The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 14 of 2021

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

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

Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021

Purpose	This bill seeks to: • reduce the administrative burden on CATSI corporations by making it easier to satisfy reporting and meeting obligations; • provide greater flexibility for CATSI corporations to enable the realisation of economic and community development priorities; • ensure governance requirements are fit-for-purpose by expanding the capacity of CATSI corporations to determine their own operational rules; • increase transparency of CATSI corporation operations through improved reporting for members, common law holders and other stakeholders; • enhance support for CATSI corporations that are experiencing difficulties to enable these entities return to health and, ultimately, the control of their members; • streamline the process of winding up defunct CATSI corporations; • enhance the efficacy of operations by increasing access by CATSI corporations to modern technology, including for managing their membership bases; and • provide the Registrar with expanded powers to enable a graduated, proportionate response to non-compliance.
Portfolio	Indigenous Australians
Introduced	House of Representatives on 25 August 2021

Reversal evidential burden[1]

1.1 Item 6 of Schedule 1 seeks to insert a number of new offences into the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the Act). Proposed subsection 453-2(5) provides that it will be an offence if the Registrar gives a person a notice to produce specific books and the person does an act, or omits to do an act, with the result that the notice is not complied with. Proposed subsection 453-2(6) provides an exception to the offence (offence-specific defence), stating that the offence does not apply if the person has a reasonable excuse.

1.2 Proposed subsection 453-3(2) provides that a person commits an offence if they are given an order under proposed subsection 453-3(1) and the person does an act, or omits to do an act, with the result that the notice is not complied with. Proposed subsection 453-3(3) provides an offence-specific defence, stating that the offence does not apply if the person has stated the required matter to the best of the person's knowledge or belief or the person has a reasonable excuse.

1.3 Proposed subsection 453-4(2) provides that a person will commit an offence if the person is given an order under proposed subsection 453-4(1) and the person does an act, or omits to do an act, with the result that the notice is not complied with. Proposed subsection 453-4(3) provides an offence-specific defence, stating that the offence does not apply if the person has performed the relevant acts in proposed subsection 453-4(1) or the person has a reasonable excuse.

1.4 Additionally, item 126 of Schedule 1 seeks to insert proposed subsection 201-150(5) into the Act to provide four new exceptions to the existing offence of not holding an annual general meeting (AGM) within five months after the end of the financial year. The exceptions are that:

- the 5-month period is extended under subsection 201-153(1);
- the corporation has been granted an extension under subsection 201-155(2);
- the AGM is covered by a special resolution in effect under section 201-175; or
- the AGM is required to be held within a different period specified in a direction given by the Registrar under section 201-190.

1.5 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[2] 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

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1 Schedule 1, items 6 and 126, proposed subsections 453-2(6), 453-3(3), 453-4(3) and 201-150(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2 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.

defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.6 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. In relation to the reversals of the evidential burden of proof, the statement of compatibility states:

> They are justified having regard to the regulatory nature of the offence provisions, and because the facts that the defendant must prove will be matters that are peculiarly within their knowledge.[3]

1.7 The committee notes that the *Guide to Framing Commonwealth Offences,*[4] 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.[5]

1.8 In this case, it is not apparent that any of the matters in proposed subsections 453-2(6), 453-3(3), 453-4(3) and 201-150(5) 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.

1.9 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[6]

1.10 The committee notes that no explanation has been provided in the explanatory memorandum regarding why an offence-specific defence of 'reasonable excuse' has been used in relation to the offence-specific defences in item 6 of Schedule 1 or why it would not be possible to design more specific defences.

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3 Statement of compatibility, p. 84.

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

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

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

1.11 The committee requests the minister's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 453-2(6), 453-3(3), 453-4(3) and 201-150(5).

1.12 The committee also requests the minister's advice as to whether the bill can be amended to provide for more specific defences in proposed subsections 453-2(6), 453-3(3) and 453-4(3).

1.13 The committee further suggests that it may be appropriate for the bill to be amended to provide that the defences set out at proposed subsection 201-150(5) are instead specified as elements of the offence. The committee requests the minister's advice in relation to this matter.

