The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

It is the committee's usual practice to table a *Scrutiny Digest* (the 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.

Aboriginal Land Grant (Jervis Bay Territory) Amendment (Strengthening Land and Governance Provisions) Bill 2022

Purpose	This bill seeks to amend the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* to facilitate home ownership style leases, strengthen local decision-making, improve the Wreck Bay Aboriginal Community Council's governance and corporate operations, and amend or remove outdated or unclear provisions.
Portfolio	Indigenous Australians
Introduced	House of Representatives on 26 October 2022

No-invalidity clause[1]

1.2 This bill seeks to amend the Wreck Bay Aboriginal Community Council's governance and corporate operations in several ways, including by prescribing new eligibility criteria for executive members. The bill seeks to insert proposed subsection 29(1) into the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Act) to provide that a person is not eligible to be an executive member unless the person is a registered member and a fit and proper person. Proposed section 34F sets out the meaning of fit and person for the purposes of the Act, including that a person has not been convicted of certain kinds of offences or is not an undischarged bankrupt.[2] However, proposed subsection 29(1A) provides that anything done by or in relation to a person purporting to hold the office of an executive member is not invalid merely because the person is not a fit and proper person.

1.3 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does

1 Schedule 1, item 20, proposed subsection 29(1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

2 See Schedule 1, item 29, proposed section 34F.

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. In this instance, the explanatory memorandum provides no explanation, merely restating the effect of the provision.

1.4 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 29(1A) of the bill.

Broad delegation of administrative powers[3]

1.5 Item 29 of Schedule 1 to the bill seeks to insert proposed Division 4A into the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* in order to regulate the appointment, functions and powers of the Chief Executive Officer. Proposed subsection 34E(1) provides that the Chief Executive Officer may, in writing, delegate all or any of its functions or powers to an employee of the Wreck Bay Aboriginal Community Council (the Council).

1.6 The bill provides similar powers in relation to the executive committee. Proposed subsection 36(1) of Schedule 1 to the bill provides that the executive committee may, in writing, delegate all or any of its functions or powers, other than the powers set out at sections 38 or 39, to a subcommittee established under section 35A, the Chief Executive Officer or an employee of the Council. Section 38 relates to the granting of a lease of, or a licence to use, Aboriginal Land, while section 39 allows the Council to surrender to the Crown the whole of its estate or interest in any part of Aboriginal Land.

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

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3 Schedule 1, item 29, proposed subsection 34E(1); Schedule 1, item 33, proposed subsection 36(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation as to why these are considered necessary should be included in the explanatory memorandum.

1.8 In relation to the delegation of powers set out under proposed subsection 34E(1), the explanatory memorandum states:

> The proposed delegation power is necessary and appropriate given the broad remit of the Chief Executive Officer's functions and powers.
> …
> It would not be appropriate to impose seniority or other limits on the CEO's discretion to delegate given the small size of the Council and its employee base.[4]

1.9 An identical explanation has been provided in relation to proposed subsection 36(1).

1.10 The committee acknowledges that it may sometimes be inappropriate to impose stringent seniority limits on delegation powers in relation to agencies with a small number of staff. However, in this case it is not clear to the committee why there could not be some limit on the persons to whom the Chief Executive Officer and the executive committee may delegate their functions or powers. For example, a requirement that the Chief Executive Officer or the executive committee are satisfied that the person has the appropriate training, qualifications, skills or experience to appropriately exercise the delegated powers and functions.

1.11 In light of the above, the committee requests the minister's advice as to whether the bill could be amended to require that the Chief Executive Officer and the executive committee, when exercising the delegation power under proposed subsections 34E(1) and 36(1), must be satisfied that the relevant person has the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

4 Explanatory memorandum, p. 21.

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Purpose	This bill seeks to refine and strengthen the legal and regulatory frameworks relating to sexual harassment and discrimination in Australia. This bill seeks to amend the: • *Australian Human Rights Commission Act 1986*; • *Sex Discrimination Act 1984*; • *Workplace Gender Equality Act 2012*; • *Disability Discrimination Act 1992*; • *Racial Discrimination Act 1975*; and • *Age Discrimination Act 2004*. The bill would also make consequential amendments to the: • *Federal Circuit and Family Court of Australia Act 2021*; • *Federal Court of Australia Act 1976*; and • *Inspector-General of Intelligence and Security Act 1986*.
Portfolio	Attorney-General
Introduced	House of Representatives on 27 September 2022

Retrospective application

Broad discretionary power[5]

1.12 The *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Age Discrimination Act 2004* (the anti-discrimination Acts) currently provide that it is a criminal offence to commit an act of victimisation against another person.[6] Part 1 of Schedule 7 to the bill seeks to insert new civil victimisation provisions into each of the anti-discrimination Acts[7] and make consequential amendments to the definition of

5 Schedule 7, Part 2, items 17 and 18. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

6 See section 42 of the *Disability Discrimination Act 1992*; subsection 27(2) of the *Racial Discrimination Act 1975*; and section 51 of the *Age Discrimination Act 2004.*

7 Proposed section 47A of the *Disability Discrimination Act 1992*; proposed section 58A of the *Racial Discrimination Act 1975*; and proposed section 18AA of the *Age Discrimination Act 2004*.

'unlawful discrimination' in the *Australian Human Rights Commission Act 1986* (the AHRC Act).[8] The practical effect of these amendments is that victimising conduct could form the basis of civil or criminal proceedings, or both.

1.13 Items 17 and 18 of Schedule 7 to the bill provide application and transitional arrangements in relation to the proposed civil victimisation provisions. Item 17 provides that the proposed civil victimisation provisions would apply to victimising conduct that has occurred prior to the commencement of the bill. The committee notes that the effect of item 17 is that the proposed civil victimisation provisions will be retrospective in operation.

1.14 Item 18 provides that the existing definition of 'unlawful discrimination' in the AHRC Act, which currently references criminal victimisation provisions in the anti-discrimination Acts, would continue to apply in relation to complaints concerning victimising conduct engaged in prior to the commencement of the bill.[9] Subitems 18(3), (4) and (5) would provide the President of the Australian Human Rights Commission (AHRC) with discretion to deal with complaints of victimisation lodged with the AHRC prior to commencement as if the acts referred to within those complaints were unlawful under the proposed civil victimisation provisions.

1.15 Retrospective application challenges a basic principle of the rule of law that laws should only operate prospectively. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.16 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity.

1.17 In this instance, the explanatory memorandum notes that retrospectivity is appropriate because it is restoring the law to its original intention:

> As the existing victimisation provisions in all the Commonwealth anti-discrimination Acts were always intended to provide the basis of civil victimisation claims – through the operation of the definition of 'unlawful

8 'Unlawful discrimination' is defined in subsection 3(1) of the AHRC Act. Individuals may lodge a complaint of 'unlawful discrimination' with the Australian Human Rights Commission under section 46P of the AHRC Act.

9 Subsection (1) of item 18. Under subsection (2) of item 18, following the commencement of item 18 victimisation complaints should be made in relation to proposed civil victimisations provision to deal with victimisation as a civil cause of action.

> discrimination' in the AHRC Act – the new civil victimisation provisions would be retrospective in operation. The effect of item 17 would be to give subsections 47A(1) of the AD Act, 58A(1) of the DD Act and 18AA(1) of the RD Act retrospective application to acts of victimisation that occurred prior to the commencement of this Bill and ensure this subsection operates effectively to cover those pre-commencement acts of victimisation. This will ensure that a complainant seeking to make a complaint about victimising conduct that occurred prior to commencement is not precluded from using the new subsection and not disadvantaged compared to complainants seeking to make a complaint about conduct engaged in after commencement. It is appropriate for this provision to apply in relation to conduct that has already occurred given it is confirming the existing civil jurisdiction of section 51 of the AD Act, section 42 of the DD Act and subsection 27(2) of the RD Act and not introducing a new form of liability.[10]

1.18 The explanatory memorandum also notes that the proposed civil victimisation provisions are intended to clarify judicial uncertainty:

> … there have been three cases since 2011 that questioned whether the federal courts have jurisdiction to hear a *civil* application of 'unlawful discrimination' under the AHRC Act that relates to victimisation. This legal uncertainty has arisen predominantly because these provisions are set out as a criminal offence with criminal penalties.[11]

1.19 The committee notes that while the intention of the bill may be to restore the position that was intended when the original anti-discrimination Acts were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified.

1.20 In addition, the committee has generally not considered judicial uncertainty to be, of itself, sufficient justification for retrospective application. It is unclear whether the changes made by this bill will have any impact on proceedings which have already been instituted. It is also unclear from this explanation why it is necessary and appropriate to provide the President with a broad discretion to deal with complaints of victimisation lodged with the AHRC prior to commencement as if they were complaints lodged in relation to the proposed civil victimisation provisions. The committee's scrutiny concerns in this regard are heightened by the absence of legislative guidance as to the circumstances in which it may be appropriate for the President to exercise this power.

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

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10 Explanatory memorandum, pp. 103–104.

11 Explanatory memorandum, pp. 97–98.

- **why it is necessary and appropriate to apply the proposed civil victimisation provisions to acts of victimisation that occurred prior to the commencement of the bill;**
- **the extent to which individuals are expected to be affected by the retrospective application of the bill, including whether any court proceedings which have already been instituted are likely to be affected;**
- **why it is necessary and appropriate to provide the President with a broad discretion to deal with complaints concerning conduct that occurred prior to the commencement of the bill on the basis of the new civil victimisation provisions; and**
- **whether the bill can be amended to include at least high-level guidance regarding the exercise of the President's discretion or, at a minimum, whether the explanatory memorandum can be updated to include this guidance.**

Broad delegation of administrative power[12]

1.22 Part 1 of Schedule 2 to the bill introduces a positive duty in the *Sex Discrimination Act 1984* for employers and persons conducting a business or undertaking to take measures to eliminate certain discriminatory conduct. Item 23 of Schedule 2 provides the AHRC with broad powers to monitor and assess compliance with this new positive duty.[13] Among other things, this includes powers to:

- conduct inquiries into a person's compliance with the positive duty;[14]
- obtain information and documents relevant to an inquiry;[15] and
- issue, reconsider and enforce compliance notices.[16]

1.23 The committee notes that under existing subsection 19(2) of the AHRC Act the President of the AHRC would be able to delegate the majority of these powers to another member of the AHRC, a member of the staff of the AHRC or any other person. Proposed subsection 19(2C) would limit delegation of the powers to issue, reconsider

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12 Schedule 2, Part 2, Division 2, item 23. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

13 Item 23 provides that Division 2 of Part 2 of Schedule 2 to the bill commences 12 months after Royal Assent.

14 Schedule 2, item 23, proposed section 35B.

15 Schedule 2, item 23, proposed section 35D.

16 Schedule 2, item 23, proposed sections 35F, 35G and 35J.

and enforce compliance notices to members of the Senior Executive Service and Executive Level 2 employees of the AHRC.

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

1.25 In this instance, the explanatory memorandum states that:

> In practice, it may be necessary for another person within the Commission to exercise the functions relating to compliance notices on the President's behalf, as the President has limited time and resources to perform all the functions conferred on them under the AHRC Act. However, the issuing, reconsideration and enforcement of compliance notices are significant and complex functions which have serious implications for employers and people conducting a business or undertaking. Allowing delegation only to senior and experienced employees would achieve the appropriate balance between practical considerations and the significance of these functions.[17]

1.26 The committee acknowledges that it may sometimes be appropriate to delegate powers to a wide range of staff in order to allow for administrative efficiency. However, in this case, it is not clear to the committee why it is appropriate to permit the President to delegate the powers under proposed sections 35B–35E and 35H to a member of the staff of the AHRC or to *any* other person. The committee notes that proposed subsection 19(2C) limits the delegation of certain powers regarding compliance notices to members of the Senior Executive Service and Executive Level 2 employees of the AHRC. It is unclear from the explanation why similar limitations cannot be included in relation to the powers under proposed sections 35B–35E and 35H. At a minimum, the committee considers that existing subsection 19(2) could be amended to provide that delegates possess the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

1.27 The committee takes this opportunity to emphasise that it does not consider consistency with existing provisions to be sufficient justification for allowing the broad delegation of administrative powers and functions.

