3(3) of the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.36 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in subclause 9(6) have not been addressed in the explanatory materials.

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17 Subclause 9(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

18 Explanatory memorandum, p. 5.

1.37 The committee also notes that the *Guide to Framing Commonwealth Offences*[19] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[20]

1.38 In this case, it is not apparent that the matters listed in subclause 9(6) are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

1.39 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the matters listed in subclause 9(6) which do not appear to be peculiarly within the knowledge of the defendant.

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

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

Treasury Laws Amendment (2021 Measures No. 5) Bill 2021

Purpose	Schedule 1 to this bill seeks to increase the producer offset for films that are not feature films released in cinemas to 30 per cent of total qualifying Australian production expenditure, and to make various threshold and integrity amendments across the three screen tax offsets Schedule 2 to the bill seeks to makes consequential amendments to integrate the corporate insolvency reforms across the Commonwealth statute book
Portfolio	Treasury
Introduced	House of Representatives on 24 June 2021

Retrospective application[21]

1.40 Item 28 of Schedule 1 to the bill provides that Schedule 1 commences on or after July 2021, in respect of amendments made by the schedule to the tax offsets provided under sections 376-10, 376-35, and 376-55 of the *Income Tax Assessment Act 1997*.

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

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

> As the amendments are not expected to be enacted prior to 1 July 2021, they would have retrospective application. The amendments to increase the producer offset for films that are not feature films are wholly beneficial to affected companies in the Australian screen industry. The amendments to increase various eligibility thresholds and create limitations on what a company can count as a film's qualifying Australian production expenditure

21 Schedule 1, item 28. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

> remove or reduce an entitlement that existed prior to the application date of the amendments.
>
> The Government publicly announced reforms to the producer offset on 30 September 2020 and stated that the reforms would apply to films that commence principal photography or [post, digital and visual effects] activities on or after 1 July 2021. A further reform to the treatment of additional versions of films was not announced on 30 September 2020 but industry was made aware of this change when public consultation was undertaken on exposure draft material commencing on 21 May 2021. The industry has been aware that these changes would affect their film production activities from these dates and it is expected that affected companies have taken the increased eligibility thresholds and limits on the scope of qualifying Australian production expenditure into account in making decisions concerning eligibility for the film incentives for the 2021-22 income year and later income years.[22]

1.43 The committee acknowledges that aspects of Schedule 1 will have a beneficial effect for entities within the Australian screen industry. However, in relation to the other provisions within Schedule 1, the committee does not consider that public consultation with relevant entities is sufficient to address the committee's scrutiny concerns relating to the retrospective application of Commonwealth laws.

1.44 The committee reiterates its long-standing scrutiny concerns that provisions with retrospective application challenge a basic value of the rule of law that, in general, laws should only operate prospectively.

1.45 In light of the explanation provided in the explanatory memorandum as to the retrospective application of the amendments proposed by the bill, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying the amendments in the bill on a retrospective basis.

Reverse evidential burden of proof[23]

1.46 Subsection 496-10(1) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) provides that it is an offence to perform or exercise or purport to perform or exercise a function or power as an officer of a corporation that is under special administration.

1.47 Item 11 of Schedule 2 to the bill seeks to insert proposed subsection 496-10(2A) into the CATSI Act to provide a new offence-specific defence to existing

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22 Explanatory memorandum, p. 14.

23 Schedule 2, item 11, proposed subsection 496-10(2A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

subsection 496-10(1) such that it is not an offence if the person performing the function or power is a restructuring practitioner for a restructuring plan made by the corporation under Part 5.3B of the *Corporations Act 2001*. A defendant bears an evidential burden in relation to this defence.[24]

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

1.49 The committee expects any reversal of the evidential burden of proof to be justified in the explanatory memorandum. In this instance the explanatory memorandum states that the reversal of the evidential burden of proof is appropriate because '…it is limited to reliance on the codified exception, and not the proving of innocence in and of itself'.[25]

1.50 While the committee's concerns will be heightened in relation to a reversal of the legal burden (requiring the defendant to positively prove the matter), the committee considers that the mere fact that the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden, is not a sufficient justification for the reversal of a burden of proof.

1.51 The committee notes that the *Guide to Framing Commonwealth Offences*[26] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[27]

1.52 It is unclear to the committee that the defence at proposed subsection 496-10(2A) is a matter that would be peculiarly within the knowledge of the defendant or a matter that it would be significantly more difficult and costly for the prosecution to disprove.

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24 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

25 Explanatory memorandum, p. 25.

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

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

1.53 In light of the above, the committee requests the Assistant Treasurer's detailed justification as to the appropriateness of including the matter in proposed subsection 496-10(2A) as an offence-specific defence. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

Bills with no committee comment

1.54 The committee has no comment in relation to the following bills which were introduced into the Parliament between 21 – 24 June 2021:

- Coronavirus Economic Response Package Amendment (Ending Jobkeeper Profiteering) Bill 2021
- Customs Amendment (Banning Goods Produced By Forced Labour) Bill 2021
- Customs Amendment (2022 Harmonized System Changes) Bill 2021
- Customs Tariff Amendment (Incorporation of Proposals) Bill 2021
- Customs Tariff Amendment (2022 Harmonized System Changes) Bill 2021

  Education Services for Overseas Students (TPS Levies) Amendment Bill 2021
- Education Services for Overseas Students Amendment (Cost Recovery and Other Measures) Bill 2021
- Independent National Security Legislation Monitor Amendment Bill 2021
- No Domestic COVID Vaccine Passports Bill 2021
- Repatriation of Defence Data Bill 2021
- Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021
- Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021
- Tertiary Education Quality and Standards Agency (Charges) Amendment Bill 2021

Commentary on amendments and explanatory materials

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

1.55 On 23 June 2021, the House agreed to five Government amendments, the Minister for the Environment (Ms Ley) presented a supplementary explanatory memorandum, and the bill was read a third time.

1.56 The committee welcomes these amendments, which appear to partially address scrutiny concerns regarding the inclusion of significant matters in delegated legislation by including sunsetting provisions for the first national environmental standards made under proposed section 65C of the bill.[28]

Online Safety Bill 2021

1.57 On 22 June 2021, the Senate agreed to 11 Government amendments (1 as amended by 3 Opposition amendments) and seven Opposition amendments, the Assistant Minister to the Attorney-General (Senator Stoker) tabled an addendum explanatory memorandum and a supplementary explanatory memorandum and the bill was read a third time. On 23 June 2021, the House agreed to the Senate amendments and the bill finally passed both Houses.

1.58 The committee thanks the Assistant Minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[29]

Telecommunications Legislation Amendment (International Production Orders) Bill 2020

1.59 On 23 June 2021, the House agreed to 502 Government amendments, the Minister for Home Affairs (Mrs Andrews) presented a replacement explanatory memorandum and a supplementary explanatory memorandum, and the third reading was agreed to. On 24 June 2021 in the Senate, Senator Ruston tabled a revised explanatory memorandum, the bill was read a third time, and the bill finally passed both Houses.

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28 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, 16 June 2021, pp. 69–72.

29 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, 12 May 2021, pp. 20–23.

1.60 In *Digest 5 of 2020* and *Digest 8 of 2020* the committee raised significant scrutiny concerns regarding the dis-applying of Australian privacy laws in relation to requests by foreign governments for access to information held in Australia under designated international agreements, in the absence of safeguards on the face of the bill to ensure that the information is only accessed in appropriate circumstances, or express requirements that designated international agreements be subject to appropriate parliamentary oversight.

1.61 The committee welcomes the amendments that:

- **provide that the full text of any designated international agreement to be published in the regulations;**
- **provide that the regulations setting out any designated international agreement will not commence until the disallowance period for the regulations has passed; and**
- **allow the Attorney-General to make a statutory requirements certificate stating that the relevant agreement meets certain requirements prior to the text of an agreement being published in the regulations.**

1.62 The committee also raised concerns regarding provisions allowing for a broad range of persons to be able to make an application for an international production order.

1.63 The committee welcomes amendments which restrict applications for an interception or stored communications international production order by ASIO to senior position-holders and restricts applications for a telecommunications data international production order on behalf of ASIO to Executive Level 2 or equivalent employees.[30]

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

- Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021;[31]
- Financial Regulator Assessment Authority Bill 2021;[32]

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30 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2020*, 17 June 2020, pp. 27–52.

31 On 22 June 2021, the Senate agreed to two Opposition and two Independent amendments, and the third reading was agreed to. On 23 June 2021, the House agreed to the Senate amendments, and the bill finally passed both Houses.

32 On 22 June 2021, the Senate agreed to 28 Australian Greens amendments, and the bill was read a third time. On 23 June 2021, the House agreed to the Senate amendments, and the bill finally passed both Houses.

- National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020;[33]
- Private Health Insurance Legislation Amendment (Age of Dependants) Bill 2021;[34]
- Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021.[35]

33 On 21 June 2021, the Senate Committee of the Whole agreed to 10 Government amendments, the Minister for Families and Social Services (Senator Ruston) tabled a supplementary explanatory memorandum and a replacement supplementary memorandum, and the bill was read a third time.

34 On 22 June 2021 in the Senate, the Assistant Minister to the Attorney-General (Senator Stoker) tabled a replacement explanatory memorandum, and the bill was read a third time.

35 On 23 June 2021, the Senate agreed to two Government amendments and two Pauline Hanson's One Nation amendments, Senator Ruston tabled a supplementary explanatory memorandum, and the bill was read a third time. On 24 June 2021, the House agreed to Senate amendments Nos. 2 and 3 and disagreed to Senate amendments Nos. 1 and 4, the Senate did not insist on is amendments, and the bill finally passed both Houses. On 30 June 2021, the bill received the Royal Assent.

Chapter 2

Commentary on ministerial responses

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

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

Purpose	This bill seeks to establish a framework for making, varying, revoking, and applying National Environment Standards. It further seeks to establish an Environment Assurance Commissioner to undertake transparent monitoring and/or auditing
Portfolio	Environment
Introduced	House of Representatives on 25 February 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation
Exemption from disallowance[1]

2.2 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2021* and *Scrutiny Digest 6 of 2021* and requested the minister's advice.[2] The committee considered the minister's response in *Scrutiny Digest 8 of 2021* and requested that the bill be amended to provide certainty in relation to the first standards made under proposed section 65C by:

- requiring the positive approval of each House of the Parliament before the first standards come into effect; or
- providing that the first standards do not come into effect until a disallowance period of five sitting days has expired.

1 Schedule 1, item 6, proposed sections 65C and 65H, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 1–4, Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 41–46.

2.3 The committee also requested that, if such an amendment is not considered appropriate, at a minimum, the bill be amended to provide for the automatic repeal of the first standards following the first review of a standard undertaken in accordance with proposed subsection 65G(2).[3]

Minister's response[4]

2.4 The minister advised:

> The Committee requested that the Bill be amended to provide certainty in relation to the first standard made under proposed section 65C by either requiring the positive approval of each House of the Parliament before the first standards come into effect or by providing that the first standards do not come into effect until a disallowance period of five sitting days has expired. Alternatively, the Committee requested, at a minimum, that the Bill be amended to provide for the automatic repeal of the first standards following the review of a standard undertaken in accordance with proposed subsection 65G(2).
>
> On 23 June 2021, I moved amendments to the Bill in the House of Representatives which provide for the automatic repeal (sunsetting) of the first national environmental standard made in relation to a particular matter (a first made standard). Unless revoked earlier, a first made standard will automatically sunset on the earlier of the following days:
>
> (a) the day after the period of 30 months beginning on the day on which the standard commences. Under this scenario, a national environmental standard which commences on 1 January 2022 will sunset at the end of 1 July 2024.
>
> (b) the day after the end of the period of 6 months beginning on the day after the report of the first review of a standard is published on the Department of Agriculture, Water and the Environment's website. Under this scenario, if the report is published on 30 May 2024, the standard will sunset at the end of 1 December 2024.