Strict liability[7]

1.14 Item 81 of Schedule 1 seeks to insert proposed section 180-37 into the Act to provide that at the end of each financial year, an Aboriginal and Torres Strait Islander corporation must give the Registrar a copy of the register of members. Proposed subsection 180-37(3) provides that a corporation commits an offence of strict liability if it fails to do so. The penalty for the offence is 25 penalty units or imprisonment for six months, or both.

1.15 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.

1.16 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] In this instance, the bill proposes applying strict liability to offences that are subject to a penalty of up to 6 months imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

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7 Schedule 1, item 81, proposed subsection 180-37(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

1.17 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.*[9]

1.18 In this instance, the explanatory memorandum notes that the penalty aligns with the penalties for failing to lodge annual reports.[10] The committee does not consider that consistency with existing provisions is a sufficient justification for including strict liability offences with a penalty of imprisonment.

1.19 From a scrutiny perspective, the committee considers that the bill should be amended to remove the penalty of imprisonment from the strict liability offence in subsection 180-37(3), consistent with the principles set out in the *Guide to Framing Commonwealth Offences*.[11] The committee requests the minister's advice in relation to this matter.

Privilege against self-incrimination[12]

1.20 The bill seeks to insert a number of broader powers for the Registrar to compel the production of books. Section 461-15 of the Act currently provides it is not a reasonable excuse for a person to refuse to, or fail to, give information or produce a book because the information or production of the book might tend to incriminate the person or make the person liable to a penalty. This section therefore overrides the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[13]

1.21 A limited use immunity is included in subsection 461-15(2) for oral statements only. No use or derivative use immunity is provided in relation to the production of books. The committee recognises that there may be certain circumstances in which the privilege against self-incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will

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

10 Explanatory memorandum, p. 25.

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

12 Schedule 1, item 6, proposed sections 453-2, 453-3 and 453-4. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

13 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

1.22 In this instance, the statement of compatibility states:

> The Bill gives the Registrar broader powers, based on ASIC's powers in relation to the production of books. In particular, the existing powers relating to the production of books in section 453-5 will be replaced by new powers in section 453-2, 453-3 and 453-4 which are based on ASIC's powers. Details of the relevant provisions 85 are in Item 6 of the explanatory memorandum. The new provisions do not directly affect the privilege against self-incrimination. However, like the existing power to require production of books in section 453-5, the new provisions will be subject to the abrogation of the privilege against self-incrimination in the existing section 461-15.[14]

1.23 The statement of compatibility also provides the justification provided for the abrogation of the privilege against self-incrimination in section 461-15 in the explanatory memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill 2006:

> Proposed section 461-15 is based on section 68 of the ASIC Act, which also restricts the provision of derivative use immunity and provides use immunity for answers to questions, not for documents produced. The enactment of more limited immunities for ASIC and APRA followed extensive inquiries and empirical research into the particular difficulties of corporate regulation. The circumscribing of immunities was recommended by the Joint Standing Committee on Companies and Securities (1992) and by the 'Review of the Derivative Use Immunity Reforms' by John Kluver (1997). It was accepted that a full 'use' and 'derivative use' immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences. In light of the Registrar's similar role as a corporate regulator, a limited immunity is also justified here.[15]

1.24 While acknowledging these explanations, the committee considers that any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by a use and derivative use immunity (providing that the information or documents produced or answers given, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings). In this case, the committee notes that section 461-15 includes a limited use immunity but not a derivative use immunity (meaning anything obtained as a consequence of the requirement to produce a document or answer a question can be used against the person in criminal proceedings).

14 Statement of compatibility, pp. 83-84.

15 Statement of compatibility, p. 83.

1.25 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding powers in relation to the production of books in circumstances where the privilege against self-incrimination has been abrogated and no use or derivative use immunity is provided.