17 Explanatory memorandum, p. 52.

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

- **why it is necessary and appropriate to allow the President to delegate powers under proposed sections 35B–35E and 35H to another member of the AHRC, a member of the staff of the AHRC or any other person; and**
- **whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or to further limit the categories of people to whom those powers might be delegated.**

Tabling of documents in Parliament[18]

1.29 Schedule 3 to the bill seeks to amend the AHRC Act to confer a new inquiry function on the AHRC to enable it to inquire into, and report on, issues of systemic unlawful discrimination. Proposed subsection 35Q(1) provides that the AHRC may report to the minister or publish a report at the conclusion of an inquiry into systemic unlawful discrimination, or both. Item 10 of Schedule 3 amends section 46 of the AHRC Act so that any reports provided to the minister under proposed subsection 35Q(1) would not have to be tabled in the Parliament.

1.30 The committee's consistent scrutiny view is 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 not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification for removing a tabling requirement. In this instance, the explanatory memorandum merely restates the operation of the provision.[19]

1.31 Noting the impact on parliamentary scrutiny of not requiring reports to be tabled in the Parliament, the committee requests the minister's advice as to why reports prepared for the minister under proposed subsection 35Q(1) are not required to be tabled in the Parliament.

18 Sch 3, item 10, proposed section 46. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

19 Explanatory memorandum, p. 78.

Appropriation Bill (No. 1) 2022-2023

Appropriation Bill (No. 2) 2022-2023

Purpose	Appropriation Bill (No. 1) 2022-2023 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government. Appropriation Bill (No. 2) 2022-2023 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure.
Portfolio	Finance
Introduced	House of Representatives on 25 October 2022

Parliamentary scrutiny—ordinary annual services of the government[20]

1.32 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.33 Appropriation Bill (No. 1) 2022-2023 (Appropriation Bill No. 1) seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.34 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[21]

1.35 The Senate Standing Committee on Appropriations and Staffing[22] has also actively considered the inappropriate classification of items as ordinary annual

20 Various provisions of Appropriation Bill (No. 1) 2022-2023. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

21 See Senate standing order 24(1)(a)(v).

22 Now the Senate Standing Committee on Appropriations, Staffing and Security.

services of the government.[23] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[24]

1.36 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

> 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
>
> 2) That appropriations for expenditure on:
>
> a) the construction of public works and buildings;
>
> b) the acquisition of sites and buildings;
>
> c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
>
> d) grants to the states under section 96 of the Constitution;
>
> e) new policies not previously authorised by special legislation;
>
> f) items regarded as equity injections and loans; and
>
> g) existing asset replacement (which is to be regarded as depreciation),
>
> are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.37 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of

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23 Senate Standing Committee on Appropriations, Staffing and Security, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

24 Senate Standing Committee on Appropriations, Staffing and Security, *45th Report: Department of the Senate's Budget Ordinary annual services of the government Parliamentary computer network*, 2008, p. 2.

government and new programs and projects or to identify the expenditure on each of those areas.[25]

1.38 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[26]

1.39 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[27]

1.40 Based on the Senate resolution of 22 June 2010, it appears that at least part of the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 1) 2022-2023:

- Powering Australia – Rewiring the Nation;[28]
- Office for Youth and Youth Engagement Strategy;[29] and
- Strategic Fleet Taskforce – establishment.[30]

1.41 While it is not the committee's role to consider the policy merit of these measures, the committee considers that they may have been inappropriately classified as 'ordinary annual services', thereby impacting upon the Senate's ability to subject the measures to an appropriate level of parliamentary scrutiny.

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25 Senate Standing Committee on Appropriations, Staffing and Security, *45th Report: Department of the Senate's Budget Ordinary annual services of the government Parliamentary computer network*, 2008, p. 2.

26 Senate Standing Committee on Appropriations, Staffing and Security, *45th Report: Department of the Senate's Budget Ordinary annual services of the government Parliamentary computer network*, 2008, p. 2.

27 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, *Senate Hansard*, 19 March 2018, pp. 1487–1490.

28 Budget Measures 2022-23 – Budget Paper No. 2, p. 72.

29 Budget Measures 2022-23 – Budget Paper No. 2, p. 93.

30 Budget Measures 2022-23 – Budget Paper No. 2, p. 165.

1.42 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;[31] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.43 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.44 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.45 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 1) 2022-2023 which should only contain appropriations that are not amendable by the Senate).

Parliamentary scrutiny—appropriations determined by the Finance Minister[32]

1.46 Clause 10 of Appropriation Bill (No. 1) enables the Finance Minister to allocate additional funds to entities when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

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31 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, pp. 402–406; *Fourth Report of 2015*, pp. 267–271; *Alert Digest No. 6 of 2015*, pp. 6–9; *Fourth Report of 2016*, pp. 249–255; *Alert Digest No. 7 of 2016*, pp. 1–4; *Scrutiny Digest 2 of 2017*, pp. 1–5; *Scrutiny Digest 6 of 2017*, pp. 1–5; *Scrutiny Digest 12 of 2017*, pp. 89–95; *Scrutiny Digest 2 of 2018*, pp. 1–7, *Scrutiny Digest 2 of 2019*, pp. 1–4, *Scrutiny Digest 3 of 2020*, pp. 1–4, *Scrutiny Digest 15 of 2020*, pp. 10–13, *Scrutiny Digest 8 of 2021*, pp. 5–8, *Scrutiny Digest 2 of 2022*, pp. 12–15.

32 Clause 10 of Appropriation Bill (No. 1) 2022-2023; Clause 12 of Appropriation Bill (No. 2) 2022-2023. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

1.47 Subclause 10(2) of Appropriation Bill No. 1 provides that when the Finance Minister makes such a determination the Appropriation Bill has effect as if it were amended to make provision for the additional expenditure. Subclause 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Bill No. 1 at $2,400 million. Identical provisions appear in Appropriation Bill (No. 2) 2022-2023 (Appropriation Bill No. 2), with a separate $3,600 million cap in that bill.[33] The amount available under the AFM provisions in these bills is significantly higher than that available in previous annual appropriation bills,[34] but is similar to amounts available during the COVID-19 pandemic.[35]

1.48 The committee considers that, in allowing the Finance Minister to allocate additional funds to entities up to a total of $6 billion via non-disallowable delegated legislation, the AFM provisions in Appropriation Bills Nos. 1 and 2 delegate significant legislative power to the executive. While this does not amount to a delegation of the power to create a new appropriation, the committee notes that one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[36] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.49 The committee's significant scrutiny concerns in relation to these provisions are heightened given that AFM determinations are not subject to the usual parliamentary disallowance process. In this regard, the committee notes that the explanatory memorandum to Appropriation Bill (No. 1) 2022-2023 suggests that exempting AFM determinations from disallowance:

> would reduce an entity's appropriation to its original level. Yet the urgent expenditure it has already undertaken validly prior to disallowance, in reliance upon the determination, would count towards the newly reduced appropriation…
>
> Accordingly, disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the

33 Clause 12 of Appropriation Bill (No. 2).

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

35 For example, proposed subsection 10(3) of *Appropriation Act (No. 1) 2021-2022* set a cap of $2 billion and subsection 12(3) of *Appropriation Act (No. 2) 2021-2022* set a cap of $3 billion.

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

Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.[37]

1.50 While noting this explanation, the committee notes that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless there are exceptional circumstances, and any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases. [38]

1.51 The committee concurs with the view expressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the disallowance status of AFM determinations. In particular, the committee agrees that if the AFM is used for a genuine emergency situation, the likelihood of it subsequently being disallowed would be virtually non-existent, and not sufficient to justify an exemption from disallowance. Instead, the potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgently circumstances, as intended by the Parliament.[39]

1.52 In addition, the committee is concerned about the breadth of the Finance Minister's discretion to make AFM Determinations. Subclause 10(3) of Appropriation Bill No. 1 provides that $2,000 million of the amount that may be included within an AFM determination made under that bill must relate to expenditure for the purposes of responding to circumstances relating to COVID-19,[40] an event that the Finance Minister is satisfied is a natural disaster,[41] or circumstances that the Finance Minister is satisfied constitute a national emergency.[42] Subclause 12(4) of Appropriation Bill No. 2 provides that the total of the amounts included within an AFM determination under that bill for the purposes of responding to circumstances relating to COVID-19 cannot be more than $600 million.

1.53 The committee welcomes the inclusion of provisions which limit the purposes for which additional funds may be allocated under an AFM determination. However, the committee notes that the bill provides no guidance on its face as to what considerations the Finance Minister may take into account in coming to a decision as

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37 Explanatory memorandum, p. 10.

38 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

39 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2022*, 25 January 2022, pp. 4–6.

40 Subparagraph 10(3)(b)(i) of Appropriation Bill (No. 1) 2022-2023.

41 Subparagraph 10(3)(b)(ii) of Appropriation Bill (No. 1) 2022-2023.

42 Subparagraph 10(3)(b)(iii) of Appropriation Bill (No. 1) 2022-2023.

to whether circumstances constitute a national emergency or a natural disaster. The committee notes that 'national emergency' and 'natural disaster' are imprecise terms. As a result, the committee considers that the bill provides the Finance Minister with a broad discretionary power to allocate additional funds to entities under an AFM determination.

1.54 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. When an administrative power is not defined with sufficient precision, the committee expects the explanatory memorandum to the bill to provide a sound justification for why it is necessary to set out the power in broad terms, including whether there are appropriate criteria or considerations that limit or constrain the exercise of the power, and whether these are contained in law or policy.

1.55 The explanatory memorandum to Appropriation Bill (No. 1) states that the AFM provisions:

> expand the scope of the statutorily limited AFM provision to also support expenditure on natural disaster and other national emergency related responses. The expanded AFM provision enables the Government to make funding available to events, such as flood and fire, in a timely manner should the relevant circumstances arise during the 2022-23 financial year, where it is not possible or not practical to pass further Appropriation Acts.
>
> The meaning of 'national emergency' for the purposes of subclause 10(3) is not limited to geographic scope alone; it can refer also to the scale, economic effects, or even resonance, of an emergency. On that broader interpretation, severe but localised emergencies could also be considered 'national'. Further, the term 'national emergency' for the purposes of subclause 10(3) is not linked to section 11 of the *National Emergency Declaration Act 2011*, which empowers the Governor-General to declare a national emergency.[43]

1.56 While noting this explanation, the committee considers that it would be appropriate to include additional guidance, including the example set out in the explanatory memorandum, on the face of the primary legislation. The committee considers that this would provide legislative guidance as to the appropriate exercise of the Finance Minister's power to make an AFM Determination. While acknowledging that it may be appropriate to maintain a degree of flexibility in relation to terms such as 'national emergency' or 'natural disaster', the committee considers that it would be possible to set out at least an *inclusive* definition of these terms, or, at a minimum, guidance in relation to the exercise of the Finance Minister's powers to make an AFM Determination.

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43 Explanatory memorandum, p. 9.

1.57 Finally, the committee notes that in *Scrutiny Digest 2 of 2022*, the committee thanked the minister for responding constructively to its proposals regarding the provision of additional information about transparency measures applying to AFM provisions within explanatory memoranda to future appropriation bills.[44] The committee welcomes the inclusion of this additional information regarding the AFM provisions within Appropriation Bills No. 1 and 2, including associated transparency measures, in the explanatory memorandums to these bills. The committee considers that the provision of this additional information provides the Parliament with important details to assist in scrutiny of the AFM provisions.

1.58 The committee requests the minister's advice as to whether the bill can be amended so that inclusive definitions of 'national emergency' and 'natural disaster' are set out on the face of the bill, or, at minimum, whether guidance on the exercise of the power in relation to those concepts may be provided on the face of the primary legislation.

1.59 The committee otherwise draws its general scrutiny concerns about AFM provisions to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the purposes for which up to $6,000 million in additional funds may be allocated in legislative instruments not subject to disallowance.

Parliamentary scrutiny—measures marked 'not for publication'[45]

1.60 Clause 4 of both Appropriation Bill (No. 1) and Appropriation Bill (No. 2) provide that portfolio budget statements (PBS) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PBS may be considered in interpreting the provisions of each bill. Moreover, the explanatory memorandums to the bills state that they should be read in conjunction with the PBS.[46]

1.61 Noting the important role of the PBS in interpreting Appropriation Bills No. 1 and No. 2, the committee has scrutiny concerns in relation to the inclusion of measures within the portfolio statements that are earmarked as 'not for publication' (nfp), meaning that the proposed allocation of resources to those budget measures is not

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45 Clause 10 of Appropriation Bill (No. 1) 2022-2023; Clause 12 of Appropriation Bill (No. 2) 2022-2023. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

45 Clause 10 of Appropriation Bill (No. 1) 2022-2023; Clause 12 of Appropriation Bill (No. 2) 2022-2023. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

46 Explanatory memorandum to Appropriation Bill (No. 1) 2022-2023, pp. 2–3; Explanatory memorandum to Appropriation Bill (No. 2) 2021-2022, pp. 2–3.

published within the PBS. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are commercial-in-confidence or relate to matters of national security.