Committee comment

2.5 The committee thanks the minister for this response. The committee notes the minister's advice that the bill has been amended such that, unless revoked earlier, a first national environmental standard will automatically sunset on the earlier of the following days:

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3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 69–72.

4 The minister responded to the committee's comments in a letter dated 6 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

(a) the day after the period of 30 months beginning on the day on which the standard commences; or

(b) the day after the end of the period of 6 months beginning on the day after the report of the first review of a standard is published on the Department of Agriculture, Water and the Environment's website.

2.6 These amendments respond to a committee recommendation that, at a minimum, the bill be amended to provide for the automatic repeal of the first standards following the review of a standard undertaken in accordance with proposed subsection 65G(2).

2.7 The committee welcomes amendments that provide for the sunsetting of first national environmental standards made under proposed section 65C of the bill, noting the importance of sunsetting in ensuring effective scrutiny of legislative instruments by the Parliament.

Incorporation of external materials existing from time to time[5]

2.8 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2021* and *Scrutiny Digest 6 of 2021* and requested the minister's advice.[6] The committee considered the minister's response in *Scrutiny Digest 8 of 2021* and reiterated its request that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the incorporation of external materials be tabled in the Parliament as soon as practicable.[7]

Minister's response

2.9 The minister advised:

> The Committee has requested that an addendum to the explanatory memorandum be provided containing the information I have previously provided to the Committee regarding why it is necessary and appropriate for national environmental standards to incorporate documents as in force or existing from time to time.
>
> I am required to provide a revised explanatory memorandum to the Senate which takes account of the amendments to the Bill made by the House of Representatives. I will include this information in the revised explanatory memorandum.

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5 Schedule 1, item 6, proposed subsection 65C(4), *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 1–4, Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2021*, pp. 41–46.

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 72–73.

Committee comment

2.10 The committee thanks the minister for this response. The committee notes the minister's advice that the information previously provided to the committee in relation to provisions in the bill that allow for the incorporation of external materials as existing from time to time will be included in a revised explanatory memorandum.

2.11 The committee thanks the minister for her proposal to update the explanatory memorandum reflecting the advice provided to the committee. The committee requests that the revised explanatory memorandum containing this information be tabled in the Parliament as soon as practicable.

Financial Regulator Assessment Authority Bill 2021

Purpose	This bill, along with the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021, seeks to establish the Financial Regulator Assessment Authority to assess the effectiveness and capability of each of the Australian Prudential Regulation Authority and Australian Securities and Investments Commission
Portfolio	Treasury
Introduced	House of Representatives on 13 May 2021
Bill status	Received the Royal Assent on 29 June 2021

Tabling of documents in Parliament[8]

2.12 In *Scrutiny Digest 8 of 2021* the committee requested the Treasurer's advice as to whether clause 17 of the bill can be amended to provide that the minister must arrange for a copy of a report prepared under paragraph 12(1)(c) to be tabled in each House of the Parliament within 15 sitting days of the House after the report is given to the minister.

2.13 The committee also requested the Treasurer's advice as to why clause 17 provides that biennial reports must be tabled in Parliament within 20 sitting days after the report is received by the minister, rather than the standard 15 sitting days.[9]

Treasurer's response[10]

2.14 The Treasurer advised:

> *Background*
>
> Clause 12 of the Bill sets out the Authority's functions, which include assessing and reporting on the effectiveness and capability of both the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investments Commission (ASIC). The Authority must provide each of these reports to the Minister biennially (clause 13).

8 Paragraph 12(1)(c) and clause 17. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 17–18.

10 The Treasurer responded to the committee's comments in a letter dated 23 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Clause 17 of the Bill provides that the Minister must cause a copy of a biennial report to be tabled in each House of the Parliament within 20 sitting days of receiving the report.

Clause 12 also allows the Authority to make a report to the Minister on any matter relating to APRA or ASIC's effectiveness or capability where they are requested to do so by the Minister. There is no requirement for these ad hoc reports to be tabled in the Parliament.

Ad hoc reports

The power for the Minister to request ad hoc reports from the Authority is a broad one, and allows the Minister to request a report on any matter relating to the effectiveness or capability of APRA or ASIC. Such a report may relate to sensitive matters concerning the operation of APRA or ASIC.

I do not consider it necessary to amend the Bill to require ad hoc reports to be tabled. These reports may identify potential systematic issues with APRA or ASIC identified by the Authority, or make recommendations to Government about APRA or ASIC. While the Minister may choose to table an ad hoc report, it is not appropriate for this to be compulsory.

I note that biennial reports provided by the Authority will always be required to be tabled. These reports are expected to provide a comprehensive review of the function of each regulator, and will provide opportunity for public debate about how APRA and ASIC are undertaking their respective roles.

Biennial reports

The Bill requires that biennial reports must be tabled in each House of the Parliament within 20 sitting days, rather than 15 sitting days. Tabling within 20 sitting days was recommended by Commissioner Hayne in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Committee comment

2.15 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that ad hoc reports may relate to sensitive matters concerning the operation of APRA or ASIC and may identify potential systematic issues with APRA or ASIC or may make recommendations to the government about APRA or ASIC. As such, the Treasurer advised that it would not be appropriate to require that ad hoc reports be tabled in Parliament. The Treasurer also noted that the requirement that biennial reports be tabled in Parliament will provide opportunities for public debate about the functions of APRA and ASIC.

2.16 The Treasurer further advised that the requirement that biennial reports be tabled within 20 days after the report is received by the minister, rather than the standard 15 sitting days, is based on a recommendation by Commissioner Hayne in the

Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

2.17 While noting this advice, the committee reiterates that not providing for reports 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 public debate that are not otherwise available. The fact that a report may identify issues with Commonwealth bodies, or may make recommendations, is not a sufficient justification for failing to provide for the usual tabling requirements. Rather, the committee considers that the need to table reports may be heightened in those circumstances. From a scrutiny perspective, the committee therefore does not consider that the Treasurer's response has provided a sufficient justification in relation to the tabling of ad-hoc reports.

2.18 The committee notes Commissioner Hayne's recommendation in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that "the Minister should be required to cause a copy of the report to be laid before each House of the Parliament within 20 sitting days of that House after the report is received by the Minister."[11] However, it remains unclear to the committee why it is necessary and appropriate to deviate from the standard requirement that reports be tabled within 15 sitting days of receipt, noting that neither the royal commission report nor the explanatory memorandum to the bill provide an explanation for this approach.

2.19 The committee notes that the bill has already passed both Houses of the Parliament. The committee considers that when future changes to the *Financial Regulator Assessment Authority Act 2021* are being formulated consideration should be given to amending section 17 of the Act to provide that ad hoc reports must be tabled in each House of the Parliament.

Legal professional privilege[12]

2.20 In *Scrutiny Digest 8 of 2021* the committee requested the Treasurer's advice as to the rationale for, and the appropriateness of, abrogating legal professional privilege in the bill.[13]

11 Commonwealth of Australia, *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 2019, vol. 1, p. 478.

12 Clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 18–19.

Treasurer's response

2.21 The Treasurer advised:

> Clause 20 of the Bill requires APRA and ASIC, as well as their members and staff, to cooperate with the Authority, including by providing the Authority with information or documents. Clause 21(1) provides that the information or documents must be provided to the Authority regardless of whether legal professional privilege applies to the documents. Clause 21(2) confirms that the giving of information to the Authority under clause 21(1) does not affect a claim of legal professional privilege.
>
> The provisions are necessary to ensure the ability of the Authority to conduct its core functions. Due to the nature of the work undertaken by the regulators, a large proportion of information handled by them that would be relevant to assessing their performance (particularly under their enforcement remit), may be covered by legal professional privilege. If the information or documents could not be disclosed to the Authority it would severely impede the ability of the Authority to conduct an objective assessment of the effectiveness of the regulators, as the Authority would either be unable to access many documents relevant to their assessment, or encounter great difficulty in accessing them.
>
> Further, as the Committee has noted, the Bill also includes protections for information or documents that are covered by legal professional privilege. Such information or documents will be "protected information" and protected from disclosure by the Authority.

Committee comment

2.22 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it is necessary to require that the relevant information or documents must be provided to the Authority regardless of legal professional privilege in order to ensure the ability of the Authority to conduct its core functions. The Treasurer advised that a large portion of the information and documents of interest to the Authority may be covered by legal professional privilege and that, as such, the ability of the Authority to carry out its functions would be severely impeded if this information could not be accessed.

2.23 In light of the fact that the bill has already passed both Houses of the Parliament, and noting the information provided, the committee makes no further comment on this matter.

Reverse evidential burden of proof[14]

2.24 In *Scrutiny Digest 8 of 2021* the committee requested the Treasurer's more detailed justification as to the appropriateness of including the specified matters as offence-specific defences.

2.25 In addition, from a scrutiny perspective, the committee suggested that it may be appropriate if the bill were amended so that the offence-specific defences in subclauses 40(2) and 40(3) are instead framed as elements of the relevant offence. The committee also requests the Treasurer's advice in relation to this matter.[15]

Treasurer's response

2.26 The Treasurer advised:

> Clause 40 of the Bill prohibits a person who is or was an "entrusted person" from disclosing "protected information" in certain circumstances. Broadly, entrusted persons will be the staff and members of the Authority, the Secretary of the Treasury, APS employees, and consultants or others engaged to provide services to the Authority (including officers or employees of consultants or other service providers) (clause 5).
>
> The prohibition on the unauthorised disclosure of protected information is important because of the range of sensitive information that will be provided to the Authority by APRA and ASIC. For example, this includes information that is otherwise prohibited from being disclosed by legislation, information subject to legal professional privilege, and documents that would reveal Cabinet deliberations.
>
> The Bill also allows for the disclosure of information in a limited number of circumstances (see Subdivision B, Division 3 of Part 4 to the Bill), and it is not anticipated that a disclosure would take place outside of those circumstances. In this way, the prohibition serves as a general deterrent against the unauthorised disclosure of information.
>
> It is appropriate to reverse the evidential burden of proof in the offence-specific defence in relation to the prohibition, because the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Committee comment

2.27 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it is appropriate to reverse the evidential burden of proof

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14 Clause 40. 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 8 of 2021*, pp. 19–20.

in this instance, because the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.28 While noting this advice, it is not clear from this justification why the relevant knowledge will be peculiarly within the knowledge of the defendant in respect of the offence-specific defences set out at subclauses 40(2) and (3) of the bill. It is not clear to the committee which specific 'matter' the Treasurer is referring to in his response. However, it would appear that several elements of the defences set out at clause 40 would be readily ascertainable by the prosecution. For example, as noted in the committee's previous comment, whether disclosure of information is authorised by another Commonwealth law would appear to be a matter that the prosecution could establish.

2.29 The committee also notes that the Treasurer's response does not address the committee's concerns in relation to the assertion in the explanatory memorandum that the relevant matters are 'in many cases' within the knowledge of the defendant. As noted in the committee's previous comments on the bill, the committee considers that the matter must be, as a matter of course, peculiarly within the defendant's knowledge and not available to the prosecution.

2.30 As such, from a scrutiny perspective, the committee does not consider that the Treasurer has adequately addressed the committee's scrutiny concerns in relation to the reversal of the evidential burden of proof in clause 40 of the bill.

