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Committee for the Scrutiny of Bills

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Committee information

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 nonpartisan 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, standing order 24 enables senators to ask in the Senate Chamber, the responsible minister, for an explanation as to 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.

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[1] This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 173.

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.

Family Law Amendment Bill 2024[2]

Purpose	This bill seeks to amend the *Family Law Act 1975* and make consequential amendments to the *Evidence Act 1995*, *Federal Circuit and Family Court of Australia Act 2021*, *Federal Proceedings (Costs) Act 1981*, *Child Support (Registration and Collection) Act 1988* and *Child Support (Assessment) Act 1989*. Schedule 1 seeks to amend the property framework in the *Family Law Act 1975* to codify aspects of the common law and ensure the economic effects of family violence are considered in property and spousal maintenance proceedings. Schedule 2 seeks to provide a regulatory framework for Children's Contact Services. Schedule 3 seeks to improve case management in family law proceedings by, amongst other matters: permitting the family law courts to determine if an exemption to the mandatory family dispute resolution requirements applies; safeguarding against the misuse of sensitive information in family law proceedings; and amending Commonwealth Information Order powers and expanding the category of persons about which violence information must be provided to the family law courts in child related proceedings. Schedule 4 seeks to insert definitions of 'litigation guardian' and 'manager of the affairs of a party', remake costs provisions, and require superannuation trustees to review actuarial formulas used to value superannuation interests to ensure courts have access to accurate and reasonable valuations.

[2] This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 174.

	Schedule 5 provides for review of the operation of the bill and tabling of a report of the review in the Parliament.
Portfolio	Attorney-General
Introduced	House of Representatives on 22 August 2024
Bill status	Before the House of Representatives

Immunity from civil liability[3]

1.2 The bill provides that no action, suit or proceeding would lie against the Commonwealth or its officers in relation to any act done, or omitted to be done, in good faith in the performance or exercise of, or the purported performance or exercise, of a function, power or authority conferred by the Accreditation Rules.[4]

1.3 This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is 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.

1.4 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 soundly justified.

1.5 In this instance the explanatory memorandum explains:

> It is considered reasonable and appropriate to indemnify officers of the Commonwealth against actions for negligence arising from a good faith policy decision as to a person or entity's compliance with the Accreditation Rules, made in the performance of their duties and based on information provided by that person or entity.
>
> Section 10AA is not intended to provide immunity for bad faith or unreasonable actions taken in purported performance of a function or duty or exercise of power. [5]

1.6 While the committee acknowledges the explanation in relation to individual officers, the committee is concerned that the explanatory memorandum does not address why it is necessary and appropriate for the Commonwealth as a whole to be provided with civil immunity in relation to actions taken or powers conferred under

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3 Schedule 2, item 14, proposed section 10AA of the *Family Law Act 1975.* The committee draws senator's attention to this provision pursuant to Senate standing order 23(1)(a)(i).

4 Proposed section 10AA. The Accreditation Rules are prescribed by the regulations as empowered by section 10A of the *Family Law Act 1975*.

5 Explanatory memorandum, p. 101.

the Accreditation Rules. This is a broad immunity and in this instance, the committee expects that a sound justification should be provided. Further, the committee expects that the explanatory memorandum should address whether any alternate remedies are available for persons prevented from bringing a civil suit.

1.7 The committee requests the Attorney-General's advice as to:

- **the remedies available to individuals whose rights to bring an action to enforce their legal rights are limited to situations where a lack of good faith is shown; and**
- **why it is necessary and appropriate for the Commonwealth as a whole to be granted immunity in this context (rather than restricting the immunity to officers of the Commonwealth).**

Privacy[6]

1.8 The bill makes provision for the protection of certain safety-related information held by entrusted persons who are children's contact services (CCS) practitioners or businesses.[7] Safety information would be information that relates to the risks of harm to a child or a member of a child's family, or to the identification and management of such risks in relation to the provision of children's contact services.

1.9 The bill sets out a range of exceptions as to when an entrusted person would be able to disclose safety information, including (but not limited to):

- if the disclosure is reasonably necessary for the purpose of complying with law;[8]
- where consent of the information communicated by an individual is provided, dependant on the individual's age;[9] and
- where the entrusted person reasonably believes that disclosure is necessary for the protection of a child from risk of harm, to prevent threat to life or health of a person or to prevent the commission of violence.[10]

1.10 The committee welcomes these privacy protections for safety information. In relation to these matters the explanatory memorandum states:

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6 Schedule 2, item 15, proposed section 10KE. The committee draws senators' attention to this provision pursuant to Senate standing order 23(1)(a)(i).

7 Children's contact services are third-party providers who provide children of separated parents with a safe place to maintain contact with both parents or other family members where it would have otherwise been unmanageable without assistance.