1.62 Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the full amount of funding allocated to each Budget measure. However, where it is necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the portfolio statements. The committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the portfolio statements that are earmarked as nfp where there is either no, or only a very limited, explanation as to why it is appropriate to mark the measure as nfp.

1.63 In *Scrutiny Digest 16 of 2021*, the committee requested that future Department of Finance guides on preparing portfolio budget statements be updated to include guidance that, where a measure is marked as nfp, at least a high-level explanation should be included within the portfolio budget statements explaining why this is appropriate.[47] As a result, the Department of Finance updated the Guide to Preparing the Portfolio Budget Statements to reflect the committee's scrutiny concerns.[48] The committee notes that the most recent Department of Finance *Guide to Preparing the 2022-23 Portfolio Budget Statements* also includes advice reflecting the committee's scrutiny concerns.[49]

1.64 The committee welcomes the inclusion of this advice. However, the committee has scrutiny concerns in relation to the lack of detailed explanation provided within the PBS. For example, in the majority of cases explanations for measures marked as nfp within the 2022-23 portfolio statements merely state that the funding for a measure is not for publication due to commercial-in-confidence considerations, or due to national security reasons.

1.65 The committee notes that the high-level nature of these explanations makes it difficult to assess whether several of the measures categorised as nfp within the portfolio statements are appropriately categorised. More detailed explanations as to why it is appropriate to mark a Budget measure as nfp would allow for a greater level of parliamentary scrutiny over these explanations. For example, it is unclear to the

47 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, pp. 47–51.

48 See comments on Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022*, pp. 19–21.

49 Department of Finance, *Guide to preparing the 2022-23 Portfolio Budget Statements*, p. 36.

committee why it is appropriate not to publish total amounts in relation to the Rum Jungle Rehabilitation project.[50]

1.66 To this end, the committee notes that the mere existence of a commercial element in relation to a Budget measure is likely not sufficient, of itself, as a justification for not publishing any of the funding amount for that measure. The lack of detailed explanation makes it difficult for the Parliament and others to interrogate the rationale behind the classification of a measure as nfp. The committee considers that high-level explanations as to why a measure may be marked as nfp, beyond simply stating that commercial elements apply, could be included within the Budget documents without compromising commercial sensitivities.

1.67 Finally, the committee notes that there has been a significant upwards trend in the number of nfp measures being included within Budget Paper No. 2. For example, Budget Paper No. 2 for the 2004-05 Budget contained seven references to the term nfp, while Budget Paper No. 2 for the 2022-23 Budget contained 196 references. Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself.'[51] Given the parliament's fundamental scrutiny role over the appropriation of money from the Consolidated Revenue Fund, the committee has scrutiny concerns in relation to the proliferation of measures within the pbs for which the proposed allocation of resources is not published. Any decision not to publish the total amount for a Budget measure must be weighed against the significance of abrogating Parliament's fundamental scrutiny role.

1.68 In light of the above, the committee reiterates its significant scrutiny concerns that the Parliament is being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual Budget measure. The committee's concerns in relation to measures marked as 'not for publication' (nfp) are heightened in light of the upwards trend in the number of measures marked as nfp.

1.69 The committee thanks the Department of Finance for updating the *Guide to Preparing the 2022-23 Portfolio Budget Statements* to reflect the committee's scrutiny concerns as outlined in Scrutiny *Digest 16 of 2021*. However the committee notes that, from a scrutiny perspective, it would be appropriate to include more

50 Department of Industry, Science and Resources, *Portfolio Budget Statements October 2022-23*, pp. 41–42.

51 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61].

detailed explanations within the portfolio budget statements explaining why it is appropriate to mark a measure as nfp, where possible.

1.70 The committee will continue to consider this important matter in its scrutiny of future Appropriation bills.

Parliamentary scrutiny—section 96 grants to the states[52]

1.71 Clause 14 of Appropriation Bill No. 2 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.72 Clause 14 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[53] and
- the amounts and timing of those payments.[54]

1.73 Subclause 14(4) provides that determinations made under subclause 14(2) are not legislative instruments. The explanatory memorandum states that this is:

> because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 14(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[55]

1.74 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[56]

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52 Clause 14 and Schedules 1 and 2 to Appropriation Bill (No. 2) 2022-2023. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

53 Paragraph 14(2)(a) of Appropriation Bill (No. 2) Bill 2022-2023.

54 Paragraph 14(2)(b) of Appropriation Bill (No. 2) Bill 2022-2023.

55 Explanatory memorandum to Appropriation Bill (No. 2) 2022-2023, pp. 12–13.

56 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511–516; *Ninth Report of 2015*, pp. 611–614; *Fifth Report of 2016*, pp. 352–357; *Eighth Report of 2016*, pp. 457–460; *Scrutiny Digest 3 of 2017*, pp. 51–54; *Scrutiny Digest 6 of 2017*, pp. 7–10; *Scrutiny Digest 12 of 2017*, pp. 99–104; *Scrutiny Digest 2 of 2018*, pp. 8–11; *Scrutiny Digest 6 of 2018*, pp. 9–12; *Scrutiny Digest 4 of 2019*, pp. 9–12; *Scrutiny Digest 15 of 2020*, pp. 16–17, *Scrutiny Digest 8 of 2021*, pp. 13–14; *Scrutiny Digest 2 of 2022*, pp. 21–22.

1.75 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.76 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[57] These improvements include the addition of an Appendix E to Budget Paper No. 3,[58] which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them, and a mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[59]

1.77 The committee considers that these measures improve the ability of the Parliament to scrutinise the executive's use of the delegated power to make grants to the states and to determine terms and conditions attaching to them under section 96 of the Constitution.

1.78 The committee leaves to the Senate as a whole the appropriateness of clause 14 of Appropriation Bill (No. 2) 2022-2023, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

57 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2016*, pp. 7–10; and *Eighth Report of 2016*, pp. 457–460.

58 Appendix E of Budget Paper No. 3.

59 See Department of Finance, *Guide to Preparing the 2021-22 Portfolio Budget Statements*, p. 27.

Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2022

Purpose	This bill seeks to amend the *Australian Crime Commission Act 2002* to provide greater certainty with respect to the Australian Criminal Intelligence Commission (ACIC) Board's powers to authorise special ACIC operations and special ACIC investigations.
Portfolio	Attorney-General
Introduced	House of Representative on 26 October 2022

Coercive powers

Broad discretionary power

No-invalidity clause[60]

1.79 Schedule 1 to the bill seeks to amend provisions of the *Australian Crime Commission Act 2002* (the ACC Act) that relate to special ACC operations (special operations) and special ACC investigations (special investigations).[61] Under existing subsections 7C(2) and (3), the Australian Crime Commission (ACC) Board (the Board) may make a determination authorising a special operation or investigation.[62] The only condition for the exercise of this power is that the Board considers it to be in the public interest.[63] However, neither the bill nor the ACC Act provide any specific criteria as to when a matter may be in the public interest.

1.80 Special operations and investigations are intended to collect intelligence and disrupt and deter identified criminal syndicates.[64] Where the Board authorises a

60 Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (ii) and (iii).

61 A special operation is defined to mean an intelligence operation that the Board has authorised to occur. A special investigation is defined to mean an investigation relating to federally relevant criminal activity that the Board has authorised. See ACC Act, section 4.

62 ACC Act, s. 7C(4A). The Australian Crime Commission is also known as the Australian Criminal Intelligence Commission.

63 The public interest test was introduced by the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019.*

64 See, for example, ACC's *submission* to the Parliamentary Joint Committee on Law Enforcement's inquiry into the operation of the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019*, p. 1.

special operation or investigation, officers are able to use the ACC's coercive powers of examination outlined in Division 2 of Part 2 of the ACC Act to:

- compel people to give evidence for the purposes of a special operation or investigation; and
- issue notices requiring people to produce documents or things relevant to a special operation or investigation.

1.81 In addition, the ACC has a broad range of investigative powers, including the ability to make applications for search warrants, telephone interception and the use of surveillance devices.[65]

1.82 The committee has previously expressed scrutiny concerns in relation to the special operation and investigation framework.[66] In particular, the committee raised concerns regarding the Board's broad discretionary power to authorise a special operation or investigation and the inclusion of a no-invalidity clause in subsection 7C(4J). The committee continues to have these scrutiny concerns in relation to this bill, noting that the bill makes amendments to the definitions that underpin the jurisdictional limits of the Board's power to make a determination under subsections 7C(2) and (3).

1.83 The committee considers that the exercise of the Board's broad discretionary power to authorise a special operation or investigation could unduly trespass on personal rights and liberties, noting that a decision to authorise a special operation or investigation would allow significant coercive powers to be exercised under the ACC Act. For instance, the committee notes that the ACC's coercive powers of examination may operate to abrogate the privilege against self-incrimination, including in relation to persons facing unresolved criminal charges.[67] In this regard, the committee also notes that failure to attend or answer questions if required to do so is an offence.[68] The committee further notes that the ACC Act provides only limited protection for witnesses in the form of use immunity in some cases if self-incrimination is claimed.[69] The committee's scrutiny concerns are heightened in light of the absence of any specific criteria or considerations regarding the public interest test set out at existing subsection 7(4A) of the ACC Act.

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65 ACC Act, section 22. For discussion of these powers, see ACC, *Operations and investigations*, Operations and investigations | Australian Criminal Intelligence Commission (acic.gov.au) (accessed 16 November 2022).

66 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2019*, 5 December 2019; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2020*, 5 February 2020.

67 See, for example, ACC Act, section 25B.

68 ACC Act, section 30.

69 ACC Act, subsections 30(4) and (5).

1.84 Further, the committee has ongoing scrutiny concerns regarding the no-invalidity clause in subsection 7C(4J). The effect of subsection 7C(4J) is that the validity of a determination is not affected by any failure to comply with the requirements set out in subsection 7C(4C). Subsection 7C(4C) requires that a determination must, to the extent the Board reasonably considers appropriate, set out the purpose of the special operation or investigation and describe the general nature of the circumstances or allegations constituting the federally relevant criminal activity. The committee reiterates that 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. The committee therefore expects a sound justification for the inclusion of a no-invalidity clause. The committee notes that, despite seeking advice from the minister, no explanation was provided.

1.85 In light of the above, the committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the Australian Crime Commission Board's broad discretionary power to authorise special operations or investigations, noting that such an authorisation has the potential allow the exercise of significant coercive powers.

Broadcasting Services Amendment (Community Radio) Bill 2022

Purpose	This bill seeks to amend the *Broadcasting Services Act 1992* to provide greater regulatory clarity and flexibility for community radio broadcasters by simplifying aspects of community broadcasting licensing arrangements.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 27 October 2022

Availability of merits review[70]

1.86 Part 6 of the *Broadcasting Services Act 1992* (the Broadcasting Act) sets out requirements in relation to community broadcasting licences. A community broadcasting licence is a radio or television licence which provides a community broadcasting service.[71] Community broadcasting services are defined under section 15 of the Broadcasting Act to mean a not-for-profit service that is provided for a community purpose, is freely and readily available, and which complies with any additional criteria prescribed by the Australian Communications and Media Authority (ACMA) under section 19.

1.87 Under Part 6 of the Broadcasting Act the ACMA has the power to, among other things, allocate community broadcasting licences, impose conditions on those licences, and to renew, vary or transfer licences. Part 6A of the Broadcasting Act sets out similar powers in relation to temporary community broadcasting licences.

1.88 Item 7 of Schedule 1 to this bill seeks to amend existing subsection 91(2A) of the Broadcasting Act to alter the scope of the ACMA's discretionary power to refuse to renew a community broadcasting licence. The explanatory memorandum states that the intention of this amendment is to confirm that licence renewal is not a competitive process.[72]

1.89 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. The committee expects that any such

70 Schedule 1, item 7, proposed subsection 91(2A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

71 Section 6 of the *Broadcasting Services Act 1992*.

72 Explanatory memorandum, p. 7.

justification will refer to the criteria set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

1.90 It appears that a decision made by the ACMA under subsection 91(2A) will, or is likely to, affect individual interests. However, the decision does not appear to be subject to independent merits review. The committee notes that section 204 of the Broadcasting Act, which sets out decisions that are subject to Administrative Appeals Tribunal review, does not include a decision made under subsection 91(2A). By contrast a decision that a person is not a suitable applicant or licensee under subsection 83(2) is included with section 204 despite the fact that the ACMA must refuse to renew a licence under subsection 91(2) if a subsection 83(2) decision is made.