2.31 The committee continues to have scrutiny concerns regarding provisions of the bill that allow for the reversal of the evidential burden of proof. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

Immunity from liability[16]

2.32 In *Scrutiny Digest 8 of 2021* the committee requested the Treasurer's advice as to why it is considered necessary and appropriate to confer immunity from liability on members and staff members of the Authority and on consultants, contractors, and members and staff members of cooperating agencies.[17]

16 Clause 47. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 20–21.

Treasurer's response

2.33 The Treasurer advised:

> Clause 47 of the Bill protects members, staff members, consultants and contractors of the Authority, and members and staff of cooperating agencies from liability in specified circumstances related to the Authority.
>
> This protection from civil liability is required for the Authority to be able to conduct its functions. The Authority's functions involve providing reports to the Minister relating to the functioning and performance of APRA and ASIC. These functions rely on the Authority being able to provide frank advice and may involve the provision of advice that is critical of agencies in question. As a result, it is necessary that protected persons are able to perform their functions and exercise their powers without being obstructed by challenges to the performance of those functions or the exercise of those powers through civil proceedings for loss, damage or injury. The lack of a liability protection could limit the Authority's ability to undertake its functions and discourage the Authority from providing comprehensive advice to Government.

Committee comment

2.34 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the protection from civil liability afforded by clause 47 is required for the Authority to be able to conduct its functions. The Treasurer advised that the Authority's reporting functions rely on the Authority being able to provide frank advice and may involve the provision of advice that is critical of APRA and ASIC. The lack of a liability protection could limit the Authority's ability to provide comprehensive advice to government.

2.35 In light of the fact that the bill has already passed both Houses of the Parliament, and noting the information provided, the committee makes no further comment on this matter.

Delegation of administrative powers[18]

2.36 In *Scrutiny Digest 8 of 2021* the committee requested the Treasurer's advice as to why it is considered necessary and appropriate to allow the Authority to delegate its information-gathering powers under subclause 20(2) to Executive Level 2 staff members, rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices.[19]

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18 Subclause 49(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 21–22.

Treasurer's response

2.37 The Treasurer advised:

> As the Committee has noted, the Authority is permitted to delegate its information-gathering powers to certain of its staff members, including to an Executive Level 2 staff member.
>
> The staff members of the Authority will be made available by the Secretary of the Treasury. It is expected that there will be a relatively small number of employees of the Authority, and that the most senior full-time staff member of the Authority will be an Executive Level 2 employee of the Treasury. As such, the Authority must be able to delegate certain of its functions to an Executive Level 2 staff member.
>
> I note that this delegation only applies to the information-gathering powers of the Authority. All other powers set out in the Bill that may be delegated may only be delegated to the Secretary of the Treasury or a SES employee (or acting SES employee) of the Treasury.

Committee comment

2.38 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the Authority will have a relatively small number of employees, and that the most senior full-time staff member of the Authority will be an Executive Level 2 employee of the Treasury. The Treasurer advised that, as such, the Authority must be able to delegate certain of its functions to an Executive Level 2 staff member. Delegations to an Executive Level 2 staff member are limited to the Authority's information-gathering functions.

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

Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021

Purpose	This bill, along with the Financial Regulator Assessment Authority Bill 2021, seeks to establish the Financial Regulator Assessment Authority to assess the effectiveness and capability of each of the Australian Prudential Regulation Authority and Australian Securities and Investments Commission
Portfolio	Treasury
Introduced	House of Representatives on 13 May 2021
Bill status	Received the Royal Assent on 29 June 2021

Reverse evidential burden of proof[20]

2.40 In *Scrutiny Digest 8 of 2021* the committee requested the Treasurer's more detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee noted that its consideration of the appropriateness of a provision which reverses the burden of proof would be assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[21]

Treasurer's response[22]

2.41 The Treasurer advised:

> Section 56 of the *Australian Prudential Regulation Authority Act 1998* prohibits the disclosure of information by individuals in certain circumstances. Section 56 includes a range of defences that apply in relation to the prohibition. Item 3 of Schedule 1 to the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021 adds additional defences that apply to APRA officials who make disclosures to the Authority (proposed section 56(6AA), and officials of the Authority (proposed section 56(6AB)).

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20 Schedule 1, Item 3, proposed subsections 56(6AA) and 56(6AB). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 23–24.

22 The Treasurer responded to the committee's comments in a letter dated 23 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> A defendant bears an evidential burden in relation to these defences. This is appropriate as it will be peculiarly within the knowledge of the defendant how and whether the conduct was disclosed to the Authority for the performance of its functions or powers (proposed section 56(6AA)) or the circumstances of the disclosure where the person was an official of the Authority and acquired the information in the course of their duties in relation to the Authority (proposed section 56(6AB)).

Committee comment

2.42 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it will be peculiarly within the knowledge of the defendant how and whether the information was disclosed to the Financial Regulator Assessment Authority (the Authority) for the performance of its functions or powers. Similarly, the Treasurer advised that the circumstances of the disclosure where the relevant person was an official of the Authority will be peculiarly within the defendant's knowledge.

2.43 While noting this advice, it is not clear from this justification why the relevant knowledge will be peculiarly within the knowledge of the defendant in respect of either subsection 56(6AA) or 56(6AB). For example, in relation to subsection 56(6AA) it is not clear why the official to whom information is disclosed would not have knowledge of the circumstances of the disclosure. Further, the committee notes that for the purposes of subsection 56(6AA) it is not directly relevant "how" the disclosure occurred. Rather, the relevant factor is whether the disclosure was for the performance of the Authority's functions or powers. Similarly, the relevant consideration in relation to subsection 56(6AB) is whether the disclosure occurred during the course of the official's duties.

2.44 The committee also notes that the Treasurer's advice did not address whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the relevant matter. As noted in the committee's previous comments in *Scrutiny Digest 8 of 2021*, the *Guide to Framing Commonwealth Offences*[23] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; *and*
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[24]

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

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

2.45 As such, from a scrutiny perspective, the committee does not consider that the Treasurer has adequately addressed the committee's scrutiny concerns in relation to the reversal of the evidential burden of proof in item 3 of Schedule 1 to the bill.

2.46 The committee continues to have scrutiny concerns regarding provisions of the bill that allow for the reversal of the evidential burden of proof. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021

Purpose	This bill seeks to amend the *Major Sporting Events (Indicia and Images) Protection Act 2014* to provide protection against ambush marketing by association for the Fédération Internationale de Football Association Women's World Cup Australia New Zealand 2023 and International Cricket Council T20 World Cup 2022. It also seeks to remove the historical Schedule related to the Gold Coast 2018 Commonwealth Games as this Schedule has ceased to have effect, and to make a minor technical amendment to the *Sport Integrity Australia Act 2020*
Portfolio	Sport
Introduced	Senate on 16 June 2021
Bill status	Before the Senate

Significant matters in delegated legislation[25]

2.47 In *Scrutiny Digest 9 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow the definition of 'event bodies' to be amended to allow additional event bodies to be prescribed in the rules; and
- whether the bill could be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which it would be appropriate to prescribe additional event bodies in the rules.[26]

Minister's response[27]

2.48 The minister advised:

> The *Major Sporting Events (Indicia and Images) Protection Act 2014* (Act) provides protections against ambush marketing by association for major international sporting events hosted in Australia. Typically, these

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

26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2021*, pp. 4–5.

27 The minister responded to the committee's comments in a letter dated 7 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> protections are provided for event owners (international federations) and organisers (domestic bodies). The Bill proposes these protections for both the International Cricket Council (ICC) T20 World Cup 2022 and the FIFA Women's World Cup 2023.
>
> To support the delivery of the FIFA Women's World Cup 2023, FIFA has established a wholly owned entity in Australia and New Zealand (FWWC2023 PTY LTD with ACN 650 853 302). This entity was not yet established at the time the Bill was introduced. It was therefore considered necessary and appropriate to allow the definition of 'event bodies' to be amended to allow additional event bodies to be prescribed in the Rules to ensure the FIFA entity (the event organiser) would be able to use the FIFA Women's World Cup 2023 indicia and images for commercial purposes.
>
> The passage of the Bill through Parliament in the Spring sitting is required to allow the Australian Border Force approximately 12 months' lead-time to ensure appropriate enforcement arrangements at the Australian border ahead of the ICC T20 World Cup 2022. Given the two-year lead-time to the FIFA Women's World Cup 2023, it is prudent to retain the option to prescribe additional event bodies through the Rules to accommodate any unforeseen new bodies FIFA may wish to add.

Committee comment

2.49 The committee thanks the minister for this response. The committee notes the minister's advice that to support the delivery of the FIFA Women's World Cup 2023, FIFA has established a wholly owned entity in Australia and New Zealand that was not yet established at the time the bill was introduced. The committee also notes the minister's advice that it is prudent to retain the option to prescribe additional event bodies through the rules to accommodate any unforeseen new bodies FIFA may wish to add.

2.50 The committee's consistent scrutiny view is that significant matters, such as the scope of definitions or concepts central to the operation of a scheme established by an Act, should be included in primary legislation unless a sound justification is provided for the use of delegated legislation.

2.51 The committee reiterates its view that, given the nature of the relevant events and the amount of planning generally undertaken, there would be time for any additional event bodies to be included by amendments to the primary legislation. As the bill is currently before the Parliament, the bill could be amended to include the new FIFA entity as an event body. The committee does not consider that the minister's response has adequately justified the appropriateness of allowing the rules to prescribe additional event bodies. The committee notes the minister's response does not address whether the bill could be amended to provide at least high-level guidance as to the circumstances in which additional bodies could be added by the rules.

2.52 As the minister's response has not adequately addressed the scrutiny concerns raised by the committee, the committee requests the minister's further advice as to whether the bill could be amended to:

- **prescribe the new FIFA entity (FWWC2023 Pty Ltd) as an event body for the FIFA Women's World Cup Australia New Zealand 2023; and**
- **include at least high-level guidance on the face of the primary legislation as to the circumstances in which it would be appropriate to prescribe additional event bodies in the rules.**

National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* in order to strengthen supports and protections for NDIS participants who may be at risk of harm, and to clarify the NDIS Commissioner's powers
Portfolio	National Disability Insurance Scheme
Introduced	House of Representative on 3 June 2021
Bill status	Before the House of Representatives

Broad discretionary power

Significant penalties[28]

2.53 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to impose specified conditions on a banning order;
- whether the bill can be amended to provide, at a minimum, that the Commissioner must consider any matters set out in the NDIS rules when imposing a specified condition on a banning order; and
- why it is considered necessary and appropriate to apply a significant civil penalty to breaches of specified conditions on banning orders.[29]

28 Item 28, proposed subsection 73ZN(2); item 32, proposed paragraph 73ZN(3)(c); item 35, proposed paragraph 73ZN(10)(b); item 36, proposed subsection 73ZO(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 34–36.

Minister's response[30]

2.54 The minister advised:

> ***Why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to impose specified conditions on a banning order?***
>
> The purpose of making a banning order is to remove a provider or worker entirely from the NDIS market or to restrict their involvement in that market. Orders are made because the continued involvement of that provider or person would pose a risk to NDIS participants that cannot be averted in any other way. Making a banning order is one of the most serious compliance actions the Commissioner can take in response to conduct by a provider or worker. A banning order is only contemplated after other possible compliance responses such as education, warning letters or infringement notices are considered but found to be inappropriate in the circumstances.
>
> The current banning order provisions empower the Commissioner to prevent or restrict a provider or person who is, was or may be employed or engaged by a provider (worker) from engaging in specified activities either permanently or for a specified period.
>
> The current provisions are a 'blunt instrument' and do not allow the Commissioner to refine the banning order to address specific concerns in particular cases. The ability to impose conditions allows a more fine-tuned regulatory response to enhance participant safeguarding. A broad discretion to impose conditions on a banning order enables the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. It supports the Commissioner, when exercising his or her functions, to use best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner as required by paragraph 181D(4)(b) of the NDIS Act.
>
> In some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided supports or services to people with a disability. This could be skill development or training in a particular area, such as medication management.
>
> The Commissioner routinely reviews banning orders which are near the end of their term and can decide to extend them for a further period. Where a banning order is for a specified time, the Commissioner can consider the person's compliance with a condition (e.g. if a person was banned until such time that they had successfully completed particular training) in deciding

30 The minister responded to the committee's comments in a letter dated 1 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

whether to vary the banning order to extend it. Compliance with the condition could demonstrate to the Commissioner that the banning order subject has addressed the concerns which led to the order being made.