Investment Funds Legislation Amendment Bill 2021

Purpose	This bill seeks to amend the *Future Fund Act 2006* to enact a new employment framework for staff of the Future Fund Management Agency. The new employment framework reinforces the independence of the Future Fund Board from the Australian government and better aligns the framework with norms in the financial services industry. The bill also amends the *Freedom of Information Act 1982* to provide a partial exemption for documents handled by the Future Fund Board and the Agency in respect of the Board's investment activities. The Bill also makes further amendments to the *Medical Research Future Fund Act 2015*, to streamline the administration of the Medical Research Future Fund, including making state and territory governments eligible to receive funding directly from the Medical Research Future Fund special account. The Bill also amends the *Emergency Response Fund Act 2019* to transfer the administrative responsibility for expenditure from the Emergency Response Fund to the National Recovery and Resilience Agency.
Portfolio	Finance
Introduced	House of Representatives on 25 August 2021

Instruments not subject to parliamentary disallowance[16]

1.26 Item 4 of Schedule 1 to the bill seeks to insert proposed sections 79B and 79C into the *Future Fund Act 2006* to provide that the Future Fund Chair must determine a Code of Conduct for the new Future Fund Management Agency (the Agency) and a set of Agency Values.

1.27 Proposed subsections 79B(5) and 79C(6) respectively provide that the Code of Conduct and the Agency Values are not legislative instruments.

1.28 The committee notes that, as instruments made under proposed sections 79B and 79C are specified to not be legislative instruments, they will not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such there is no parliamentary scrutiny of non-legislative instruments. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to

16 Schedule 1, item 4, proposed 79B and 79C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

include a justification for why instruments made under proposed sections 79B and 79C are not considered to be legislative in character. In this instance, the explanatory memorandum states in relation to proposed subsection 79B(5) that:

> New subsection 79B(5) would clarify that the Agency Code of Conduct is not a legislative instrument. This is because it has an administrative rather than a legislative character.[17]

1.29 An almost identical explanation is provided for proposed subsection 79C(6).[18] It is not clear to the committee from these explanations why the determinations are administrative in character rather than legislative. It would appear that a broad power to make a Code of Conduct or a set of Agency Values may determine or alter the content of the law and therefore be of legislative character. For example, the committee notes that proposed 79C(3) provides that employees of the Agency must uphold the Agency Values.

1.30 Further, from a scrutiny perspective, the committee considers, that given the potentially significant nature of the determinations, it is important to allow for additional parliamentary scrutiny and oversight of instruments made under proposed sections 79B and 79C. In this regard, the committee notes that equivalent Codes of Conduct for the Australian Public Service,[19] and the Australian Parliamentary Service,[20] as well as equivalent Values for the Australian Public Service,[21] and the Australian Parliamentary Service,[22] are set out in primary legislation. It is therefore unclear to the committee why the Code of Conduct and Agency Values for the Future Fund Agency are not subject to *any* level of parliamentary scrutiny.

1.31 This issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015,*[23] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[24] and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit

17 Explanatory memorandum, p. 13.

18 Explanatory memorandum, p. 13.

19 *Public Service Act 1999*, section 13.

20 *Parliamentary Service Act 1999*, section 13.

21 *Public Service Act 1999*, section 10.

22 *Parliamentary Service Act 1999*, section 10.

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

24 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.[25]

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

- **why it is considered necessary and appropriate that the Code of Conduct and Agency Values made under proposed sections 79B and 79C 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.**

Parliamentary scrutiny—section 96 grants to the states[26]

1.33 Item 16 of Schedule 3 to the bill seeks to amend section 24 of the *Medical Research Future Fund Act 2015* (the Act) to provide that it is a purpose of the Medical Research Future Fund Special Account to make grants to a state or territory or an authority of a state or territory. Section 27 of the Act provides that the terms and conditions on which financial assistance is to be granted is to be set out in a written agreement between the Commonwealth and the grant recipient. Item 21 of Schedule 3 to the bill seeks to amend section 27 to clarify that the section applies to grants to a state or territory.