1.91 The committee notes that there is nothing in the explanatory memorandum stating why a decision under subsection 91(2A) is not subject to independent merits review.

1.92 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide that independent merits review will be available in relation to a decision made under proposed subsection 91(2A) of the bill.

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

Purpose	This bill seeks to amend the *Fair Work Act 2009* and related legislation to improve the workplace relations framework.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 27 October 2022

Broad delegation of administrative functions and powers[73]

1.93 Item 222 of Part 3 of Schedule 1 to the bill seeks to insert proposed paragraph 40(1)(ba) into existing section 40 of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). Section 40 currently allows the Federal Safety Commissioner (FSC) to delegate all or any of their powers and functions to Federal Safety Officers, members of the Senior Executive Service (SES) or a person prescribed by the rules. Proposed paragraph 40(1)(ba) provides that the FSC may also delegate all or any of their powers and functions to an APS employee whose duties relate to the powers and functions of the FSC. The committee notes that the FSC's role has a number of regulatory and administrative functions, including administering the Accreditation Workplace Health and Safety Scheme.[74]

1.94 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the SES. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.95 In this instance, the explanatory memorandum seeks to justify the broad delegations power on the grounds that proposed paragraph 40(1)(ab) would preserve the FSC's current delegation powers:

> The FSC can further delegate their functions or powers to APS employees engaged for the purposes of the Office of the FSC because of a transitional provision of the BCI C&T Act [*Building and Construction Industry*

73 Schedule 1, Part 3, item 222, proposed paragraph 40(1)(ba). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

74 See BCIIP Act, section 38.

> *(Consequential and Transitional Provisions) Act 2016*] preserving a regulation made under the Fair Work (Building Industry) Act 2012. Item 317 would repeal the BCI C&T Act. As such, this provision would ensure the FSC's current delegation powers are preserved, while avoiding convoluted drafting and enhancing transparency concerning the ability of the FSC to delegate their powers.[75]

1.96 While noting this advice, the committee does not consider that consistency with existing provisions is, of itself, sufficient justification for allowing the broad delegation of administrative powers and functions. From a scrutiny perspective, the committee continues to have concerns given the breadth of the power in proposed paragraph 40(1)(ab) to delegate any or all of the FSC's functions and powers to employees below the SES level. Further, the committee is concerned that the FSC may delegate these functions *any* APS employee whose duties relate to the powers or functions of the FSC.

1.97 In relation to the broad class of people to whom functions and powers may be delegated under proposed paragraph 40(1)(b), the explanatory memorandum states that:

> It is anticipated that powers would be delegated to Executive Level APS officers engaged in the Office of the FSC, who the FSC considers possess the appropriate training, qualifications, skills or experience to exercise the decision-making powers and / or carry out the administrative functions. This provision would also ensure the FSC is well-placed to delegate decisions arising under the Accreditation Scheme Rules to appropriate staff of the Office of the FSC if any conflicts of interest arise. The Office of the FSC would continue to ensure delegates are provided with policy and procedural guidance to assist in appropriate decision-making.[76]

1.98 The committee welcomes this advice but considers that it would be more appropriate if the bill included a requirement that the FSC is satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power or function.

1.99 In light of the above, the committee requests the minister's detailed advice as to whether the bill can be amended to:

- **provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated; or**
- **at a minimum, require that the Federal Safety Commissioner, when making a delegation under proposed paragraph 40(1)(ab), must be satisfied that the**

75 Explanatory memorandum, p. 32.

76 Explanatory memorandum, p. 32.

person has the appropriate training, qualifications or experience to appropriately exercise the delegated power or function.

Immunity from civil liability[77]

1.100 The bill seeks to introduce several provisions which provide immunity from civil liability. These provisions are set out in item 303 and subitem 323(3) of Part 3 of Schedule 1 to the bill. Part 3 of Schedule 1 would amend the BCIIP Act to abolish the Australian Building and Construction Commission (ABCC) and provide transitional arrangements, including to transfer the responsibility for the ABCC's ongoing civil court proceedings to the Fair Work Ombudsman (FWO).

1.101 Section 118 of the BCIIP Act currently provides protection from civil proceedings for the Australian Building and Construction (ABC) Commissioner in circumstances where a person suffered loss, damage or injury as a result of an act or omission committed in good faith and without negligence by a person referred to in subsection 118(2) while that person was executing powers or functions under the BCIIP Act. Item 303 would transfer this immunity to the FSC.

1.102 In addition, item 323 would substitute the FWO for the ABC Commissioner or an ABC Inspector as party to any civil proceedings pending in court immediately prior to the commencement of Division 1 of Part 3.[78] Subitem 323(3) provides that the FWO, a Fair Work Inspector, consultants and staff members of the Office of the FWO and any persons assisting the FWO[79] are protected from civil liability in relation to anything done, or omitted to be done, in good faith and without negligence in relation to ongoing civil court proceedings.[80]

1.103 The immunities provided for under item 303 and subitem 323(3) would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless a lack of good faith can be shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.104 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be

77 Schedule 1, Part 3, item 303, proposed section 118 and subitem 323(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

78 Division 1 of Part 3 would commence the day after the bill receives Royal Assent.

79 Defined in section 698 of the Fair Work Act.

80 The day after the bill receives Royal Assent.

soundly justified within the explanatory materials for the bill. In relation to the immunity provided under subitem 323(3), the explanatory memorandum states that:

> The item would additionally provide the FWO, staff of the Office of the FWO, a person assisting or engaged as a consultant to the FWO (under section 698 or 699 of the FW Act), and FW Inspectors protection from liability for conduct in good faith in relation to BCIIP Act matters as designated officials under s 118 of the BCIIP Act, as there is no equivalent protection in the FW Act. This would preserve the status quo in relation to all proceedings, ensuring that officials in the Office of the FWO have the appropriate protection for carrying out their regulatory functions.[81]

1.105 In relation to the transfer of the existing immunity in section 118 to the FSC, the explanatory memorandum states that item 303 would confer transitional functions necessary to facilitate the orderly and efficient winding up of the ABCC.[82]

1.106 While noting the above advice, the committee does not generally consider that consistency with existing provisions is, of itself, sufficient justification for provisions that confer immunity from liability, particularly where such immunity could affect individual rights. The committee therefore remains concerned that the immunity conferred by item 303 and subitem 323(3) is overly broad, particularly given that the effect of these clauses is that affected persons will have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

1.107 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on the Australian Building and Construction Commissioner, the Fair Work Ombudsman (FWO), a Fair Work Inspector, consultants and staff members of the Office of the FWO and any persons assisting the FWO.

Fees in delegated legislation[83]

1.108 Item 393 of Part 8 of Schedule 1 to the bill seeks to insert proposed section 527F into the BCIIP Act to provide that an 'aggrieved person' may make an application for the FWC to deal with a sexual harassment dispute. Proposed subsection 527H(1) provides that an application must be accompanied by the fee, if any, that is prescribed in the regulations. Proposed paragraphs 527H(2)(a) and (b) provide that the regulations may prescribe the application fee, or the method for indexing the fee.

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81 Explanatory memorandum, p. 53.

82 Explanatory memorandum, p. 41.

83 Schedule 1, Part 8, item 393, clause 527H. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

1.109 The committee has longstanding scrutiny concerns regarding provisions which allow fees to be calculated within delegated legislation where the bill contains no cap on the maximum fee amount, or any information or guidance as to how the fee will be calculated. The committee expects that any proposal to include fees within delegated legislation should be justified within the explanatory materials for the bill.

1.110 In this instance, the explanatory memorandum states that fees imposed under proposed section 527H will not amount to a tax.[84] While welcoming this advice, the committee considers that it would be more appropriate to include this as a requirement on the face of the bill. In this regard, the committee notes the advice set out in the Office of Parliamentary Counsel Drafting Direction 3.6 which states that:

> AGS has advised that it is inherent in the concept of a 'fee' that the liability does not amount to taxation. However, it is quite common to put such a provision in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that 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.[85]

1.111 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide high-level guidance regarding how the application fee in proposed subsection 527H(1) will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.

Broad discretionary power

Significant matters in delegated legislation[86]

1.112 Item 393 of Part 8 of Schedule 1 to the bill inserts proposed Part 3-5A into the *Fair Work Act 2009* (Fair Work Act) which merges the stop sexual harassment order jurisdiction in existing Part 6-4B with a new prohibition on sexual harassment. Proposed Part 3-5A would allow a worker who has been bullied or sexually harassed at work to apply to the FWC for an order to stop the bullying or sexual harassment. Proposed sections 527N, 527P and 527Q would, respectively, permit the Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service (ASIS) to declare by legislative instrument, with the approval of the Minister, that some or all of the stop sexual harassment order provisions do not apply in relation to specified activities, or persons who carry out work for the Director-General of Security or the Director-General of ASIS.

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84 Explanatory memorandum, p. 87.

85 Office of Parliamentary Counsel, *Drafting Direction 3.6*, October 2012, p. 38.

86 Schedule 1, Part 8, item 393, proposed sections 527N, 527P and 527Q. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

1.113 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Broad powers providing for exemptions to be made to restrict access to remedies are one such matter. Further, the committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum and that guidance or criteria in relation to the exercise of the power should be included within the primary legislation.

1.114 The committee notes that, in this instance, there is no guidance or criteria on the face of the bill or in the explanatory memorandum as to how or when these powers should be exercised. The explanatory memorandum merely states that:

> Clause 527N is modelled on section 789FJ of the FW [Fair Work] Act. It would provide for the Chief of the Defence Force to declare by legislative instrument, if the Minister approves, that some or all of the stop sexual harassment order provisions do not apply in relation to a specified activity. This is consistent with the existing stop sexual harassment order jurisdiction.[87]

1.115 Similar explanations are provided in relation to proposed sections 527P and 527Q.

1.116 The committee notes that existing sections 789FJ, 789FK and 789FL provide similar discretionary powers for the Chief of the Defence Force, Director-General of Security or the Director-General of ASIS.[88] The statement of compatibility with human rights for the *Fair Work Amendment Act 2013*, which introduced these provisions as part of the FWC's anti-bullying jurisdiction, states that:

> These amendments align with the existing framework for exemptions under the WHS Act, which reflects the sensitive nature of the work that is undertaken by Australia's defence and security personnel. Declarations issued by the Chief of Defence Force, Director-General of Security and the Director-General of ASIS will be in the form of legislative instruments and will be subject to scrutiny by both Houses of Parliament. Such declarations can also only be made with the approval of the Minister for Employment and Workplace Relations. These safeguards will ensure that such declarations are subject to appropriate scrutiny. To the extent that these amendments reduce access to FWC orders under Part 6-4B, they are necessary to ensure that the workplace bullying measures do not interfere with Australia's defence, national security or covert international law

87 Explanatory memorandum, p. 89.

88 The Sex *Discrimination and Fair Work (Respect at Work) Amendment Act 2021* extended these provisions to the new stop sexual harassment order regime.

enforcement activity, and achieve that legitimate objective in a proportionate and reasonable way.[89]

1.117 The committee acknowledges the above advice about the need for exemptions to the stop sexual harassment order regime for defence, security and Australian Federal Police operations. However, the committee is concerned about the use of delegated legislation to provide for such exemptions, particularly in circumstances where there is no guidance on the face of the bill as to how or when these powers should be exercised. In this regard, the committee notes that delegated legislation is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

1.118 In addition, the committee does not accept that consistency with existing provisions is a sufficient justification for providing the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS with broad discretionary powers to create exemptions to the stop sexual harassment order regime by legislative instrument. While acknowledging the importance of Australia's security and defence interests, it is unclear to the committee why at least high-level guidance cannot be included within the bill in relation to the exercise of the broad discretionary powers under proposed sections 527N, 527P and 527Q. For example, it may be appropriate to include criteria which the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS must have regard to before making a declaration that some or all of the stop sexual harassment order provisions do not apply. The committee is concerned that without guidance on the face of the bill as to how these powers may be exercised it would be possible for broad-ranging exemptions to be made which undermine the stop sexual harassment order framework. The committee also considers that it would have been helpful if information setting out the possible circumstances in which a declaration may be made had been included in the explanatory memorandum to the bill.