The imposition of conditions can also provide greater safeguards where a banning order restricts a person only from providing particular types of services. For example from providing direct disability support services but not from providing indirect disability support services, such as working in an administrative or clerical role which involves no direct contact with people with disability. The condition might be that the worker provides a copy of the banning order with this restriction to each prospective employer. This ensures the employer knows not to employ the person in a direct service role. Without the power to impose this condition on the banned worker, the Commission relies on the honesty of the worker to inform the new employer of the restrictions in the banning order and to comply with it themselves, although the worker screening system provides some protections in this regard.

In this context, it is important to note that the Commissioner's practice is to notify worker screening units of banning orders which may then affect the worker's NDIS worker screening check. Registered providers must only engage or employ workers who have an NDIS clearance in a risk assessed role. However an unregistered provider is not subject to this requirement and may choose to employ workers without an NDIS worker screening check. It may therefore be appropriate in some cases to impose a condition that the banned worker gives a copy of the banning order to any employer who is an NDIS provider to ensure the employer has knowledge of any restriction on their work duties.

Can the bill be amended to provide, at a minimum, that the Commissioner must consider any matters set out in the NDIS Rules when imposing a specified condition on a banning order?

The Commissioner must always be guided by paragraph 181D(4)(b) of the NDIS Act in deciding what conditions should be imposed. Paragraph 181D(4)(b) provides that the Commissioner must use best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner. In practice this means when determining conditions on a banning order, the Commissioner may consider matters such as the risk to participants, the nature of the conduct which led to banning order being made, previous work, conduct history of the banned person, expressions or actions of remorse/ commitment to rehabilitation/ co-operation of the banned person, support for the banned person from NDIS participants or their families based on past experience of service provision by that person. Further specification in NDIS Rules is considered unnecessary as it would not add to the current approach taken by the Commissioner, in line with requirements in the Act, when issuing banning orders.

Why it is considered necessary and appropriate to apply a significant civil penalty to breaches of specified conditions on banning orders?

A banning order is the most serious compliance action the Commission can take in response to conduct by a worker or provider, and is only contemplated after other possible compliance responses such as education, warning letters or infringement notices have been considered. Additionally, as outlined in the responses above, there is a wide variety of conditions that could be imposed on banning orders.

The intention is that any civil penalty applied for the breach of condition would be commensurate with the overall impact of the breach in question, with due regard to circumstances around the breach. Where a breach involves a low level risk to NDIS participants, particularly if there are extenuating circumstances, it is expected that the amount of the civil penalty imposed would be low. For more serious breaches with more significant ramifications or unacceptable risk of harm to NDIS participants, a higher civil penalty, particularly if the breach of the condition was materially akin to breaching the banning order, would be appropriate.

The application of a civil penalty is necessary as a further deterrent for a provider or worker who has a banning order in place to meet any conditions and to re-enforce that there is no tolerance for behaviour or actions that pose an unacceptable risk of harm to NDIS participants. Protecting and safeguarding NDIS participants from the risk of harm is the highest priority.

Committee comment

2.55 The committee thanks the minister for this response. The committee notes the minister's advice that the ability to impose conditions allows a more fine-tuned regulatory response to enhance participant safeguarding and that a broad discretion to impose conditions on a banning order enables the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case.

2.56 While noting this advice, the committee reiterates that there is no guidance on the face of the bill as to what types of conditions could be imposed, how long any condition will be imposed for, or the criteria the Commissioner will use when determining whether the imposition of a condition is appropriate. The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for the inclusion of broad discretionary powers in circumstances where there is no guidance on the face of the primary legislation as to how those powers should be exercised.

2.57 The committee notes the minister's advice that further specification in the NDIS Rules is considered unnecessary as it would not add to the current approach taken by the Commissioner, in line with requirements in the *National Disability Insurance Scheme Act 2013* (the Act), when issuing banning orders. While noting this advice, the committee notes that items 26, 29 and 30 of the bill amend the banning order provisions to provide that when considering whether a person is not suitable to

provide supports or services, the Commissioner must have regard to any matters prescribed by the NDIS rules. As such, it remains unclear to the committee why, at a minimum, a similar requirement cannot be provided in relation to the imposition of specified conditions.

2.58 The committee also notes the minister's advice that the intention is that any civil penalty applied for the breach of condition would be commensurate with the overall impact of the breach in question, with due regard to circumstances around the breach. The committee also notes the minister's advice that where a breach involves a low-level risk to NDIS participants, particularly if there are extenuating circumstances, it is expected that the amount of the civil penalty imposed would be low.

2.59 Noting the broad discretionary nature of the Commissioner's power to impose conditions on a banning order and the lack of guidance on the face of the bill as to the types of conditions that can be imposed, the committee has scrutiny concerns regarding the imposition of a significant civil penalty for persons who breach conditions of banning orders. As such, from a scrutiny perspective, the committee does not consider that the minister's response adequately justifies why it is appropriate to provide a civil penalty of up to 1,000 penalty units for the breach of a condition of a banning order.

2.60 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*).

2.61 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Commissioner with a broad discretion to impose specified conditions on a banning order, contravention of which is subject to significant civil penalties.

Significant matters in delegated legislation

Privacy[31]

2.62 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as regarding:

- why it is considered necessary and appropriate to allow delegated legislation to expand the permitted disclosures of information to any person or body prescribed by the rules for any purpose prescribed by the rules; and
- whether the bill could be amended to include at least high-level guidance as to the types of entities information can be disclosed to and the purposes for which it can be disclosed.[32]

Minister's response

2.63 The minister advised:

> ***Why it is considered necessary and appropriate to allow delegated legislation to expand the permitted disclosures of information to any person or body prescribed by the rules for any purpose prescribed by the rules?***
>
> Currently if the Commission wishes to disclose personal information to a State/Territory body/authority and that disclosure is not for the purposes of the NDIS Act (or other grounds in section 67 A) then the disclosure must be made under section 67E. This requires compliance with the Information Disclosure Rules including consideration of de-identification and consultation which delays the release of information to protect NDIS participants.
>
> While the Commission appreciates the importance of these privacy protections, it is also important to be able to disclose information quickly to key public sector bodies to safeguard participants. This was a specific concern identified in the Robertson Review. Disclosures need to be made to law enforcement bodies, child protection authorities, disability commissioners or worker screening bodies so they can have relevant information to respond swiftly and exercise their own functions and powers.
>
> The Commissioner's core functions include an information sharing function (to engage in, promote and coordinate the sharing of information to achieve the objects of the NDIS Act paragraph 181E(h)). The proposed amendment under the Bill allows the making of Rules to support this function and is therefore appropriate.

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31 Schedule 1, item 10, proposed paragraph 67A(1)(db). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, p. 37.

The amendment will allow flexibility in specifying bodies to which information can be disclosed under section 67A. The NDIS (Protection and Disclosure of Information-Commissioner) Rules 2018 are Category D Rules which require mandatory consultation with States and Territories before they are made or amended. There will therefore be consultation about the proposed prescribed bodies and purposes before the Rules are amended, with the amended Rules subject to a disallowance period before the Parliament in which further parliamentary scrutiny can occur.

As the Commission's regulatory role evolves, it is likely that the Commissioner will identify the specific bodies and purposes which are appropriate to be prescribed under this section. It is more appropriate to prescribe these bodies and purposes through the Rules rather than through amendments to the Act to allow the deletion or addition of prescribed bodies that become defunct, change their name or assume a different role in a timely way. This approach balances the need to ensure appropriate information to protect and safeguard NDIS participants is able to be shared to the right bodies at the right time, with the need for appropriate consultation and parliamentary scrutiny.

Whether the bill could be amended to include at least high-level guidance as to the types of entities information can be disclosed to and the purposes for which it can be disclosed

It would be a matter for the Rules to prescribe the bodies and purposes following consultation with states and territories and other key stakeholders. Providing more high level guidance in the Act could create limitations on the entity type/disclosure purposes and prove counterproductive. For example, if the legislation was to limit the reason for disclosure to protecting people with disability from receiving poor quality services; the Commissioner may ·not be able to disclose compelling information it had uncovered relating to a parent's treatment of an NDIS participant to child protection authorities because it is not related to the receipt of services. Therefore it is better to leave such guidance to the Rules to enable the Commissioner to make adjustment to ensure relevant bodies have the information they need to protect NDIS participants. As noted above, the Rules are subject to consultation requirements and a disallowance period before the Parliament.

I trust this information clarifies the matters raised and will assist with your deliberations on the Bill.

I will consider making adjustments to the Explanatory Memorandum accompanying the Bill to address any clarification required, once you have finalised your deliberations.

Committee comment

2.64 The committee thanks the minister for this response. The committee notes the minister's advice that the amendment will allow flexibility in specifying bodies to which information can be disclosed under section 67A. The committee also notes the minister's advice that the rules require mandatory consultation with states and territories before they are made or amended.

2.65 The committee further notes the minister's advice that as the Commission's regulatory role evolves, it is likely that the Commissioner will identify the specific bodies and purposes which are appropriate to be prescribed under this section and that providing more high level guidance in the Act could create limitations on the entity type or disclosure purposes and therefore prove counterproductive.

2.66 While noting this advice, the committee continues to have scrutiny concerns regarding allowing the NDIS rules to expand the permitted disclosures of information to *any* person or body prescribed by the rules for *any* purpose prescribed by the rules. It remains unclear to the committee why it would not be possible to include at least high-level guidance regarding the types of entities or purposes that could be prescribed in the rules. The committee's scrutiny concerns in this instance are heightened as the bill as currently drafted could allow for broad permitted disclosures of personal information.

2.67 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*).

2.68 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing delegated legislation to expand the permitted disclosures of information to any person or body prescribed by the rules for any purpose prescribed by the rules.

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

Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021

Purpose	This bill seeks to amend *the Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) to provide for increased government oversight and scrutiny of entities throughout the life of an offshore project, from exploration through to development and eventual decommissioning
Portfolio	Resources
Introduced	House of Representatives on 26 May 2021
Bill status	Before the House of Representatives

Fees in delegated legislation[33]

2.70 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to whether the bill can be amended to provide at least high-level guidance regarding how the fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.[34]

Minister's response[35]

2.71 The minister advised:

> *Background to proposed sections 566ZD and 566ZE*
>
> The Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 (the Bill) seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) to provide for increased Government oversight and scrutiny of entities over the life of an offshore project, from exploration to eventual decommissioning. This is to ensure that entities are suitable (including being capable, competent and well-governed) to carry out petroleum and

33 Schedule 1, item 1, proposed section 566ZD and proposed subsections 566ZE(1) and (3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 38–39.

35 The minister responded to the committee's comments in a letter dated 24 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

greenhouse gas (GHG) activities and are able to discharge their duties under the OPGGS Act.

Item 1, Schedule 1 of the Bill seeks to insert a new Chapter 5A into the OPGGS Act, to provide for the regulation of changes in control of registered holders of petroleum and GHG titles (titleholders). As outlined on page 13 of the Explanatory Memorandum, changes in control typically involve transfers of shares in the company that is the titleholder. The measures in Chapter 5A complement measures in existing Chapters 4 and 5 of the OPGGS Act, which regulate transfers of and dealings in petroleum and GHG titles. In providing for increased Government oversight of changes in control of titleholders, the measures in Chapter 5A aim to ensure that a titleholder remains suitable to hold a title following a transaction involving a change of control.