1.34 The committee notes that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them.[27] Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.35 In this instance, however, neither the bill nor the Act contains any guidance as to the terms and conditions on which financial assistance may be granted. In addition, there is no requirement to table the written agreements between the Commonwealth and the states and territories in the Senate to ensure that senators are at least made

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

26 Schedule 3, item 16, proposed paragraphs 24(e) and 24(f). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

27 Section 96 of the Constitution provides that: '…the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

aware of, and have an opportunity to debate, any agreements made under section 27 of the Act. In this context, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

1.36 The committee therefore requests the minister's advice as to whether the bill can be amended to:

- **include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**
- **include a requirement that written agreements with the states and territories about grants of financial assistance relating to medical research made under section 27 of the Act are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days after being made.**

Live Performance Federal Insurance Guarantee Fund Bill 2021

Purpose	This bill seeks to place an obligation on the Treasurer to make a legislative instrument for the establishment, governance and operation of the Live Performance Insurance Guarantee Fund. The purpose of the fund is to underwrite insurance for the live performance industry to deal with the market failure that exists within the insurance industry.
Sponsor	Senator Sarah Hanson-Young
Introduced	Senate on 25 August 2021

Significant matters in delegated legislation[28]

1.37 Clause 3 of the bill provides that the Treasurer must, within 30 days of the commencement of the provision, make rules to provide for the establishment, governance and operation of a Live Performance Insurance Guarantee Fund. The Fund is intended to underwrite an insurance scheme for the live performance sector in response to the impact of the COVID-19 pandemic on that industry.

1.38 The committee has consistently drawn attention to framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as the establishment of a substantial Commonwealth insurance fund, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.39 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key aspects of the scope and operation of the proposed Live Performance Federal Insurance Guarantee Fund to delegated legislation.

28 Clause 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

Bills with no committee comment

1.40 The committee has no comment in relation to the following bills which were introduced into the Parliament between 23-26 August 2021:

- Health Insurance Amendment (Enhancing the Bonded Medical Program and Other Measures) Bill 2021
- National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2021
- Paid Parental Leave Amendment (COVID-19 Work Test) Bill 2021
- Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021
- Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021
- Treasury Laws Amendment (2021 Measures No. 7) Bill 2021

Commentary on amendments and explanatory materials

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

1.41 On 25 August 2021, the Assistant Minister to the Minister for the Public Service (Mr Morton) tabled an addendum to the explanatory memorandum to the bill.

1.42 The committee thanks the assistant minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[29]

Surveillance Legislation Amendment (Identify and Disrupt) Bill 2021

1.43 On 24 August 2021, the House of Representatives agreed to 60 government amendments to the bill. Additionally, the Minister for Home Affairs (Mrs K. L. Andrews) presented an addendum to the explanatory memorandum to the bill and a supplementary explanatory memorandum relating to the government amendments to the bill.

1.44 In *Scrutiny Digest 1 of 2021* and *Scrutiny Digest 5 of 2021* the committee raised significant scrutiny concerns regarding the introduction of three new types of warrants for investigating and disrupting online crime.[30]

1.45 The committee welcomes these amendments which appear to address some, but not all, of the committee's scrutiny concerns. In particular, the committee welcomes amendments that:

- **provide additional criteria to be considered by eligible judges or AAT members when issuing warrants or assistance orders, including consideration of the privacy implications for third parties;**
- **require additional matters to be considered before an emergency authorisation may be issued; and**
- **provide a more detailed definition of 'criminal network of individuals'.**

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29 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, 16 June 2021, pp. 34-37.

30 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, pp. 29-47; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2021*, 17 March 2021, pp. 120-155.

1.46 The committee also thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.

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

- Royal Commissions Amendment (Protection of Information) Bill 2021.[31]

31 On 25 August 2021, the Senate agreed to 7 government amendments to the bill, and the Attorney-General (Senator Cash) tabled a supplementary explanatory memorandum relating to the government amendments to the bill.