1.119 The committee requests the minister's detailed advice regarding:

- **why it is considered necessary and appropriate for the Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service to be provided with broad powers under proposed sections 527N, 527P and 527Q to declare by legislative instrument that some or all of the stop sexual harassment order provisions do not apply; and**
- **whether the bill can be amended to provide at least high-level guidance regarding the exercise of these powers on the face of the primary legislation.**

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89 Supplementary explanatory memorandum, p. 5.

Legislative instrument not subject to disallowance[90]

1.120 Item 509 of Part 14 of Schedule 1 to the bill seeks to repeal section 188 of the Fair Work Act and insert a new section 188 dealing with requirements for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by employees. Proposed subsection 188B(1) provides that the FWC must make a statement of principles containing guidance for employers on how to ensure their employees have genuinely agreed to an enterprise agreement. The explanatory memorandum explains that:

> The Statement of Principles will guide parties as to how the FWC will consider particular issues when determining whether the proposed enterprise agreement has been 'genuinely agreed'. These scenarios could include issues such as whether bargaining genuinely occurred prior to voting and whether employee organisation bargaining representatives were appropriately involved in bargaining.[91]

1.121 Proposed subsection 188B(4) provides that the statement of principles is a non-disallowable legislative instrument.

1.122 The committee notes that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless there are exceptional circumstances, and any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[92]

1.123 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee on a number of occasions, including most recently in its 2021 review of the *Biosecurity Act 2015*,[93] and by the Senate Standing Committee for the Scrutiny of Delegated

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90 Schedule 1, Part 14, item 509, proposed subsection 188B(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

91 Explanatory memorandum, p. 131.

92 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

93 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2021*, 12 May 2021, pp. 33–34.

Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[94]

1.124 The committee will therefore have significant scrutiny concerns where a bill includes powers to make delegated legislation which is not subject to parliamentary disallowance. The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

> The statement would not create new rights or obligations for employers and employees but would be taken into account by the FWC when determining whether an enterprise agreement has been genuinely agreed. The statement is intended to assist parties in moving from more prescriptive pre-approval requirements to the principles-based approach to genuine agreement proposed by these amendments. Making the statement would therefore be divorced from the broader political process and largely explanatory and facilitative (i.e. directed at assisting persons to comply with the new provisions). The statement would be independent of Parliament and not require additional Parliamentary scrutiny.[95]

1.125 While noting this advice, the committee does not consider the fact that an instrument is intended to be explanatory and facilitative to be a sufficient justification for excluding parliamentary disallowance. Rather, exemptions from disallowance are only justified in exceptional circumstances. It is unclear to the committee what exceptional circumstances justify the exemption from disallowance for the statement of principles.

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

- **the exceptional circumstances that are said to justify exempting the statement of principles made under proposed subsection 188B(1) from the usual parliamentary disallowance process; and**
- **whether the bill could be amended to provide that the statement of principles is subject to disallowance to ensure that they receive appropriate parliamentary oversight.**

94 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.

95 Explanatory memorandum, p. 131.

Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022

Purpose	This bill seeks to amend *Privacy Act 1988*, the *Australian Information Commissioner Act 2010* and the *Australian Communications and Media Authority Act 2005* to increase penalties under the *Privacy Act 1988*, provide the Australian Information Commissioner with greater enforcement powers, and provide the Commissioner and the Australian Communications and Media Authority with greater information sharing powers.
Portfolio	Attorney-General
Introduced	House of Representatives on 26 October 2022

Broad discretionary power

Availability of merits review[96]

1.127 Item 32 of Schedule 1 seeks to insert proposed subsection 52(5A) into section 52 of the *Privacy Act 1988* (the Privacy Act). Section 52 currently provides that, after investigating a complaint about acts or practices that may be an interference with the privacy of an individual, the Commissioner may make a determination in relation to the investigation. A determination may include, for example, a declaration that the respondent has engaged in conduct constituting an interference with the privacy of an individual, or that an individual is entitled to compensation. An entity to which a determination relates must comply with certain declarations in the determination.[97] Proposed subsection 52(5A) would provide that the Commissioner may publish a determination made under section 52 before or after commencement of the bill on the Commissioner's website.[98]

1.128 The committee's scrutiny view is that proposed subsection 52(5A) provides the Commissioner with a broad discretionary power to publish a determination made before or after the commencement of the bill in circumstances where there is limited guidance on the face of the primary legislation as to when it may be appropriate to exercise this power.

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96 Schedule 1, item 32, proposed subsection 52(5A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

97 See Privacy Act, s. 36A and 52.

98 Item 45 provides that the proposed subsection 52(5A) applies in relation to determinations made by the Commissioner before or after commencement of the bill.

1.129 The committee expects that the inclusion of broad discretionary powers will be justified in the explanatory memorandum. In this instance, the explanatory memorandum states that:

> This item clarifies that the Commissioner has the power to publish a determination made under section 52, which represents a final finding, on the OAIC website. The purpose of this item is to ensure information about the Commissioner's determinations is publicly available, and the Australian community is aware of emerging privacy issues.[99]

1.130 While noting the intention behind the Commissioner's discretionary power, it is unclear to the committee why at least some limits cannot be placed upon the power. For example, the committee considers that section 52 could be amended so that high-level guidance, such as the circumstances in which it may be appropriate to publish a determination, are provided on the face of the primary legislation. The committee considers that, at a minimum, it would be useful for the explanatory memorandum to provide specific examples of when publication may be appropriate.

1.131 The committee's scrutiny concerns are heightened in this instance given that it appears that merits review is not available for a decision by the Commissioner to publish a determination. The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*. The committee notes that a decision to publish a determination could have adverse impacts, such as damage to a person's reputation. In this instance, the explanatory memorandum contains no justification for the limitation on merits review. In addition, the committee notes that a decision by the Commissioner under existing subsections 52(1) or (1A) to make a determination is subject to external merits review under section 96. The committee considers that section 96 should be amended to provide that a decision to publish a determination under proposed subsection 52(5A) is also subject to merits review.

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

- **why it is necessary and appropriate to provide the Commissioner with a broad discretion to publish determinations made before or after the commencement of the bill;**
- **whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation or, at a minimum, whether this information can be included within the explanatory memorandum; and**

99 Explanatory memorandum, p. 20.

- **whether the bill can be amended to provide that independent merits review will be available in relation to a decision made under proposed subsection 52(5A).**

Reversal of the evidential burden of proof[100]

1.133 Item 39 of Schedule 1 to the bill seeks to amend existing section 66 of the Privacy Act to insert proposed subsection 66(1AA) into that section. Proposed subsection 66(1AA) makes it an offence for a body corporate to engage in conduct that constitutes a system of conduct or a pattern of behaviour which results in multiple instances of non-compliance with subsection 66(1), as amended by item 38. Proposed subsection 66(1) provides that a person who fails to answer a question or give information when required under the Privacy Act may be liable to a civil penalty. The new offence carries a maximum penalty of 300 penalty units. It is a defence under subsection 66(1B) if the person has a reasonable excuse.[101] A defendant bears an evidential burden in relation to this defence.

1.134 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[102] 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.

1.135 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in relation to proposed subsection 66(1AA) has not been addressed in the explanatory materials.

1.136 The committee notes that the *Guide to Framing Commonwealth Offences* 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

100 Schedule 1, item 40, proposed subsection 66(1B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

101 Item 40 seeks to amend subsection 66(1B) to extend the existing defence of reasonable excuse to the new criminal offence in proposed subsection 66(1AA).

102 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.

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[103]

1.137 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.[104]

1.138 The committee therefore expects the explanatory materials for a bill which includes the defence of 'reasonable excuse' to include a justification as to why the defence is appropriate and an explanation as to why it is not possible to include more specific defences within the bill. The committee notes that the explanatory memorandum does not include any information regarding these matters.

1.139 While noting that the bill seeks to extend the existing defence of reasonable excuse in subsection 66(1B) to the new criminal offence in proposed subsection 66(1AA), the committee has generally not considered consistency with existing provisions to be sufficient justification for including a defence of reasonable excuse or for reversing the evidential burden of proof. Rather, the committee expects that any provision which may unduly trespass on rights and liberties be justified on its own merits, with an explanation as to why the provision is appropriate and necessary in its specific context and with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[105]

1.140 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is appropriate to use a defence of reasonable excuse (which reverses the evidential burden of proof) for proposed subsection 66(1AA). 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*.[106]

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

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

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

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

Private senators' and members' bills that may raise scrutiny concerns

1.141 The committee notes that there are no new private senators' and members' bills that may raise scrutiny concerns under Senate Standing Order 24.

Bills with no committee comment

1.142 The committee has no comment in relation to the following bills which were introduced into the Parliament between 26 October – 10 November 2022:

- Appropriation (Parliamentary Departments) Bill (No. 1) 2022-2023
- Customs Amendment (Australia-United Kingdom Free Trade Agreement Implementation) Bill 2022
- Customs Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Bill 2022
- Customs Tariff Amendment (Australia-United Kingdom Free Trade Agreement Implementation) Bill 2022
- Customs Tariff Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Bill 2022
- Defence Home Ownership Assistance Scheme Amendment Bill 2022
- Education Legislation Amendment (2022 Measures No. 1) Bill 2022
- Higher Education Support Amendment (2022 Measures No. 1) Bill 2022
- Supply Bill (No. 3) 2022-2023
- Supply Bill (No. 4) 2022-2023
- Supply (Parliamentary Departments) Bill (No. 2) 2022-2023
- Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022
- Veterans' Affairs Legislation Amendment (Budget Measures) Bill 2022

Commentary on amendments and explanatory materials

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

- Aged Care Amendment (Implementing Care Reform) Bill 2022;[107]
- Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022;[108]
- Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022;[109]
- Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022;[110]
- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022;[111]
- Jobs and Skills Australia Bill 2022;[112]
- National Health Amendment (General Co-payment) Bill 2022;[113]
- Social Services and Other Legislation Amendment (Lifting the Income Limit for the Commonwealth Seniors Health Card) Bill 2022;[114] and

107 On 27 October 2022, Senator Ruston moved two amendments to the bill.

108 On 7 November 2022, the House of Representatives agreed to 1 crossbench amendment to the bill.

109 On 27 October 2022, the House agreed to 3 government amendments to the bill and the Minister for Home Affairs (Ms O'Neil MP) presented a supplementary explanatory memorandum to the bill.

110 On 26 October 2022, the Senate agreed to 2 opposition, 1 Jacqui Lambie Network, and 4 government amendments. Additionally, the Minister for Agriculture, Fisheries and Forestry, and Minister for Emergency Management (Senator Watt) tabled a supplementary explanatory memorandum relating to the government amendments moved to the bill.

111 On 10 November 2022, the House of Representatives agreed to 153 government and 4 crossbench amendments to the bill.

112 On 26 October 2022, the Senate agreed to 4 opposition and 2 independent amendments to the bill.

113 On 26 October 2022, the Senate agreed to 2 independent amendments to the bill. On 27 October 2022, the House of Representatives agreed to the Senate amendments.

114 On 26 October 2022, the House of Representatives agreed to the Senate amendments 1, and 8 to 13.

- Social Services and Other Legislation Amendment (Workforce Incentive) Bill 2022.[115]

115 On 8 November 2022, the House of Representatives agreed to two government amendments to the bill. Additionally, the Minister for Social Services (Ms Rishworth MP) presented a supplementary explanatory memorandum to the bill.

Chapter 2

Commentary on ministerial responses

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

Atomic Energy Amendment (Mine Rehabilitation and Closure) Bill 2022

Purpose	This bill seeks to amend the *Atomic Energy Act 1953* to allow the Minister to preserve the regulatory framework that applies to the Ranger Uranium Mine in the Northern Territory.
Portfolio	Industry, Science and Resources
Introduced	House of Representatives on 8 September 2022
Bill status	Before the House of Representatives

Availability of merits review[1]

2.2 The bill provides for the variation and revocation of Part III authorities, which may authorise operations, impose requirements and set conditions for specified activities in relation to the Ranger Uranium Mine (Ranger). Proposed section 41CK allows the minister, by writing, to vary a Part III authority in response to a failure to comply with an authority,[2] to extend the time period in which an authority is in force,[3] to ensure continued effective operation of an authority,[4] or to specify close-out conditions.[5] In addition, proposed subsection 41CR(1) provides that the minister may, by writing, revoke an authority conferred under section 41 if satisfied of certain matters. The bill does not provide for a decision made by the minister under proposed subsections 41CK(1) to (5) and proposed subsection 41CR(1) (the proposed variation provisions) to be independently merits reviewed.