New Chapter 5A proposes to make the National Offshore Petroleum Titles Administrator (NOPTA) responsible for oversight of changes in control of a titleholder. NOPTA would be responsible for approving changes in control of a titleholder, and would be able to obtain information, documents or evidence relating to a change in control, or possible change in control, in certain circumstances. The measures largely mirror those in existing Chapters 4 and S of the OPGGS Act, which require that transfers of and dealings in petroleum and GHG titles be approved by NOPTA, and require NOPTA to keep a Register of petroleum and GHG titles including documentary information relating to transfers and dealings.

Proposed section S66ZD would provide for access to instruments, or copies of instruments, that are subject to inspection under new Chapter 5A. The section would require NOPTA to ensure that all such instruments are open for inspection at all convenient times on payment of a fee calculated under the regulations.

Proposed section S66ZE would facilitate proof of certain types of matters in relation to changes in control of titleholders (including possible changes in control), by enabling parties to proceedings to provide the relevant court with specified documents as evidence in relation to those matters. Proposed subsection S66ZE(1) would enable NOPTA to supply a certified true copy or extract of an instrument on payment of a fee calculated under the regulations.

Proposed subsection S66ZE(3) would enable NOPTA, on payment of a fee calculated under the regulations to supply a written certificate (evidentiary certificate) which is to be received in all courts and proceedings as prima facie evidence of specified matters.

NOPTA's cost recovery arrangements

NOPTA operates on a fully cost recovered basis, and is funded via an Annual Titles Administration (ATA) Levy and through application and other fees authorised by the OPGGS Act. The majority of the fees applicable to NOPTA's activities are set out in the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011 (RMA Regulations). NOPTA's cost recovery arrangements aim to ensure that NOPTA has adequate funding for the performance of its functions.

NOPTA's cost recovery arrangements operate in accordance with the Australian Government Cost Recovery Guidelines (CR Guidelines). The CR Guidelines provide that a government entity may recover its costs through fees, levies, charges and other means, subject to the entity:

- having policy approval from the Australian Government to cost recover;
- having statutory authority to charge;
- ensuring alignment between expenses and revenue; and
- maintaining up-to-date, publicly available documentation and reporting.

Of relevance to the fees that may be imposed under proposed sections 566ZD and 566ZE, the CR Guidelines state at page 51 that amounts recovered through the payment of fees should be aligned with the expenses incurred in providing the relevant activity to an individual or a non-government organisation. As outlined below, fees that were formerly payable to NOPTA in relation to access to information and documents, the provision and certification of copies, and the issue of evidentiary certificates, have not exceeded the costs to NOPTA of performing the relevant activity.

NOPTA's cost recovery arrangements are outlined in its Cost Recovery Implementation Statement (CRIS). Among other matters, the CRIS sets out the policy and statutory authority for NOPTA to cost recover, as well as the staffing and other costs that NOPTA seeks to recover through the imposition of fees and levies. At present, NOPTA' s costs are recovered through the ATA Levy and via fees payable on an application by a titleholder to undertake certain regulated activities. NOPTA's current CRIS may be accessed at www.nopta.gov.au/ documents/nopta-cris-2016-17-nov20.pdf.

NOPTA reviews its resourcing requirements on an ongoing basis, and updates its cost recovery arrangements as necessary to reflect changes to the nature and extent of its regulatory activities. NOPTA also consults with its key stakeholders on a regular basis, including to seek feedback on the quality and effectiveness of its activities and on industry expectations regarding fees and charges.

Fees payable under proposed sections 566ZD and 566ZE

As out lined at pages 43 and 45 of the Explanatory Memorandum, fees payable under proposed sections 566ZD and 566ZE will only serve to enable NOPTA-as a fully cost recovered agency to recover the costs it will incur in relation to enabling public access to an instrument, supplying and certifying a copy or extract, or preparing and issuing an evidentiary certificate.

Proposed sections 566ZD and 566ZE substantially mirror existing provisions of the OPGGS Act relating to the administration of transfers of and dealings in petroleum and GHG titles. Proposed section 566ZD substantially mirrors current sections 515 and 564 of the OPGGS Act, which provide for inspections of the Register and of certain instruments on payment of a fee calculated under the regulations. Proposed section 566E substantially mirrors current sections 516 and 565, which enable NOPTA to provide certified copies of documents and to issue evidentiary certificates on payment of a fee calculated under the regulations.

No fee is currently prescribed in relation to section 515, 516, 564 or 565 of the OPGGS Act. However, fees were previously set out in the RMA Regulations in relation to those sections as follows:

> **11.03 Register inspection fee**
>
> (1) For subsections 515 (1) and (2) of the Act, the fee is $20.
>
> (2) For subsections 564 (1) and (2) of the Act, the fee is $19.
>
> **11.04 Document and certification fees**
>
> (1) For subsection 516 (2) of the Act, the fee is $4.00 per page.
>
> (2) For subsection 516 (4) of the Act, the fee is $50.
>
> (3) For subsection 565 (2) of the Act, the fee is $3.50 per page.
>
> (4) For subsection 565 (4) of the Act, the fee is $45.

NOPTA has advised that the fees set out above were nominal fees for administrative cost purposes. Moreover, in accordance with the CR Guidelines, fees did not amount to more than cost recovery of the time and resources needed to action a request to inspect the Register or an instrument, provide a certified document, or issue an evidentiary certificate.

The fees outlined above give an indication of fees that may be charged under proposed section 566ZD and 566ZE. NOPTA has also confirmed that, should fees be prescribed in relation to those sections, fee amounts would not exceed the costs to NOPTA of enabling access to instruments or copies of instruments, providing certified copies of instruments, or issuing evidentiary certificates. This accords with the CR Guidelines. Moreover, any fees prescribed in relation to proposed sections 566ZD and 566ZE would be reflected in updates to NOPTA's CRIS.

> There is also a body of case law that would be applied in prescribing fees under the regulations. The application of this case law would limit the fees that could be charged under proposed sections 566ZD and 566ZE, and ensure that the relevant fees would not amount to a tax.
>
> Finally, any amendments to regulations to prescribe fees payable in relation to proposed sections 566ZD and 566ZE would be subject to parliamentary scrutiny and disallowance. This would provide the opportunity for the Standing Committee for the Scrutiny of Delegated Legislation to assess whether any prescribed fees amount only to cost recovery.

Committee comment

2.72 The committee thanks the minister for this response. The committee notes the minister's advice that the National Offshore Petroleum Titles Administrator (NOPTA) operates on a fully cost-recovered basis and that NOPTA's cost recovery arrangements operate in accordance with the Australian Government Cost Recovery Guidelines. Relevantly, the minister advised that fees payable under proposed sections 566ZD and 566ZE will be limited to enabling NOPTA to recover the costs it will incur in relation to enabling public access to an instrument, supplying and certifying a copy or extract, or preparing and issuing an evidentiary certificate.

2.73 The minister also advised that proposed sections 566ZD and 566ZE mirror sections 515, 516, 564 and 565 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act). None of sections 515, 516, 564 and 565 include guidance that a fee must not be such as to amount to taxation. The minister has advised that, despite this lack of guidance, previously prescribed fees under those sections have not amounted to more than a cost recovery level. The minister advised that, should fees be prescribed in relation to proposed sections 566ZD and 566ZE, the relevant fees would similarly not amount to more than cost recovery.

2.74 More generally, the minister advised that there is a body of case law that would place a limitation on proposed sections 566ZD and 566ZE to ensure that a fee prescribed under those provisions would not amount to taxation, and that any fee prescribed under those sections would be subject to scrutiny by the Standing Committee for the Scrutiny of Delegated Legislation.

2.75 While noting this advice, the committee reiterates its scrutiny concerns regarding the inclusion of a fee-making power within delegated legislation where no guidance is included on the face of the bill as to how a fee will be calculated. The committee has generally not accepted consistency with existing legislation or the existence of non-legislative policy guidance to be a sufficient justification for not including guidance in relation to the calculation of fees within primary legislation.

2.76 It is also unclear to the committee why some fee-making powers in both the bill and the OPGGS Act contain guidance as to the calculation of fees while other fee-making powers do not. For example, and as previously noted by the committee,

proposed section 566M of the bill contains guidance that a fee prescribed under that section must not be such as to amount to taxation, while proposed sections 566ZD and 566ZE do not. Similarly, sections 515, 516, 564, and 565 of the OPGGS Act do not include guidance as to the calculation of fees, but sections 516A and 565A do include such guidance. The committee considers that all relevant provisions should include guidance to that effect on the face of the primary legislation. As previously noted by the committee, the committee considers that it is important to include to a provision providing that the relevant fee must not be such as to amount to taxation to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In addition, such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

2.77 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*).

2.78 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the regulations to prescribe how the amount of fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated, without including, at a minimum, a provisions on the face of the bill stating that the fees must not be such as to amount to taxation.

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

Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021

Purpose	This bill seeks to modernise and streamline social security law to support the New Employment Services Model, which will operate from July 2022
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 27 May 2021
Bill status	Before the House of Representatives

Instruments not subject to parliamentary disallowance[36]

2.80 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice regarding:

- why it is considered necessary and appropriate that all determinations made under proposed section 40T are not legislative instruments; and
- whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[37]

Minister's response[38]

2.81 The minister advised:

> Section 40T relates to exceptional circumstances in which classes of people will not be required to satisfy the employment pathway plan requirements if a determination to that effect is made. As stated in the explanatory memorandum, where there are circumstances such as bushfires or pandemics "there is a need for job seekers to receive timely information in advance as to whether they will need to meet mutual obligation requirements". This is not merely a matter of administrative flexibility – job seekers need timely information in advance, so they do not expose

36 Schedule 1, item 123, proposed sections 40T and 40U. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

37 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 40–41.

38 The minister responded to the committee's comments in a letter dated 24 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> themselves to danger, for example due to bushfires, due to uncertainty about whether they need to meet requirements.
>
> The usual tabling and disallowance processes are inconsistent with this, due to the potential for emergency situations to evolve rapidly and unpredictably in many areas simultaneously, as noted in the explanatory memorandum. While not all exceptional circumstances which might fall within the scope of section 40T will constitute health or safety emergencies, they may nonetheless evolve rapidly. Classes of job seekers who are affected by the exceptional circumstances need timely information in advance about their obligations, so they are not exposed to unnecessary stress or anxiety in connection with whether they need to meet requirements.
>
> Accordingly, it is appropriate that the Bill provides that determinations under section 40T are not legislative instruments.

Committee comment

2.82 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate that determinations made under proposed section 40T are not legislative instruments because the determinations relate to exceptional circumstances which will require job seekers to receive advance, timely information as to their employment pathway plan obligations. The minister advised that without this advance notice, jobseekers may be exposed to dangerous emergency situations, including bushfires, and to unnecessary stress or anxiety in connection with whether they need to meet requirements.

2.83 The minister advised that due to the potential for emergency situations to evolve rapidly and unpredictably in many areas simultaneously, it would be inappropriate to subject determinations made under proposed 40T to the usual tabling and disallowance processes.

2.84 The committee thanks the minister for his considered engagement with this issue noting the importance of subjecting instruments to the usual parliamentary scrutiny processes. This issue has been highlighted recently in the committee's review into the *Biosecurity Act 2015*,[39] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[40] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit

39 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-44.

40 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[41]

2.85 While acknowledging the minister's advice, the committee notes that it does not generally consider that a need for urgency is a sufficient justification for the removal of the usual parliamentary oversight processes. In this regard, the committee notes that legislative instruments that are subject to disallowance can commence immediately after they are registered,[42] that disallowance may only occur after the instrument is tabled in Parliament, that disallowance operates prospectively and therefore does not invalidate actions taken under the instrument prior to the time of disallowance, and that disallowances themselves are rare. Similarly, the committee notes that neither the tabling nor sunsetting requirements that legislative instruments are subject to impact upon the ability of an instrument to commence immediately.