Chapter 2

Commentary on ministerial responses

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

Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* (the Act) to enable the Electoral Commissioner or their delegate to declare a person to be a 'designated elector', on the basis of a reasonable suspicion that the elector has voted more than once in the same election. The bill also seeks to amend the penalty for the offence of interference with political liberty in section 327 of the Act.
Portfolio	Finance
Introduced	House of Representatives on 12 August 2021
Bill status	Passed both Houses

Broad discretionary power[1]

2.1 In *Scrutiny Digest 13 of 2021* the committee requested the assistant minister's advice as to whether the bill can be amended to include at least high-level guidance on the factors the Electoral Commissioner may take into account when determining that an elector should be declared a 'designated elector'.[2]

Assistant Minister's response[3]

2.2 The assistant minister advised:

> In relation to proposed section 202AH into the *Commonwealth Electoral Act 1918* (the Electoral Act), I note the Committee's comments about the

1 Schedule 1, item 10, proposed section 202AH. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 8-9.

3 The minister responded to the committee's comments in a letter dated 26 August 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 14 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

provision to allow the Electoral Commissioner to declare an elector as a 'designated elector' if the Electoral Commissioner reasonably suspects that the elector has voted more than once in an election.

I note the explanatory memorandum explains that:

A reasonable suspicion can be determined by any means available to the Electoral Commissioner. For example, this may include consideration of records of certified-lists, which contain multiple-marks recorded against an elector's name as having voted more than once in a single election.

Proposed sections 202AJ and 202AK also set out the conditions and procedures for the review of a decision to declare an elector as a designated elector.

I am satisfied this provides sufficient guidance as to the appropriate exercise of the power to declare a person a designated elector.

Committee comment

2.3 The committee thanks the assistant minister for this response and for providing it to the committee in a timely manner. The committee notes the assistant minister's advice that sufficient guidance as to the appropriate exercise of the power to declare a person a 'designated elector' is set out in the explanatory memorandum. The assistant minister also advised that review of a decision to declare a person a 'designated elector' is provided for under proposed sections 202AJ and 202AK of the *Commonwealth Electoral Act 1918*.

2.4 While the committee acknowledges this advice, the committee reiterates that the bill provides no guidance on its face as to what considerations the Electoral Commissioner may take into account in forming a reasonable suspicion that an elector has voted more than once in an election and subsequently making a decision to declare an elector as a 'designated elector'.

2.5 The committee remains of the view that the bill provides the Electoral Commissioner with a broad discretionary power to declare an elector a 'designated elector'. However, in light of the fact that this bill has already passed both Houses of the Parliament and noting that both internal and external merits review is available, the committee makes no further comment on this matter.

Electoral Legislation Amendment (Party Registration Integrity) Bill 2021

Purpose	This bill seeks to amend the registration eligibility requirements for a federal non-Parliamentary party. These amendments increase the minimum membership requirements for registration from 500 to 1500 unique members. The bill also amends the prohibitions regarding registrable names, abbreviations, and logos.
Portfolio	Finance
Introduced	House of Representatives on 12 August 2021
Bill status	Passed both Houses

Administrative power not defined with sufficient precision[4]

2.6 In *Scrutiny Digest 13 of 2021* the committee requested the assistant minister's advice as to whether the bill can be amended to:

- replace 'frivolous or vexatious' with alternate terms, such as 'nonsensical', 'malicious' or 'misleading', which more appropriately define the scope of the power at section 129; or
- alternatively, whether the bill can be amended to:
  - include examples of frivolous or vexatious party names; or
  - include an inclusive definition of the phrase 'frivolous or vexatious'; or
  - set out matters that the Electoral Commission may consider in determining whether a party name or abbreviation is frivolous or vexatious.[5]

Assistant Minister's response[6]