1 Schedule 1, item 18, proposed subsections 41CK(1)–(5) and 41CR(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

2 Proposed subsection 41CK(1).

3 Proposed subsection 41CK(2).

4 Proposed subsection 41CK(3).

5 Proposed subsection 41CK(4).

2.3 In *Scrutiny Digest 5 of 2022* the committee requested the minister's advice as to why merits review will not be available in relation to a decision to vary, or revoke, an authority under the proposed variation provisions. The committee noted that its consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.[6]

Minister's response[7]

2.4 The minister advised that, given the limited scope for decisions to vary or revoke a Part III authority and consultation processes, she does not consider that merits review is necessary for decisions made under the proposed variation provisions.

2.5 The minister advised that the proposed variation provisions provide only a narrow scope to vary a Part III authority and are limited to technical or procedural decisions. For example, the proposed variation provisions would not permit the minister to vary the substantive rehabilitation obligations imposed on the mine operator, or the roles and responsibilities of other stakeholders. Because of this limited scope, the minister advised that decisions to vary or revoke a Part III authority would fall into the category of decisions for which there may not be an effective remedy available and which are therefore not suitable for review.

2.6 The minister noted that the purpose of the bill is to preserve regulatory arrangements at Ranger and to support Ranger's rehabilitation and closure. The minister advised that this means that decisions can only be made in respect of a Part III authority to rehabilitate Ranger to the required standard and are therefore beneficial to all parties. The minister also advised that only a limited number of stakeholders will be affected by such decisions as there is only one Part III authority in existence at any one time.

2.7 The minister further advised that variation or revocation can only occur following significant inquiry and consultation processes, and if agreement with the land's Traditional Owners is in effect and the variation is not inconsistent with the Commonwealth's obligations under that agreement. The minister advised that the extensive consultation process involved in making a decision would be a further factor against external merits review, in line with the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

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6 Senate Standing Committee for the Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 1–2.

7 The minister responded to the committee's comments in a letter dated 12 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.8 In relation to proposed subsection 41CR(1), the minister advised that this provision is intended to preserve the ability of the holder of a historic section 41 authority to request revocation under existing section 41A and therefore merits review is not appropriate.

2.9 Finally, the minister advised that, in the context of the limited scope for decisions and extensive consultation, the costs of review would not be justified.

Committee comment

2.10 The committee thanks the minister for this response.

2.11 The committee notes the minister's advice that, given the extensive consultation process involved in making a decision to revoke or vary a Part III authority, such decisions are unsuitable for merits review. The minister's response also highlighted two further exceptions with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. However, the committee notes that it would have been helpful if the advice provided by the minister had justified the grounds for exception, rather than merely stating that these exceptions applied.

2.12 For example, the minister advised that decisions made under the proposed variation provisions are unsuitable for merits review on the basis that the costs of the review would not be justified. The Administrative Review Council's guidance document provides that this exception would apply where the cost of merits review would be vastly disproportionate to the significance of the decision under review.[8] As such, the committee expects any claim that this exception applies to explain why the costs of review cannot be justified. In addition, it is unclear to the committee why the minister has advised that there is no effective remedy available due to the limited scope of the decision. The committee notes that this exception concerns decisions where, for example, a decision has been taken and the results are irrevocable, or where decisions operate for such a short period that their effect would be spent by the time of review. It is not clear to the committee from the explanation provided that decisions to vary or revoke a Part III authority are captured by either of these scenarios.

2.13 The committee also notes the minister's advice that only limited stakeholders will be affected by decisions to vary or revoke a Part III authority, and that such decisions will be beneficial to all parties. The committee shares the view of the Administrative Review Council that, as a matter of principle, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is required.

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8 See Chapter 4 of the Administrative Review Council, *What decisions should be subject to merit review?*, January 1999.

2.14 In relation to proposed section 41CR(1), the committee takes this opportunity to emphasise that it does not generally consider consistency with existing provisions to be sufficient justification for excluding merits review.

2.15 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing for external merits review of decisions made by the minister to vary or revoke a Part III authority under proposed subsections 41CK(1) to (5) and proposed subsection 41CR(1).

Incorporation of external materials as existing from time to time[9]

2.16 Proposed section 41CU provides that a Part III authority may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing from time to time.

2.17 In *Scrutiny Digest 5 of 2022* the committee requested the minister's advice as to whether documents incorporated by reference will be freely and readily available to all persons interested in the law.[10]

Minister's response[11]

2.18 The minister advised that the ability to incorporate a document by reference would provide for more transparency and efficiency in decision making. The minister noted that this may, for example, include closure criteria used to determine if the mine operator has achieved its rehabilitation obligations.

2.19 The minister also advised that many of the documents incorporated by reference are or will be publicly available. In relation to the above example, the minister advised that these criteria would be specified in the mine operator's publicly available Mine Closure Plan and would not create uncertainty in the law. Further, the minister advised that the mine operator would not have inadequate access to the terms of incorporated documents as decisions, including to incorporate a document by reference, will only occur after consultation with stakeholders.

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9 Schedule 1, item 18, proposed section 41CU. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

10 Senate Standing Committee for the Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, p. 3.

11 The minister responded to the committee's comments in a letter dated 12 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.20 The committee thanks the minister for this response. In relation to whether documents incorporated by reference will be freely and readily available to all persons interested in the law, the committee notes the minister's advice that many of these documents will be publicly available. However, it remains unclear as to whether *all* incorporated documents will be publicly available and where a relevant incorporated document may be accessed. Further, while the committee welcomes the minister's advice that closure criteria incorporated by reference will be specified in the mine operator's publicly available Mine Closure Plan, the committee notes that this is not a requirement set out on the face of the bill.

2.21 The committee also notes the minister's advice that decisions, including to incorporate a document by reference, will only occur after consultation with stakeholders. The committee notes that the minister's response focuses on the access to the documents by the mine operator and other key stakeholders, which may exclude access by other persons who are interested in the terms and operation of the law. The committee therefore reiterates its consistent scrutiny view that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law. The committee considers that where it is proposed to incorporate external material into the law, the explanatory memorandum for the bill should, at a minimum, contain an undertaking that the material will be freely and readily available in all circumstances. If it is not possible to do this, the committee expects that the explanatory memorandum state this clearly and explain why it is not possible and why it is nevertheless justifiable to allow external incorporation of non-legislative materials.

2.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a power to incorporate external materials as in force from time to time in circumstances where incorporated materials may not be freely and readily available.

Biosecurity Amendment (Strengthening Biosecurity) Bill 2022

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to enhance Australia's ability to manage the risk of pests and diseases entering, emerging, establishing or spreading in Australian territory and causing harm to animal, plant and human health, the environment and the economy
Portfolio	Agriculture, Fisheries and Forestry
Introduced	Senate on 28 September 2022
Bill status	Before the Senate

Exemption from disallowance

No-invalidity clause[12]

2.23 Schedule 1 to the bill seeks to insert three new legislative instrument-making powers into the *Biosecurity Act 2015* (Biosecurity Act). Each new instrument-making power will be exercisable by the Agriculture Minister and mirrors existing powers that are already exercisable by the Health Minister in relation to human biosecurity risks.[13]

2.24 In *Scrutiny Digest 6 of 2022* the committee requested the minister's advice as to:

- why it is both necessary and appropriate to include no-invalidity clauses in proposed sections 196A and 393B; and
- whether the bill could be amended to provide that determinations made under proposed sections 196A, 196B or 393B are subject to disallowance to ensure that they receive appropriate parliamentary oversight.[14]

12 Schedule 1, item 5, proposed sections 196A and 196B; item 11, proposed section 393B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii), (iv) and (v).

13 See Chapter 2 of the Biosecurity Act.

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 1–11.

Minister's response[15]

No-invalidity clause

2.25 The minister advised that the inclusion of the no-invalidity clauses in proposed sections 196A and 393B aligns with similar instrument-making powers in the Biosecurity Act, such as the power to make a Biosecurity Response Zone Determination, Temporary Biosecurity Monitoring Zone Determination or Biosecurity Activity Zone Determination.

2.26 In addition, the minister advised that it is intended that section 196A and 393B determinations will be made in a consultative manner in all but exceptional circumstances. The minister advised that biosecurity threats are often urgent and emerging, with a limited window of time to respond effectively. The minister advised that, in the event of a possible extreme and time critical situation where there is a need to act urgently to respond to a pest or disease, any arguable defects in the consultation process with all of the specified bodies should not invalidate a determination made to combat serious threats to Australia. The minister further advised that the no-invalidity clause provides a mechanism to reduce jurisdictional uncertainties and facilitate activities where matters cross State and Territory boundaries.

2.27 Finally, the minister noted that the no-invalidity clause only applies in relation to a failure by the Agriculture Minister to comply with the consultation processes in proposed subsections 196A(9) and 393B(7) and does not affect a person's right to seek judicial review in relation to the exercise of power in making an entry requirements determination or a preventative biosecurity measures determination. As such, avenues to challenge executive decision-making remain.

2.28 On the basis of the above, the minister advised that it is both necessary and appropriate to include a no-invalidity clause in proposed sections 196A and 393B.

Exemption from disallowance

2.29 The minister considered that exemptions from the disallowance process within the bill are appropriately justified and therefore does not propose to amend the bill to remove the exemptions. In particular, the minister advised that it is appropriate for determinations made under proposed sections 196A, 196B and 393B to be exempt from disallowance because they are decisions that are scientific and technical in nature, critical to the effective management of biosecurity risks and may enable emergency action to manage a threat or harm from a biosecurity risk.

2.30 The minister noted the existence of legislative constraints on the use of powers to make determinations under proposed sections 196A and 393B, including

15 The minister responded to the committee's comments in a letter dated 10 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

that a determination must be appropriate and adapted to its purpose. The minister advised that an assessment of whether a determination is appropriate and adapted will be underpinned by scientific and technical processes, data and expertise. To this end, the minister noted that determinations will be made on the basis of expert technical and scientific assessments that determine whether a particular pest or disease poses an unacceptable level of biosecurity risk. The minister considered that subjecting these determinations to the disallowance process has the potential to jeopardise the effectiveness of decision-making and risk management processes.

2.31 The minister also noted safeguards within the bill which prevent determinations from continuing indefinitely. For example, under proposed subsection 196B(1) the Agriculture Minister must vary or revoke a determination if satisfied that the relevant pest or disease no longer poses an unacceptable biosecurity risk or that a requirement is no longer appropriate and adapted for its purpose.

2.32 The minister also advised that disallowance would be inappropriate because it could generate uncertainty. To this end, the minister advised that Australian businesses, individuals and trading partners rely upon Australia's favourable biosecurity status and the Commonwealth's ability to effectively manage biosecurity risk in a timely manner. Where there is an imminent, substantial threat or actual outbreak of such pest or disease entering Australia, emergency action would be required to manage the threat or harm from the spread of the pest or disease within Australian territory. The minister advised that, in this context, disallowance of a determination specified above would create uncertainty for impacted industries, regulators and the broader community and may jeopardise Australia's plant and animal health, and the agricultural industry.

2.33 The minister considered that a 15 sitting day disallowance period would give rise to considerable uncertainty around business requirements, among other things, as disallowance would take effect immediately upon the passing of the motion. The minister also noted that if an instrument were to be disallowed, no instrument that is the same in substance could then be made within six months of the disallowance. The resulting uncertainty, delays or potential inability to impose appropriate measures for 6 months would increase costs to industry, risk damaging relationships with Australia's trading partners and undermine community trust in the government to effectively manage emerging and existing biosecurity risks.

2.34 Finally, the minister noted that other mechanisms are available to Parliament to ensure oversight over exempt instruments, such as Senate Estimates, senate committee processes, or question time.

Committee comment

2.35 The committee thanks the minister for this response.

2.36 However, the committee continues to be concerned in relation to these provisions. The committee reiterates its view that simply stating that a matter is

technically complex, or has significant policy implications, is not an adequate justification for removing democratic oversight over a law of the Commonwealth.[16] It is not clear to the committee from the minister's explanation why the minister considers that it is appropriate to exempt an instrument from disallowance merely because the considerations that go into making that instrument are scientific or technical. The explanatory memorandum to the bill notes that '… potential disallowance of a determination made under new subsection 196A(2) would have a significant impact on technical and scientifically based decision-making, risk management processes and the broader management of biosecurity risks'.[17] However, it is not clear to the committee from this explanation why this would be the case.