2.86 The committee reiterates the scrutiny position adopted by the Standing Committee for the Scrutiny of Delegated Legislation 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.[43]

2.87 The committee notes that a lack of disallowance undermines the ability of Parliament to properly undertake its scrutiny functions and may subvert the appropriate relationship between the Parliament and the executive, impacting upon Parliament's constitutional role as lawmaker-in-chief.

2.88 As such, the committee does not consider that the minister has adequately addressed the committee's scrutiny concerns.

2.89 In light of the committee's continuing scrutiny concerns outlined above, the committee requests the minister's further advice regarding:

- **why it is considered necessary and appropriate that all determinations made under proposed section 40T are not legislative instruments; and**
- **whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

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41 *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

42 See, for example, Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 3) Regulations 2021 [F2021L00967].

43 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, p. xiii.

Broad discretionary powers

Parliamentary scrutiny – section 96 grants to the states[44]

2.90 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to confer on the Employment Secretary a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;
- whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which arrangements or grants can be made; and
- whether the bill can be amended to include a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 sitting days after being made.[45]

Minister's response

2.91 The minister advised:

> *Why it is considered necessary and appropriate to confer on the Employment Secretary a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised*
>
> Schedule 2 relates to legislative authority for spending on the same sort of employment programs for which various Financial Framework (Supplementary Powers) Regulations 1997 items currently authorise spending.
>
> Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* means that the Commonwealth has the power to make, vary or administer an arrangement or grant for the purpose of programs specified in the FFSP Regulations. Subsection 32B(2) means that this power can be exercised on behalf of the Commonwealth by an accountable authority of a non-corporate Commonwealth entity, for example the Employment Secretary.

44 Schedule 2, item 2, proposed sections 1062A and 1062B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

45 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 41–43.

The power to make arrangements and grants in Schedule 2 reproduces the power which already exists in section 32B.

As noted in the explanatory memorandum, all the usual processes for the establishment and oversight of such programs, such as the need to comply with the Commonwealth procurement and grants frameworks, will remain unchanged.

It is therefore necessary and appropriate for Schedule 2 to include this power.

Whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which arrangements or grants can be made

The Department of Education, Skills and Employment (the department) ensures that relevant arrangements or grants are made consistently with the *Public Governance, Performance and Accountability Act 2013* and with value for money and other requirements in the Commonwealth procurement and grants frameworks.

The department also ensures that arrangements or grants are subject to robust conditions proportionate to the amounts and issues involved. The longstanding practice of the department in relation to jobactive and other sizable employment programs has been that employment service providers must enter deeds with the department which contain extensive terms and conditions. For example, the jobactive deed is 258 pages and also requires providers to comply with around a dozen guideline documents under the deed.

Such an amendment is therefore not necessary, and would not add to the effective administration of the arrangements or grants.

Whether the bill can be amended to include a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A are:

- *tabled in the Parliament within 15 sitting days after being made; and*
- *published on the internet within 30 sitting days after being made.*

The department's practice is to widely publicise employment programs for which it administers funds and this will continue, in addition to the requirement in new section 1062D to include information about the number and total amounts paid under arrangements and grants made, whether to state or territories or otherwise, in its annual report. In addition, it may be that some agreements will contain confidential or sensitive information which it would not be appropriate to publish. The current provisions of the Bill are therefore appropriate.

Committee comment

2.92 The committee thanks the minister for this response. The committee notes the minister's advice that the legislative authority for spending provided by Schedule 2 to the bill is for the same type of employment programs as are already authorised by various provisions within the Financial Framework (Supplementary Powers) Regulations 1997. The minister also advised that the usual processes for the establishment and oversight of these programs, such as the need to comply with the Commonwealth procurement and grants frameworks, will remain unchanged.

2.93 While acknowledging this advice, the committee has generally not accepted consistency with existing legislation or the existence of non-legislative policy guidelines to be sufficient as a justification for the conferral of broad powers in circumstances where there is limited guidance on the face of the bill as to how those powers are to be exercised.

2.94 It remains unclear to the committee why at least high-level guidance cannot be included on the face of the bill as to the exercise of powers under proposed sections 1062A and 1062B.

2.95 The committee notes the minister's advice in relation to amending the bill to include tabling requirements for agreements made under proposed section 1062A that the department's current practice is to widely publicise employment programs for which it administers funds and that this will continue in relation to proposed section 1062A. The minister also noted that agreements made under proposed section 1062A may contain confidential or sensitive information which it would not be appropriate to publish.

2.96 The committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are otherwise not available. The committee does not consider that public consultation is sufficient to address the committee's scrutiny concerns relating to not providing for agreements with the states and territories to be tabled in the Parliament.

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

- **conferring on the Employment Secretary a broad power to make arrangements and grants relating to assisting persons to obtain and maintain paid work in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised; and**
- **not including a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A be tabled in the Parliament.**

Instruments not subject to parliamentary disallowance[46]

2.98 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered appropriate that instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments; and
- whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[47]

Minister's response

2.99 The minister advised:

> Subsection 8(8AC) authorises the Employment Secretary to determine, by notifiable instrument, payments and benefits from Commonwealth and State and Territory employment programs to not be considered income for social security law purposes. Subsection 40(3) authorises the Employment Secretary to determine, by notifiable instrument, employment programs which do not give rise to employment for the purposes of certain industrial relations legislation.
>
> The proposed instruments reflect the need to be able to rapidly vary administrative arrangements in response to changing programs - including in response to emergencies or rapid creation of new programs. This could include new programs needed rapidly in response to sudden industry downturns, or mass lay-offs. I therefore consider that the provisions of the Bill in relation to these instruments are appropriate.
>
> The instrument under 8(8AC) will allow job seekers to keep any assistance from these programs, without needing to declare it as income to Services Australia. The instrument under subsection 40(3) will allow job seekers to participate in these programs without needing to have the participation directly entered into their Job Plan.

Committee comment

2.100 The committee thanks the minister for this response. The committee notes the minister's advice that the proposed instruments reflect the need to be able to rapidly vary administrative arrangements in response to changing programs, including in response to emergencies or the rapid creation of new programs.

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46 Schedule 4, item 2, proposed subsection 8(8AC) and Schedule 6, item 1, proposed subsection 40(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

47 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 43–44.

2.101 As noted above, the committee does not generally consider that a need for urgency is a sufficient justification for the removal of the usual parliamentary oversight processes. In this regard, the committee notes that legislative instruments that are subject to disallowance can commence immediately after they are registered,[48] that disallowance may only occur after the instrument is tabled in Parliament, that disallowance operates prospectively and therefore does not invalidate actions taken under the instrument prior to the time of disallowance, and that disallowances themselves are rare. Similarly, the committee notes that neither the tabling nor sunsetting requirements that legislative instruments are subject to impact upon the ability of an instrument to commence immediately.

2.102 The committee also reiterates that Schedule 5 to the bill seeks to amend subsection 28(1) of the *Social Security Act 1991* to provide that declarations by the Secretary that particular programs of work are approved programs of work for income support payment will be legislative instruments. Noting the similarity in the types of determinations being made, it remains unclear to the committee why determinations under proposed subsection 8(8AC) and proposed subsection 40(3) cannot be legislative instruments.

2.103 The committee therefore does not consider that the minister has provided information that adequately justifies why instruments under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments.

2.104 In light of the committee's continuing scrutiny concerns outlined above, the committee requests the minister's further advice as to:

- **why it is considered appropriate that instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

48 See, for example, Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 3) Regulations 2021 [F2021L00967].

Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Water Act 2007* to establish the role of an independent Inspector-General of Water Compliance to monitor, and provide independent oversight of, water compliance
Portfolio	Resources, Water and Northern Australia
Introduced	House of Representatives on 26 May 2021
Bill status	Received the Royal Assent on 30 June 2021

Reverse evidential burden[49]

2.105 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to the appropriateness of including the specified matters as offence-specific defences rather than as elements of the offences, including:

- how the matters in proposed sections 73A and 73B are peculiarly within the knowledge of the defendant; and
- why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7), including why it is not possible to rely upon more specific defences.[50]

Minister's response[51]

2.106 The minister advised:

> *How the matters in proposed sections 73A and 73B are peculiarly within the knowledge of the defendant.*
>
> Proposed sections 73A and 73B create fault-based offences for taking water when not permitted under State law. Subsection 73A(8) provides that the 'first person' may rely on an exception, exemption, excuse, qualification or

49 Schedule 1, item 2, proposed subsections 73A(8), 73B(9), 73F(2), and 73G(2); item 78, proposed subsection 222D(6); item 147, proposed subsection 238(6); item 148, proposed subsections 239AC(6) and 239AD(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

50 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 50–53.

51 The minister responded to the committee's comments in a letter dated 23 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 10 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

justification provided by the law of a State, referred to in new subsections 73A(7) provided this does not involve determining the first person's state of mind.

Similarly, subsection 73B(9) provides that the 'first person' may rely on an exception, exemption, excuse, qualification or justification referred to in new subsections 73B(8) provided this does not involve determining the first person's state of mind. Where the first person wishes to rely on such an exception, exemption, excuse, qualification or justification, the first person would bear the evidential burden in relation to that matter.

The drafting of the proposed offences is unusual and complex because it draws on underlying provisions in various State and ACT laws to create the offences. The structure makes clear that in establishing a potential State contravention the prosecution does not need to prove no potential State exceptions etc. apply. Instead in line with s 13.3 of the *Criminal Code,* a defendant may rely on the State exceptions etc. but has an evidential burden.

The department considers that reliance on such an exception, exemption, excuse, qualification or justification provided by a law of the State by the defendant is necessary to provide consistency between the Commonwealth offences and an offence brought under State law.

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and-Enforcement Powers* (September 2011) (the Guide) provides that a matter should only be included in an offence-specific defence, where it is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

In accordance with the Guide, it is appropriate that the defendant bears the evidential burden of establishing that there is a reasonable possibility that a matter exists where the matter is an exception, exemption, excuse, qualification or justification. This is because it would be peculiarly within the mind of the defendant, and the defendant would be better positioned to readily adduce evidence.

To discharge the evidential burden, the defendant would need to adduce evidence that an exception, exemption, excuse, qualification or justification applied. This evidence would be readily available to the defendant as a person who is operating within the relevant state. Where the evidential burden was discharged, the prosecution would then need to disprove beyond reasonable doubt that the relevant defence is available in order to establish the offence.

For example, section 60F of the *Water Management Act 2000* (NSW) provides that:

> *"It is a defence to a prosecution under this Division in relation to a Tier 1 offence if the accused person establishes:*

(a) that the commission of the offence was due to causes over which the person had no control, and

(b) that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence."

This would be a matter that would be peculiarly within the knowledge of the defendant. This is reflected in the structuring of this matter as a defence under NSW law.

Conversely, for the prosecution to prove the substance of an exception, exemption, excuse, qualification or justification relied on by the defendant without any reliance on any evidence from the defence would impose a disproportionate burden on the prosecution. This reversal is necessary to ensure that the prosecution is not required to devote significant resources to establishing certain background facts that may be peculiarly within the knowledge of the defendant.

Why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7), including why it is not possible to rely upon more specific defences.

Proposed sections 73F and 73G provide that a person is liable to a civil penalty if they are required by the Basin Plan to give a notification with respect to the trading of water access rights and fails to do so. Proposed subsections 73F(2) and 73G(2) provide that it is a defence if the person has a reasonable excuse.

Proposed sections 238, 239AC, and 239AD provide that a person is liable for a civil penalty if the person is required to give information by the Inspector-General and fails to do so. Proposed section 222D provide that a person is liable for a civil penalty if the person is required to give information to the Authority and fails to do so. For the respective offences, proposed subsections 222D(6), 238(6), 239AC(6), and 239AD(7) provide a defence if the person has a reasonable excuse.