2.7 The assistant minister advised:

4 Schedule 1, item 6, paragraph 129(1)(b). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2021*, pp. 10-11.

6 The minister responded to the committee's comments in a letter dated 26 August 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 14 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> In relation to proposed amendment of section 129(1)(b) of the Electoral Act, I note the Committee's comments with regards to provision to allow the Electoral Commission to refuse an application for the registration of a political party if, in its opinion, the party name or the abbreviation of the party name of the applicant is frivolous or vexatious.
>
> I note the explanatory memorandum to the Bill provides that the terms frivolous and vexatious *"are to be given their ordinary meaning, and are intended to include party names or abbreviations that are nonsensical or are malicious in their application. This would include, for example, an applicant seeking to register 'Australian Electoral Commission', or 'Australian Government' as a political party."*
>
> The Electoral Act already provides that a refusal of an application for the registration of a political party, including for the reasons relating to proposed amendment of section 129(1)(b) is a 'reviewable decision' as defined in section 141.
>
> I am satisfied this provides sufficient guidance as to the appropriate exercise of the proposed measure to allow the Electoral Commission to refuse an application for the registration of a political party if, in its opinion, the party name or the abbreviation of the party name of the applicant is frivolous or vexatious.

Committee comment

2.8 The committee thanks the assistant minister for this response and for providing it to the committee in a timely manner. The committee notes the assistant minister's advice that sufficient guidance as to the appropriate exercise of the power to refuse an application for the registration of a political party on the basis that the party name or abbreviation is 'frivolous or vexatious' is set out in the explanatory memorandum. The assistant minister also advised that a refusal of an application for the registration of a political party is a 'reviewable decision' under section 141 of the *Commonwealth Electoral Act 1918* (the Electoral Act).

2.9 While the committee acknowledges this advice, the committee reiterates that 'frivolous' and 'vexatious' are imprecise terms which, as a result, may confer a broad discretion on the Electoral Commission to refuse or approve applications to register a party name.

2.10 From a scrutiny perspective, the committee remains of the view that relying solely on the ordinary meaning of 'frivolous or vexatious' means that the scope of the power afforded by proposed paragraph 129(1)(b) is not defined with sufficient precision. In this context, the committee notes that insufficiently defined administrative powers may be exercised arbitrarily or inconsistently and may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles.

2.11 In addition, the committee notes that 'frivolous or vexatious' is a well-established concept within the common law in relation to legal claims which are

groundless or instituted to achieve a wrongful purpose. This meaning of the term is used elsewhere in Commonwealth legislation, including within the Electoral Act at sections 72 and 116, but the context in which the term is used in these instances appears to be incongruent with the use of the term in the proposed amendment to paragraph 129(1)(b).

2.12 The committee remains of the view that it would be appropriate to further define the power provided to the Electoral Commission under proposed paragraph 129(1)(b) by providing additional guidance as to when the power should be appropriately used.

2.13 The committee therefore suggests that when amendments to the Electoral Act are being proposed in the future, consideration should be given to amending the Electoral Act to replace 'frivolous or vexatious' with alternate terms, such as 'nonsensical', 'malicious' or 'misleading', which more appropriately define the scope of the power at section 129.

2.14 If such an amendment is not considered appropriate, at a minimum, consideration should be given to amending the Electoral Act to:

- **include examples of frivolous or vexatious party names; or**
- **include an inclusive definition of the phrase 'frivolous or vexatious'; or**
- **set out matters that the Electoral Commission may consider in determining whether a party name or abbreviation is frivolous or vexatious.**

2.15 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on 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 draws the following bills to the attention of Senators:

- Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021;[3]
- Investment Funds Legislation Amendment Bill 2021;[4] and

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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*.

3 Part 16 establishes the Aboriginal and Torres Strait Islander Corporations Assets Protection Special Account.

4 Schedule 3 amends the Medical Research Future Fund Special Account. Schedule 4 continues and renames the 'Home Affairs Emergency Response Special Account' to the 'Emergency Response Fund Payments Special Account'.

- National Health Amendment (COVID-19) Bill 2021.[5]

Senator Helen Polley
Chair

5 Proposed Part VIIIB of the *National Health Act 1953* would provide the Minister for Health with a spending power, which relies on the standing appropriation in subsection 137(1) of the Act, to enter into arrangements and make payments in relation to securing COVID-19 vaccines and related goods and services (such as boosters, necessary consumables, and COVID-19 treatments). This power will be time-limited to 30 June 2022.