2.37 The committee reiterates its view that while it is often appropriate to delegate law-making power to the executive in relation to technically complex matters, it does not follow that such instruments should subsequently be exempt from disallowance on that basis alone. The committee again reiterates that it is not clear why parliamentarians would be incapable of taking into account scientific and technical evidence, or any resulting outcomes that could flow from disallowance, when considering the appropriateness of an instrument. Moreover, even when relevant considerations are scientific or technical the potential implications of those considerations will often have more expansive implications. The committee has considered this point at length, including recently in *Scrutiny Digest 1 of 2022*. A relevant extract is set out below:

> although the committee does not consider that scientific or technical decisions should be exempt from disallowance on that basis alone, the committee notes that decisions that can be said to be of a purely scientific or technical nature are rare. More typically, decisions grounded in scientific or technical evidence will also be made based on other factors. This is particularly the case in a law-making context where, even when a decision is purely scientific or technical in nature, the consequences of that decision may have much wider implications. In cases in which reasonable minds may differ as to the implications of a decision based on scientific or technical advice, it may be inappropriate to label the decision as merely scientific or technical in nature. The breadth contained in the terms 'scientific' and 'technical' demonstrates the ubiquitous nature of political considerations in law-making. 'Technical' in particular is an imprecise term which could be taken to include a wide variety of topics that are appropriate for parliamentary oversight and deliberation. For example, macro-economic

16 The committee has made this point in the context of the Biosecurity Act on several occasions, including

17 Explanatory memorandum, p. 11.

> considerations are highly technical and yet this is an area which is surely appropriate for parliamentary oversight and scrutiny.[18]

2.38 The broad discretionary nature of the powers set out at proposed sections 196A, 196B and 393B is presumably intentional to ensure that a range of options are available to address biosecurity risks depending on the particular circumstances of the case at hand. For instance, in relation to proposed subsection 196A(7) the explanatory memorandum notes 'This provision ensures flexibility and agility in how to manage current and emerging biosecurity threats, and provides future ready solutions to future incursions of diseases or pests which are yet to emerge.'[19] Even when based purely on scientific and technical considerations, the flexibility built into these provisions means that a decision as to what specific requirement is appropriate and adapted to the relevant purpose of an instrument is one upon which reasonable minds may differ and, as such, is the kind of decision which should appropriately be exposed to parliamentary scrutiny.

2.39 In addition, in this case, the committee notes that there is nothing on the face of the bill, or within the Biosecurity Act, limiting decisions made under proposed sections 196A, 196B and 393B to purely scientific or technical matters. For example, determining whether a matter is appropriate and adapted to preventing a biosecurity risk could theoretically involve consultation with affected stakeholders in addition to consideration of purely scientific factors. Finally, the committee notes that all three powers are exercisable by the Agriculture Minister who is not of necessity a technical or scientific expert.

2.40 In relation to the minister's advice that allowing the usual disallowance process to apply to instruments made under proposed sections 196A, 196B and 393B would create an unacceptable level of uncertainty, the committee reiterates its previous comments. For instance, in *Scrutiny Digest 1 of 2022*, the committee stated:

> While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty for industry and government, the committee considers that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government. Both government and industry regularly deal with legislative and regulatory uncertainty in a multitude of contexts, including those of an emergency nature. In the context of industry, it is difficult to conceive of any legislative measure that does not impact upon commercial certainty in some way. While some degree of uncertainty exists in relation to the disallowance process, it is important not to overstate its significance. In this context the committee reiterates that it is unlikely that the Parliament would disallow an instrument well supported by scientific and technical evidence where the effect of disallowance would be immediate harmful consequences. The

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18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 80–81.

19 Explanatory memorandum, p. 12.

> number of instruments to which a disallowance notice is attached is low and instances of disallowance themselves are rare.
>
> …
>
> A balance must be struck between protecting against uncertainty and allowing parliamentary scrutiny over executive made law. As a general principle, the committee does not consider that the difficulties associated with the small degree of uncertainty inherent in the disallowance process outweigh the significance of abrogating or limiting parliamentary oversight of executive made law by exempting an instrument from disallowance.[20]

2.41 That disallowances rarely occur is demonstrated by the fact that, of the thousands of pieces of delegated legislation tabled in the Parliament between 2010 and 2019, only 17 instruments were disallowed.

2.42 In relation to minister's advice on the limits on the Agriculture Minister's discretion included within proposed sections 196A, 196B and 393B, the committee welcomes these safeguards and considers them to be appropriate given the broad discretion the minister has to make instruments under those sections, and the potentially significant impact of such an instrument. However, the committee does not consider that the existence of these safeguards justifies excluding instruments made under proposed sections 196A, 196B and 393B from disallowance.

2.43 The committee notes the minister's advice that it is necessary and appropriate to include no-invalidity clauses at proposed sections 196A and 393B to allow instruments to be made in emergency situations, in which there is a limited window of time to respond effectively. The minister advised that determinations will be made in a consultative manner in all but exceptional circumstances. The committee welcomes this advice, but considers that it would have been more appropriate had this information had instead been included as a requirement on the face of the bill.

2.44 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*).

2.45 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting instruments made under proposed section 196A, proposed section 196B and proposed section 393B from the usual parliamentary disallowance process and of including no-invalidity clauses at proposed section 196A and 393B.

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20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 85–86.

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

Broad discretionary power

Section 96 Commonwealth grants to the states[21]

2.47 Item 6 of Schedule 6 to the bill seeks to insert proposed section 614B into the Biosecurity Act to provide that the Agriculture Minister or the Health Minister may make, vary or administer an arrangement to grant financial assistance for dealing with risks posed by diseases or pests, including to a state or territory. Proposed section 614C 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.

2.48 In *Scrutiny Digest 6 of 2022* the committee requested 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
- whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 days after being made.[22]

Minister's response[23]

2.49 The minister advised that not including any guidance as to the terms and conditions that may apply to a section 614C grant within the bill is consistent with the model in section 32C of the *Financial Framework (Supplementary Powers) Act 1997*. The minister also noted that section 614C grants would be governed by the *Federal Financial Relations Act 2009* and the COAG Reform Fund 2008 and that the Council on Federal Financial Relations (CFFR), is responsible for overseeing the financial relationship between the Commonwealth and state and territory governments.

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21 Schedule 6, item 6, proposed sections 614B and 614C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 7–10.

23 The minister responded to the committee's comments in a letter dated 10 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.50 The minister advised that it is intended that any agreements with states or territories in relation to grants would contain appropriate terms and conditions, but that specifying these terms and conditions within the bill would add additional regulatory burden in light of the existing processes outlined above.

2.51 The minister further advised that the bill contains an exhaustive list of activities in relation to which the Agriculture Minister or the Health Minister may make, vary or administer arrangements or grants of financial assistance. The minister also advised that the bill contains criteria for the activities grants must relate to. These activities are directly referrable to identifying, preventing, preparing for and managing biosecurity risks, and the minister noted that this will ensure that grants will address the potential for harm to human, animal and plant health, the environment and the economy posed by biosecurity risks.

2.52 Finally, the minister advised that it would be inappropriate to require the tabling of section 614C agreements given existing reporting requirements that will apply to the agreements. For example, the minister noted that the Federation Funding Agreements (FFA) framework and Principle 8 of the FFA Principles require funding agreements between the Commonwealth and state and territory governments to be published on the CFFR website and that proposed section 614G would require the publishing of information about arrangements within the department's annual report.

Committee comment

2.53 The committee thanks the minister for this response.

2.54 While acknowledging this advice, the committee notes that the minister's response focuses on the administration of the grants process without comprehensively addressing the appropriateness of limiting parliamentary oversight of the grant framework. In this regard, the committee notes that its scrutiny concerns relate specifically to the appropriateness of delegating to the executive Parliament's constitutional power to provide grants to the states, in circumstances in which there is little information as to the terms and conditions of those grants within the primary legislation. While welcoming the limitations that apply to what a grant may relate to, the committee remains concerned that there is no information as to the terms and conditions which may be attached to such a grant on the face of the bill.

2.55 In relation to the minister's advice that tabling the written agreements with the states and territories in relation to grants of financial assistance is not necessary, 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 if the documents are merely available online. The committee notes that tabling documents within a House of Parliament is not a mere publication requirement but rather an important element of parliamentary scrutiny and oversight. This is particularly significant in this context in which parliamentary scrutiny over grants agreements contributes to the maintenance of the Parliament's role under section 96 of the Constitution. From a scrutiny perspective, the committee does not

consider that public reporting obligations are sufficient to address the committee's scrutiny concerns relating to not providing for agreements to be tabled in the Parliament.

2.56 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the Agriculture Minister and the Health Minister a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how the power is to be exercised and where there is no guidance as to the terms and conditions on which grants may be made and no requirement to table written agreements with the states and territories in the Parliament.

Availability of merits review[24]

2.57 Part 5 of Schedule 7 to the bill seeks to amend sections 632 and 633 of the Biosecurity Act. Under those sections the Director of Biosecurity has the discretion to approve the payment of compensation for damaged or destroyed goods, conveyances or other premises. This discretion is only available in certain circumstances. This bill would amend both provisions to provide that the Director of Biosecurity's discretion to provide compensation is exercisable in a more limited set of circumstances than previously available.

2.58 In *Scrutiny Digest 6 of 2022* the committee requested the minister's advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under either section 632 or section 633 of the *Biosecurity Act 2015*.[25]

Minister's response[26]

2.59 The minister advised that an alternative mechanism for relief is already available within section 27 of the Biosecurity Act which enables persons who are dissatisfied with the Director of Biosecurity's decision under sections 632 and 633 to institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

2.60 Section 27 of the Act specifically addresses the issue of compensation for acquisition of property. It prevents the Commonwealth from acquiring property from a person otherwise than on just terms. In such cases, the Commonwealth would be

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24 Schedule 7, part 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 10–11.

26 The minister responded to the committee's comments in a letter dated 10 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

liable to pay reasonable compensation to that person. Further, it provides that, in the event of a disagreement between the parties as to the amount of compensation, the person may institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

2.61 As there is an existing mechanism under section 27, it would appear duplicative to provide for independent merits review of decisions made under sections 632 and 633. This is because a court, in making a decision under section 27, would be able to authoritatively determine whether, and to what extent, compensation should be paid by the Commonwealth for any acquisition of property.

2.62 For the above reasons, I do not consider it necessary to provide that independent merits review will be available in relation to a decision made under either section 632 or section 633 of the Biosecurity Act, as it is appropriate for the existing mechanism in section 27 to apply.

Committee comment

2.63 The committee thanks the minister for this response.

2.64 While acknowledging the minister's advice in respect of section 27 of the Biosecurity Act, the committee notes that it appears that that section relates to the acquisition of property, rather than specifically to a decision by the Director of Biosecurity under sections 632 and 633. The committee notes that sections 632 and 633 relate to destroyed or damaged goods, not to goods that have been acquired by the Commonwealth.

2.65 In any case, the committee does not consider that recourse to the court under subsection 27(2) is a sufficient justification for removing independent merits review over an administrative decision that will, or might, detrimentally affect individuals. The committee notes that proceedings under subsection 27(2) would involve the exercise of the Commonwealth's judicial power and result in findings in law. By contrast, merits review involves the exercise of administrative powers and is intended to result in a correct and preferable decision, in the sense that if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.[27]

2.66 The committee notes that other decisions relating to the destruction of goods are subject to independent merits review under the Biosecurity Act. For example, a decision to give approval for destroying high-value goods,[28] a decision to give approval for destroying high-value conveyances,[29] and a decision to give approval for destroying

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27 See paragraph 1.3 of the Administrative Review Council's guide *What decisions should be subject to merits review?*.

28 Subsection 574(1), table items 1 and 20.

29 Subsection 574(1), table items 8 and 21.

high-value premises,[30] are all subject to independent merits review. It is not clear why similar review rights cannot be provided in relation to a decision under sections 632 or 633 of the Act.

2.67 In light of the above, the committee requests the minister's further advice as to whether the bill can be amended to provide that decisions made under sections 632 and 633 of the *Biosecurity Act 2015* be subject to independent merits review.