The Committee seeks explanation about why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2),73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7) and why it is not possible to rely upon more specific defences.

The department considers that a defence of reasonable excuse for these civil penalties rather than specific defences is appropriate to ensure consistency within the broader context of the *Water Act 2007* (the Act).

The defence of reasonable excuse is contained within the Act under subsection 126(6) in relation to giving water information to the Bureau, subsection 127(4) in relation to the Director of Meteorology requiring water information and subsection 133(3) in relation to complying with notice requiring a person to rectify a requirement of National Water Information Standards.

> The department further notes that the current subsection 238(5) of the Act provides a reasonable excuse defence for where the person fails to comply with a requirement that the person give specified compellable information to the Authority. To be consistent with the current section that relates to the Authority, the reasonable excuse defence has been incorporated into the proposed section 238 that relates to the Inspector-General and the proposed section 222D that relates to the Authority. To deviate from the current legislative framework that contains a reasonable excuse defence would be inconsistent within the broader context of the Act.

Committee comment

2.107 The committee thanks the minister for this response. The committee notes the minister's advice that the drafting of the bill draws on underlying provisions in various state and Australian Capital Territory laws to create the offences and that, consequently, reliance on an exception, exemption, excuse, qualification or justification provided by a law of a state by the defendant is necessary to provide consistency between the Commonwealth offences and an offence brought under state law. The minister has advised that matters in relation to exceptions, exemptions, excuses, qualifications or justifications provided by state laws would be peculiarly in the mind of a defendant operating within that state. The minister further advised that requiring the prosecution to establish these matters would impose a disproportionate burden on them. The minister pointed to section 60F of the *Water Management Act 2000* (NSW) as an example of a defence for which the matters would be peculiarly within the knowledge of the defendant.

2.108 The minister also advised, in relation to the defences set out at proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7), that a defence of reasonable excuse, rather than the use of more specific defences, is appropriate because it ensures consistency with the existing provisions of the *Water Act 2007* (the Act).

2.109 While acknowledging this advice, the committee has generally not considered consistency with existing provisions to be a sufficient justification for including the defence of reasonable excuse within a bill. Rather, each instance of the defence must be justified on its own merits, with an explanation as to why the defence is appropriate and necessary in its specific context and with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[52]

2.110 The committee continues to have scrutiny concerns regarding provisions of the bill that allow for the reversal of the evidential burden of proof, including through the inclusion of a defence of reasonable excuse. However, in light of the fact

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

that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

Significant matters in delegated legislation[53]

2.111 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the conferral of functions and powers on the Inspector-General for the purpose of ensuring compliance with the Basin Plan to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.[54]

Minister's response

2.112 The minister advised:

> *Why it is considered necessary and appropriate to leave the conferral of functions and powers on the Inspector-General for the purpose of ensuring compliance with the Basin Pion to delegated legislation*
>
> Proposed subsection 22(8A) provides that the Basin Plan or prescribed by the regulations may confer functions or powers on the Inspector-General for the purpose of ensuring compliance with provisions of the Basin Plan.
>
> The department considers it appropriate that the conferral of functions and powers be in delegated legislation as this will allow the Basin Plan or regulations to be more easily amended so as to accommodate changing or uncertain situations that require adaptability of the Inspector-General's compliance powers. The scope for the conferral of power is limited to functions and powers for ensuring compliance with the Basin Plan, or otherwise relating to that matter. The Basin Plan itself is limited content to those matters set out in subsection 22(1) which further limits the functions and powers that can be conferred onto the Inspector-General.
>
> Further, the Act sets out a detailed process for amendment of the Basin Plan, under which the Murray-Darling Basin Authority prepares amendments of the Basin Plan in consultation with the Basin States, Basin Officials Committee, Basin Community Committee and affected entities before seeking submissions from Basin States and members of the public, and comments from the Murray-Darling Basin Ministerial Council on any proposed amendment, and then providing the amendment to the Minister

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53 Schedule 1, item 9, proposed subsection 22(8A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

54 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 53–54.

for approval. Section 35 of the Act provides that the Murray Darling Basin Authority and other Commonwealth agencies must perform their functions and exercise their powers consistently with, and in a manner that gives effect to the Basin Plan. This means that irrespective of the functions and powers conferred onto the Inspector-General in relation to compliance, the Inspector-General must give effect to the Basin Plan.

Whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation

The department does not consider it necessary or appropriate to describe the scope for the types of functions that should be conferred on the Inspector-General in the Basin Plan as this could limit the function of the Inspector-General.

Proposed section 215C sets out the functions and powers of the Inspector-General. In particular, subsection 215C(1)(e) provides the compliance functions conferred on the Inspector-General in relation to Part 8, Part 10M and Part 10AB. As the Inspector-General is already limited to the functions and powers set out in section 215C, it is not considered necessary to include further high-level guidance in the primary legislation.

In addition, proposed subsection 22(8A) limits the matters in relation to which powers and functions may be conferred on the Inspector-General by the Basin Plan. Under the proposed section, powers and functions must relate to matters mentioned in subsection 22(1) of the Act or matters prescribed by regulations for the purpose of subsection 22(8) of the Act. At present no matters are prescribed by regulations and no regulations are proposed for this purpose, so the only matters in relation to which the Basin Plan may confer functions or powers on the Inspector-General are those mentioned in subsection 22(1).

Committee comment

2.113 The committee thanks the minister for this response. The committee notes the minister's advice that describing the scope of the functions and powers that could be conferred on the Inspector-General could limit the function of the Inspector-General. The minister also advised that amendments to the Basin Plan are subject to a detailed process which includes consultation with basin states, the Basin Officials Committee, the Basin Community Committee and other affected entities. Subsequent to this process, submissions are sought from basin states and members of the public, and comments are sought from the Murray-Darling Basin Ministerial Council.

2.114 The minister further advised that it is appropriate to leave the conferral of functions and powers on the Inspector-General to delegated legislation because doing so will allow the Basin Plan and the regulations to be more easily amended so as to accommodate changing or uncertain situations. The minister advised that the scope of powers able to be conferred by delegated legislation is limited by the effect of section 215C and proposed subsection 22(8A) of the Act and that any powers exercised

by the Inspector-General must give effect to the Basin Plan which is itself limited by the matters set out in subsection 22(1) of the Act.

2.115 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, nor is it apparent to the committee why it is inappropriate to provide a greater level of guidance within the primary legislation as to the functions and powers that may be conferred upon the Inspector-General under proposed subsection 22(8A).

2.116 The committee continues to have scrutiny concerns regarding provisions of the bill that leave the conferral of functions and powers on the Inspector-General for the purpose of ensuring compliance with the Basin Plan to delegated legislation. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

Tabling of documents in Parliament[55]

2.117 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to whether the bill can be amended to provide that the minister must arrange for a copy of a report prepared under each of the provisions listed at paragraph 1.184 be tabled in each House of the Parliament.[56]

Minister's response

2.118 The minister advised:

> Whether the bill can be amended to provide that the minister must arrange for a copy of a report prepared under each of the provisions listed at paragraph 1.184 be tabled in each House of the Parliament.
>
> **Audit**
>
> Proposed section 73L establishes the power of the Inspector-General to conduct audits and prepare audit reports. Subsection 73L(4) provides that after the report is finalised, the Inspector-General would be required to publish a copy of the report on the Inspector-General or Department's website.
>
> **Responses to Audits**
>
> Proposed section 73M requires an agency of the Commonwealth or State or Territory to respond to audit reports where the report included a

55 Schedule 1, item 14, proposed sections 73L and 73M; item 67, proposed sections 215V, 215Y and 215Z; item 148, proposed sections 239AA, 239AE and 239AF. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

56 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 54–55.

recommendation that the agency take certain action. Subsection 73M(3) provides that the Inspector-General may publish a copy of a response provided by the agency on the Inspector-General's website or Department's website.

Guidelines

Proposed section 215V permits the Inspector-General to issue guidelines relating to the management of Basin water resources, which Commonwealth and Basin State agencies must have regard to in performing certain Basin water management obligations. Subsection 215V(4) requires the Inspector-General to publish any such guidelines) on the Inspector-General's website or the Department's website.

Annual report

Section 215Y provides for the Inspector-General's preparation of an annual report. Subsection 215Y(2) provides that the Inspector-General must give the annual report to the Minister and publish the report either on the Inspector-General's website or the Department's website as soon as practicable after the report is prepared.

Inquiry reports to the Minister

Proposed section 239AE would require the Inspector-General to report to the Minister on inquiries conducted under proposed section 239AA. Subsection 239AE(5) would provide that the Inspector-General may publish the report on the Inspector-General's or the Department 's website.

Responses to inquiry reports

Proposed section 239AF would require Commonwealth, State and Territory agencies to respond to recommendations made to the agency by the Inspector-General, where the Inspector-General's inquiry report has been published online. Subsection 239AF(4) would provide that the Inspector-General may publish a copy of a response provided pursuant to new subsection 239AF(2) on either the Inspector-General's website or the Department's website.

The committee has commented that not providing for the review of reports to be tabled in Parliament reduces the scope for parliamentary scrutiny, and that tabling provides opportunity for debate that are not available where documents are not made public or are only published online.

The department considers that it is appropriate and sufficient that reports under sections 73L, 73M, 215V, 215V, 239AE and 239AF are required to be published on the Inspector-General or Department's website, on which they are readily accessible to the public for free. I consider that the online publication under the relevant sections provides an appropriate level of transparency and a sufficient platform for debate.

Committee comment

2.119 The committee thanks the minister for this response. The committee notes the minister's advice that reports that may be prepared under proposed sections 73L, 73M, 215V, 215Y, 239AE and 239AF will be required to be published on the Inspector-General's website or on the department's website, on which they are readily accessible to the public for free. The minister advised that this online publication provides an appropriate level of transparency and a sufficient platform for debate and that it is therefore unnecessary to provide for these reports to be tabled in Parliament.

2.120 While acknowledging this advice, the committee reiterates its comments that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are only published online. The committee therefore does not consider that the minister has adequately addressed the committee's scrutiny concerns.

2.121 The committee continues to have scrutiny concerns regarding the failure to provide for the tabling of documents, such as reports on inquiries conducted by the Inspector-General, in Parliament. 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.

Instruments not subject to parliamentary disallowance[57]

2.122 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice regarding:

- why it is considered necessary and appropriate to specify that guidelines made under proposed section 215V are not legislative instruments; and
- whether the bill could be amended to provide that the guidelines are legislative instruments to ensure they are subject to appropriate parliamentary scrutiny.[58]

Minister's response

2.123 The minister advised:

> *Why it is considered necessary and appropriate to specify that guidelines made under proposed section 215V are not legislative instruments*

57 Schedule 1, item 67, proposed subsection 215V(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

58 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 55–56.

> Proposed section 215V permits the Inspector-General to issue guidelines relating to the management of Basin water resources, which Commonwealth and Basin State agencies must have regard to in performing certain water management obligations.
>
> Guidelines issued by the Inspector-General under section 215V are not intended to be legislative in nature or impart a binding obligation onto Basin States, the Commonwealth, the Inspector-General or auditors, rather it is the intention that these guidelines act as policy guidance. The guidelines are to impart a level of consistency and uniformity between States.
>
> Any concern that may arise out of the guidelines not being subject to parliamentary scrutiny can be mitigated by the requirement under section 215VB which provides that the Inspector-General must consult with the Basin States and have regard to any submissions made by the Basin States in connection with the consultation in preparing guidelines under proposed section 215V.
>
> I therefore consider it appropriate and necessary in these circumstances to specify that the guidelines made under proposed section 215V are not legislative instruments.

Committee comment

2.124 The committee thanks the minister for this response. The committee notes the minister's advice that guidelines issued by the Inspector-General under proposed section 215V are not intended to be legislative in nature or impart a binding obligation onto basin states, the Commonwealth, the Inspector-General or auditors. The minister has advised that, rather, the guidelines are intended to act as policy guidance and to impart a level of consistency and uniformity between states. The minister further advised that proposed section 215VB requires that the Inspector-General must consult with basin states and have regard to submissions made by basin states in preparing the guidelines.

2.125 In light of the fact that the bill has already passed both Houses of the Parliament, and noting the information provided, the committee makes no further comment on this matter.

Broad delegation of administrative powers[59]

2.126 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- which powers and functions it is proposed to allow the Inspector-General to delegate under proposed subsection 215W(1) that will not be subject to the limitations in subsections 215W(2), (3) and (4); and
- why it is considered necessary and appropriate to allow the Inspector-General to delegate their functions and powers to any APS employees under proposed subsection 215W(1) and to Executive Level 2 employees under proposed subsection 215W(4), rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices.[60]

Minister's response

2.127 The minister advised:

> *Which powers and functions it is proposed to allow the Inspector-General to delegate under proposed subsection 215W(1) that will not be subject to the limitations in subsections 215W(2), (3) and (4)*
>
> The Inspector-General's powers and functions that will not be subject to the limitations in subsections 215W(2), (3) and (4) relate to administrative matters such as publication of work plans under subsection 215E(4), amendments of workplans under subsection 215G(2) and guidelines under subsection 215V(4).
>
> *Why it is considered necessary and appropriate to allow the Inspector-General to delegate their functions and powers to any APS employees under proposed subsection 215W(1) and to Executive Level 2 employees under proposed subsection 215W(4), rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices*
>
> Subsection 215W(4) sets out that the Inspector-General is permitted to delegate specified functions and powers to an SES employee, or an acting SES employee, or an APS employee who holds, or performs the duties of either an Executive Level 2 (EL2) or equivalent position in the Department.
>
> The relevant functions that may be delegated under subsection 215W(2) are giving notice to the appropriate agency of a State of the intention to take action in relation to an alleged contravention of section 73A or 73B under subsection 73E(1), disclosing information to an enforcement body under

59 Schedule 1, item 67, proposed section 215W. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

60 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 56–57.

> subsection 215UB(2) and disclosing information to an agency of the Commonwealth or an agency of a State under subsection 21SUB(3).
>
> I consider it necessary and appropriate to permit the Inspector-General to be able to delegate the powers and functions for the reasons below.
>
> The powers that may be delegated to an EL2 are confined in nature and limited by subsection 215W(4). The powers that will be delegated under subsection 215W(4) relate only to matters that have the potential to rapidly change which requires flexibility and responsiveness from the Inspector-General (and the Inspector-General's delegates) without any undue delay or deferral. The organisational structure and pool of staff available to the Inspector-General will be limited so to require the delegation of these powers to SES or equivalent position in the Department would significantly impinge the effectiveness and efficacy of the Inspector-General. To allow delegation to the EL2 level would provide the administrative and operational flexibility for prompt disclosure of information and notice being provided to the appropriate State agencies.
>
> I further note that Executive Level 2 or equivalent positions in the Department are required pursuant to sections 25 to 29 of the *Public Governance, Performance and Accountability Act 2013* ('the PGPA Act') to exercise their powers with due care and diligence, honestly, in good faith and for proper purposes. This ensures that an EL2 will perform their duties with integrity and to a high standard as would a member of the Senior Executive Service. EL2 employees are the highest level of Executive level employees in the public service and have significant training, knowledge and experience.

Committee comment

2.128 The committee thanks the minister for this response. The committee notes the minister's advice that the powers that will be delegated under proposed subsection 215W(4) are limited to matters that have the potential to rapidly change and which therefore require flexibility and responsiveness without any undue delay or deferral. The minister advised that the organisational structure and pool of staff available to the Inspector-General will be limited and that allowing delegation to the Executive Level 2 level would provide the administrative and operational flexibility for prompt disclosure of information and notice being provided to the appropriate state agencies.

2.129 While noting this explanation, the committee reiterates that it has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for allowing a broad delegation of administrative powers below the Senior Executive Service level.

2.130 The minister also noted that the Inspector-General's powers and functions that will not be subject to the limitations provided for in proposed subsections 215W(2), (3) and (4) relate to administrative matters such as publication of work plans

under subsection 215E(4), amendments of workplans under subsection 215G(2) and guidelines under subsection 215V(4).

2.131 While thanking the minister for this advice, the committee emphasises that this kind of detail should generally be included within the explanatory memorandum to a bill, 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.[61]

2.132 In light of the fact that the bill has already passed both Houses of the Parliament, and noting the information provided, the committee makes no further comment on these matters.

Significant matters in delegated legislation[62]

2.133 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave matters relevant to whether a person is fit and proper to be an authorised compliance officer to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.[63]

Minister's response

2.134 The minister advised:

> Proposed section 222G provides that the Inspector-General may appoint one or more individuals to be authorised compliance officers. Proposed subsection 222G(2) provides that to be eligible for appointment, an individual must be an APS employee, an individual whose services are available under subsection 215S(2), an individual who holds an office or position with a State or State authority, or a contractor; and must have a high level of expertise in fields relevant to the performance of duties of an authorised compliance officer.
>
> Proposed subsection 222G(4) provides that when appointing a contractor as an authorised compliance officer, the Inspector-General must be satisfied that the individual is fit and proper to be an authorised compliance officer. Proposed subsection 222G(5) provides that in deciding whether a

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61 *Acts Interpretation Act 1901*, section 15AB.

62 Schedule 1, item 67, proposed paragraph 222G(5)(a). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

63 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, p. 58.

contractor is fit and proper, the Inspector-General must have regard to matters prescribed by regulation and may have regard to any other matter the Inspector-General considers appropriate.

However, it is the view of the Department that the requirement under subsection 222G(4) that the Inspector-General be satisfied that a contractor is a fit and proper person is sufficient. The department intends that the regulations will only prescribe matters that the Inspector-General must have regard to in deciding whether a contractor is fit and proper. Further, the requirement that a person is fit and proper applies only to contractors, not to all persons who are eligible for appointment as an authorised compliance officer. This is because Commonwealth and State/Territory employees are already subject to behaviour and conduct frameworks as part of their initial employment.

It is therefore necessary and appropriate that the other matters the Inspector-General must consider in determining if a contractor is a fit and proper person are contained in delegated legislation. In addition, allowing for such criteria to be developed under delegated legislation would allow the regulations to be amended in a timely manner; as appropriate, to ensure they can adapt to the requirements of authorised compliance officers. The regulations will be disallowable. Also, under subsection 222G(6) there is a merits review right of appeal to the Administrative Appeals Tribunal with respect to a finding that an individual is not a fit and proper person to be an authorised compliance officer.

Committee comment

2.135 The committee thanks the minister for this response. The committee notes the minister's advice that it is intended that the regulations will only prescribe matters that the Inspector-General must have regard to in deciding whether a person is fit and proper. The minister also noted that under proposed subsection 222G(4) an assessment of whether a person is fit and proper will only apply to contractors.

2.136 The minister further advised that allowing for criteria related to whether a person is a fit and proper person to be set out in delegated legislation would allow the regulations to be amended in a timely manner, to ensure the regulations can adapt to the requirements of authorised compliance officers.

2.137 While acknowledging this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient reason for including significant matters in delegated legislation.

2.138 The committee continues to have scrutiny concerns regarding provisions of the bill that leave matters relevant to whether a person is fit and proper to be an authorised compliance officer to delegated legislation. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

Immunity from liability[64]

2.139 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to confer immunity from liability on persons and bodies giving comments under proposed section 239AG.[65]

Minister's response

2.140 The minister advised:

> Proposed section 239AG requires that the Inspector-General to give a person or body an opportunity to comment on material proposed to be included in a report that is expressly or impliedly critical of them, before the report is finalised. Subsection 239AG(3) would provide that a person or body is not liable to civil proceedings or proceedings for contravening a law of the Commonwealth in relation to giving the comments, provided the comments are given in good faith.
>
> Without such protection for the person or body acting in good faith, there is a risk that frank and open commentary will be hindered where a report has been critical. This will substantially minimise the purpose and object of giving the person or body the opportunity to comment on material proposed to be included in reports that have been critical of them.
>
> The protection will only be available to a person or body who acts in good faith. Where a person or body have been exercising in good faith, they should not be exposed to proceedings aimed at frustrating their efforts. The response from the person or body is not necessarily intended to be published or made public.
>
> I therefore consider that in the context of recognition of the importance of frank conversations relating to water management, this provision 239AG(3) is necessary and appropriate to allow a person or body to respond to criticisms that will be published by the Inspector-General in a report without fear of being liable for those comments, when responding in good faith.

Committee comment

2.141 The committee thanks the minister for this response. The committee notes the minister's advice that without providing for protection from liability, there is a risk that frank and open commentary will be hindered in cases where a report has been critical. The minister advised that this risk would substantially minimise the purpose and object of providing persons or bodies with an opportunity to comment on material that has been critical of them.

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64 Schedule 1, item 148, proposed subsection 239AG(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

65 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 58–59.

2.142 In light of the fact that the bill has already passed both Houses of the Parliament, and noting the information provided, the committee makes no further comment on this matter.

Incorporation of external material into the law[66]

2.143 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow for the incorporation of documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change aspects of the Murray-Darling Basin Agreement without any involvement from the Parliament.[67]

Minister's response

2.144 The minister advised:

> Subsection 18C(1) allows the regulations to make amendments to Schedule 1 of the *Water Act 2007*, being the Murray-Darling Basin Agreement, with the consent of the Murray-Darling Basin Ministerial Council to those amendments. Proposed subsection 18C(2A) provides that subsection 14(2) of the *Legislation Act 2003* does not apply to regulations made for the purposes of subsection 18C(1). This will allow regulations amending the Murray-Darling Basin Agreement (the Agreement) to incorporate by reference any external material as in force or existing from time to time.
>
> The purpose of Agreement is to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin. The Agreement is amended from time to time by the Murray-Darling Basin Ministerial Council to ensure that the Agreement meets the current needs.
>
> The purpose of proposed subsection 18C(2A) is to enable amendments to the Agreement that have been agreed between the Commonwealth and the States and Territories to be incorporated into the Act as in force or existing from time to time. This will ensure that Schedule 1 of the Act, which sets out the text of the Murray-Darling Basin Agreement, accurately reflects any amendments made to the Agreement. Enabling the incorporation of documents as in force or existing from time to time will allow the Act to remain commensurate with changing aspects of the Agreement.
>
> In accordance with the guidelines of the Committee, an explanatory statement for regulations amending the Murray-Darling Basin Agreement

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66 Schedule 3, item 2, proposed subsection 18C(2A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

67 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 59–60.

> will include information as to where a relevant incorporated instrument or writing may be readily and freely accessed.
>
> I therefore consider it necessary and appropriate that proposed subsection 18C(2A) exclude the operation of subsection 14(2) of the *Legislation Act 2003* with respect to regulations amending the Murray-Darling Basin Agreement.

Committee comment

2.145 The committee thanks the minister for this response. The committee notes the minister's advice that proposed subsection 18C(2A) is intended to enable amendments to the Murray-Darling Basin Agreement (the Agreement) that have already been agreed between the Commonwealth and basin states and territories to be incorporated into the Act as in force or existing from time to time. Schedule 1 to the Act sets out the content of the Agreement and the minister has advised that allowing the incorporation of documents as in force from time to time will allow the Act to remain commensurate with changing aspects of the Agreement. The minister advised that the explanatory materials for amendments to the Agreement will include information as to where a relevant incorporated instrument or writing may be readily and freely accessed.

2.146 In light of the fact that the bill has already passed both Houses of the Parliament, and noting the information provided, the committee makes no further comment on this matter.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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

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