30 Subsection 574(1), table item 22.

Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022

Purpose	This bill seeks to amend the *Emergency Response Fund Act 2019* to: • establish the Disaster Ready Fund; • allow up to $200 million per annum to be debited from the Disaster Ready Fund for natural disaster resilience and risk reduction; • allow the responsible Minsters to adjust the maximum disbursement amount via a disallowable legislative instrument; and • facilitate the transfer of responsibility for fund expenditure to the National Emergency Management Agency and streamline administrative arrangements in relation to transfers from the fund.
Portfolio	Finance
Introduced	House of Representatives on 7 September 2022
Bill status	Before the House of Representatives

Documents not required to be tabled in the Parliament[31]

2.68 Item 105 of Schedule 1 to the bill seeks to insert proposed section 34A into the *Emergency Response Fund Act 2019*. Proposed section 34A requires that the responsible Ministers must seek advice from the Future Fund Board on the impact of a proposed adjustment to the amount that may be debited from the Disaster Ready Fund Special Account.

2.69 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2022* and requested the minister's advice as to whether proposed section 34A of the bill can be amended to provide that the advice given by the Future Fund Board be tabled in the Parliament.[32] The minister advised that it is not necessary to amend the bill to require the Future Fund Board's advice to be tabled in the Parliament as the reasons for an adjustment would be set out in the explanatory statement accompanying any legislative instrument that adjusts the maximum disbursement amount.

31 Schedule 1, item 105, proposed section 34A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

32 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022*, p. 9.

2.70 The committee considered the minister's response in *Scrutiny Digest 6 of 2022* and requested the minister undertake to include, at a high-level, information about the following matters in the explanatory statement for an instrument made under proposed subsections 34(2) and (3):

- an overview of the responsible Ministers' consultation with the Minister for Emergency Management;
- a summary of the Future Fund Board's advice with any sensitive information removed;
- how the Future Fund Board's advice was taken into account;
- if the responsible Ministers depart from the Future Fund Board's advice, the reasons for this; and
- other relevant factors considered.[33]

Minister's response[34]

2.71 The minister confirmed that an explanatory statement for any instrument made under proposed subsections 34(2) and (3) will include the reasons for the adjustment to the maximum disbursement amount and relevant factors considered by the responsible Ministers. The minister advised that she has directed the relevant areas in the Department of Finance to ensure that the information requested by the committee above will be included in an explanatory statement for any instrument made under proposed subsections 34(2) and (3).

Committee comment

2.72 The committee thanks the minister for this response.

2.73 The committee welcomes the minister's undertaking that the explanatory statement for an instrument which adjusts the maximum disbursement amount that may be debited from the Disaster Ready Fund Special Account will include:

- **an overview of the responsible Ministers' consultation with the Minister for Emergency Management;**
- **a summary of the Future Fund Board's advice with any sensitive information removed;**
- **how the Future Fund Board's advice was taken into account;**

33 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022*, pp. 63-65.

34 The minister responded to the committee's comments in a letter dated 9 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

- **if the responsible Ministers depart from the Future Fund Board's advice, the reasons for this; and**
- **other relevant factors considered.**

2.74 The committee also welcomes the minister's advice that she has directed the relevant areas of the Department of Finance to ensure this undertaking is implemented.

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

2.76 In light of the information provided and the minister's undertaking, the committee makes no further comment on this matter.

Maritime Legislation Amendment Bill 2022

Purpose	This bill seeks to amend the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006* to: • introduce controls for discharges of residues of noxious liquid substances in northern European waters; • ban the use of heavy fuel oil by ships in Arctic waters (a similar ban is already in place in the Antarctic); and • extend controls on ship harmful anti-fouling systems to include the chemical biocide, cybutryne.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	Senate on 28 September 2022
Bill status	Before the Senate

Reversal of the evidential burden of proof

Strict liability offence[35]

2.77 The bill seeks to establish several defences which reverse the evidential burden of proof. These defences are set out under item 10 of Schedule 1 and item 2 of Schedule 2 to the bill. Proposed subsection 10(5A) of the bill seeks to insert a new offence-specific defence to the effect that the offence of discharging certain liquids from a ship under subsection 21(1B) does not apply if the discharge of the liquid is in accordance with procedures in the Procedures and Arrangements Manual and the tank is washed in accordance with a specified procedure.

2.78 In addition, proposed section 10A of the bill prohibits the carriage of heavy grade oil (HGO) by Australian ships in the Antarctic Area. Section 10AA of the bill would extend the prohibition to the carriage of heavy grade oil by Australian ships in Arctic waters. Proposed subsections 10AA(4) and 10AA(5) set out exceptions to the offence, including in certain emergency and safety circumstances.

35 Schedule 1, item 10, proposed subsection 21(5); Schedule 2, item 2, proposed subsection 10AA(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2.79 In *Scrutiny Digest 6 of 2022* the committee requested the minister's detailed justification as to the appropriateness of including the specified matters set out in proposed subsections 10(5A), 10AA(4) and 10AA(5) as an offence-specific defence.[36]

Minister's response[37]

Reversal of the evidential burden of proof

2.80 The committee notes the minister's advice that Australian regulators face a significant challenge in monitoring and surveilling the actions of Australian flagged ships at sea, particularly beyond Australian waters and in distant seas such as the Arctic Ocean. The minister advised that the entire regulatory regime relies in large part on the information and evidence logged by ship operators to demonstrate their compliance with international regulations. The minister advised that for example, for a ship operator to demonstrate that their discharge of a persistent floater category Y residue was not an offence, they would show their waste records in their MARPOL record book, which would have an entry certified by an authorised officer that the emptying and washing of the tank was conducted in accordance with MARPOL regulations. The minister advised that receipts for waste disposal which ship operators obtain from port operators when they use waste disposal reception facilities are also kept by ship operators to verify the information in their logbook.

2.81 The minister advised that if a ship experiences an emergency situation such as that excepted under proposed 10AA(4), the information that proves this claim includes the data and entries recorded in the ship's logbook at that time.

2.82 The minister advised that it would be significantly more costly for regulators to pursue this information and bear the burden of proof that a discharge was not in accordance with international law, than for a ship operator to demonstrate their compliance with international law.

Strict liability offence

2.83 The minister advised that the strict liability offence at proposed subsection 10AA(2) is commensurate and consistent with the existing offences and their penalties in the *Protection of the Sea (Prevention of Pollution by Seas) Act 1983*.

2.84 The minister further advised that the proposed penalty of 500 penalty units for the strict liability offence of carriage of heavy grade oil by Australian ships in the Arctic is proportionate to the seriousness of the degree of harm that the offence may cause to the sensitive marine environment and is considered necessary to provide a sufficient deterrence to avoid future harm.

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36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 12–15.

37 The minister responded to the committee's comments in a letter dated 28 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.85 The committee thanks the minister for this response.

2.86 While noting the minister's advice, it appears that some of the information included in proposed subsection 10(5A) and 10AA(4) does not appear to be peculiarly within the knowledge of the defendant. For example, it appears that whether an authorised officer has certified that the emptying and washing of the tank was conducted in accordance with MARPOL regulations would be matters that are ascertainable by the prosecution.

2.87 However, the committee acknowledges the minister's advice that it may be costly for the prosecution to ascertain these matters, particularly beyond Australian waters and in distant seas such as the Arctic Ocean.

2.88 In relation to the inclusion of strict liability within the offence, the committee acknowledges the minister's advice that the intention of the offence is to provide a sufficient deterrence to avoid serious future harm to sensitive marine environments. However, the committee remains concerned given the significance of the penalty. In addition, the committee notes that consistency with existing legislation is not a valid justification for imposing penalties that significantly exceed the recommended threshold of 60 penalty units for an individual or 300 penalty units for a body corporate.

2.89 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*).

2.90 In light of the detailed information provided in relation to the new offence-specific defence the committee makes no further comment on this matter.

2.91 In relation to the inclusion of a strict liability offence which imposes penalties that significantly exceed the recommended threshold, the committee draws its scrutiny concerns to the attention of senators and leaves this matter to the Senate as a whole.

Offshore Electricity Infrastructure Legislation Amendment Bill 2022

Purpose	This bill seeks to amend the *Customs Act 1901* to ensure that goods and vessels that enter or exit areas off the coast of Australia in relation to offshore electricity infrastructure are appropriately regulated.
Portfolio/Sponsor	Climate Change, Energy, the Environment and Water
Introduced	House of Representative on 28 September 2022
Bill status	Before the Senate

Strict liability offence[1]

2.1 The bill seeks to amend the *Customs Act 1901* (Customs Act) by introducing a new offence in relation to offshore electricity installations. Under proposed section 33BA of item 11 of Schedule 1 to the bill, a person commits an offence of strict liability if the person uses an Australian offshore electricity installation that is subject to customs control, without first obtaining permission of the Comptroller-General of Customs. This offence is subject to a maximum of 500 penalty units.

2.2 In *Scrutiny Digest 6 of 2022* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to apply strict liability to the offence set out at proposed section 33BA; and
- why it is considered necessary and appropriate to impose a significant penalty of 500 penalty units for failing to comply with proposed subsection 33BA.[2]

Minister's response[3]

2.3 The minister advised that is necessary and appropriate, in line with the principles outlined in the *Guide to Framing Commonwealth Offences* (the Guide), to impose a strict liability offence for the unauthorised use of all installations located in

1 Schedule 1, item 11, proposed section 33BA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022*, pp. 42–43.

3 The minister responded to the committee's comments in a letter dated 16 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 7 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Commonwealth waters, and for the penalties across all the offences to be set at a maximum of 500 penalty units.

2.95 The Guide notes that strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime.[41] In this regard, the minister advised that proposed section 33BA is required to mitigate unique border security risks that offshore electricity infrastructure (OEI) can pose to the Australian border. The minister advised that, as vessels engaged in domestic commerce are not subject to the extensive border controls that apply to foreign vessels, there is a heightened risk that domestic vessels will be used to traffic undeclared goods or persons onto the Australian mainland. The minister advised that proposed section 33BA mitigates this risk by providing a deterrence effect.

2.96 The minister further advised that maintaining effective customs control over OEI allows the Australian Border Force (ABF) to ensure that all goods and persons that pose a threat to the public health and safety of the Australian community, or which pose a biosecurity risk, are declared to the ABF for appropriate risk assessment and clearance. The minister also advised that proposed section 33BA ensures all goods imported into Australia are declared to the ABF, so that duties and taxes payable on those goods are collected prior to being delivered into home consumption. The Guide recognises public health and safety, the environment and the protection of the general revenue as regulatory interests that may justify the imposition of strict liability.[42]

2.97 The minister also considered that OEI operators have sufficient notice of the regulatory requirements they must observe to lawfully operate OEI facilities in Commonwealth waters, including the consequences of breaching proposed section 33BA. The minister noted that OEI operators are subject to a comprehensive regulatory framework that demands a significant degree of due diligence, planning and investment, and that there are several legislative requirements for OEI operators to undertake relevant regulatory and operational planning before they would be in a position to undertake the conduct contemplated by proposed section 33BA.

2.98 The minister advised that the imposition of strict liability in proposed section 33BA complements the resourcing challenges that law enforcement agencies face in Australia's offshore environment. The minister advised that strict liability removes the requirement for ABF officers to prove fault in an environment that can be difficult for ABF officers to access and monitor on an ongoing basis. To this end, the minister advised that the Commonwealth offshore area covers an expansive region across Australia's maritime jurisdiction and that it is not practical, from a resourcing

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

42 Attorney-General's Guide, p. 24.

perspective, for the ABF to establish a consistent physical presence across this entire area.

2.99 Finally, the minister advised that the proposed penalty of 500 penalty units for failing to comply with proposed subsection 33BA is proportionate to the seriousness of the degree of harm that the offence may cause to the Australia's border security and is considered necessary to provide a sufficient deterrence to avoid future harm. In this context, the minister advised that the consequences of undeclared goods or persons entering Australia, due to the unauthorised use of OEI, can be dangerous or damaging to the Australian community. The minister advised that a maximum of 60 penalty units would be an ineffective deterrent against committing the offence in proposed subsection 33BA given that trafficking in undeclared goods can be a lucrative trade.

Committee comment

2.100 The committee thanks the minister for this response.

2.101 The committee notes the minister's advice that the imposition of a strict liability offence under proposed section 33BA is necessary and appropriate to protect the integrity of Australia's border. In relation to the inclusion of a penalty of 500 penalty units, the committee notes the minister's advice that the intention of the offence is to provide a sufficient deterrence to avoid serious future harm to Australia's border security. The committee thanks the minister for this detailed explanation.

2.102 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*).

2.103 In light of the detailed 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 Dean Smith
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*.