8 Schedule 2, item 15, proposed subsection 10KE(4).

9 Schedule 2, item 15, proposed subsection 10KE(7).

10 Schedule 2, item 15, proposed subsection 10KE(8).

> The restriction on disclosure is important for many reasons including the safety of the parties, the integrity of any family law proceedings, and the best interests of the children. In the context of privacy and reputation, these provisions are important as they satisfy obligations laid out in the ICCPR and the CRC, by ensuring that individuals utilising CCS are able to do so without concern that their privacy or reputation will be illegally or arbitrarily compromised. It also creates a protective mechanism, where separated parties may trust that information provided to the CCS, for the purpose of service provision, cannot be accessed by another party from whom the original party is seeking to have that information withheld, particularly where they have concerns that sharing this information may introduce risks to their safety or ability to live freely within the community.
>
> The section contains necessary exceptions which allow for use or disclosure of safety information in circumstances where the entrusted person is required to comply with a Commonwealth, state or territory law or where there are serious and imminent risks to persons or property. The entrusted person may also use or disclose safety information to assist an ICL to represent a child's interests, or if the relevant party provided consent for the disclosure.
>
> In the interests of ensuring all measures are reasonable, necessary and proportionate, new paragraphs 10KE(8)(d) and (e) which relate to threats against property rather than persons, require specific mention. The permitted general situations under section 16A of the Privacy Act include a condition that allows for the collection, use and disclosure of personal information if it is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety.[11]

1.11 However, while noting the generally positive nature of these protections, there is potential for this highly sensitive information to be shared for a number of purposes as set out on the face of the legislation. While these circumstances are generally (and appropriately) limited to situations in which the disclosure is for the prevention of harm, whether the disclosure is necessary relies on the perception or assessment of the children's contact services worker as to the level of risk of harm or violence that may exist in the circumstances. As such, the committee expects that the explanatory memorandum would set out relevant information as to how such an assessment would be made, such as whether the individuals making this assessment would have relevant skills, training or experience. This is especially pertinent in relation to provisions in the bill which relate to an assessment of whether the child is at risk of psychological harm.[12]

1.12 An 'entrusted person' (who is able to disclose such information) is defined as a CCS practitioner or business or their director or someone employed or engaged to

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11 Statement of compatibility, pp. 28-29.

12 Schedule 2, item 15, proposed paragraph 10KE(8)(a).

perform work (whether paid or unpaid) for a CCS business.[13] CCS practitioners and CCS businesses are those that are accredited to provide children's contact services. These are defined as services that facilitate contact between a child and a member of their family with whom they are not living, and are provided where members of the family may not be able to safely manage such contact. They are provided either on a professional basis, a commercial basis, or as a charitable enterprise.[14] Such services will need to be accredited under the Accreditation Rules. As such, a relatively broad class of persons would be authorised to disclose confidential safety information, including volunteers who work with children's contact services. Further, the committee notes that the CCS industry has until now been unregulated and the requirements for accreditation will be set out in delegated legislation, which makes it more difficult for the committee to assess the appropriateness of these provisions.

1.13 Further, while the bill sets out the permitted disclosures of the information, it does not clarify who the information should be disclosed to in the relevant contexts, nor whether any limit exists as to the persons or bodies that the information may be disclosed to. In addition, it is unclear whether persons or bodies who are the recipients of disclosed information would themselves have a duty to disclose that information, and if so, to whom. Again, this level of information would have been helpful if included in the explanatory memorandum.

1.14 The committee requests the Attorney-General's advice as to:

- **whether children's contact services workers (including volunteers) would have the appropriate skills and experience to assess when protected information must be disclosed, and what training would they be provided with in order to be able to make a fully informed assessment of when it is appropriate to disclose personal information;**
- **what safeguards are in place to protect privacy and what oversight mechanisms would apply once the information was disclosed; and**
- **examples of to whom it is intended the information will be disclosed, including how the person or body to whom the information is disclosed will handle the information, and whether further detail could be provided on the face of the bill.**

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13 Schedule 2, item 1, definition of 'entrusted person' and item 15, proposed subsection 10KE(2).

14 Schedule 2, item 15, proposed section 10KB.

Reversal of the evidential burden of proof
Strict liability offences[15]

1.15 The bill imposes a range of offences in relation to a failure for children's contact services to be accredited as per the Accreditation Rules, or for employees of CCS organisations failing to hold accreditation. For example, an individual would commit an offence if they provide a children's contact service, and the Accreditation Rules provide for accreditation of CCS practitioners, and the individual is not a CCS practitioner.[16] The offence would carry a penalty of 50 penalty units and would be subject to strict liability.

1.16 Under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so. As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences* (the Guide).[17] The committee notes in particular that the Guide states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[18]

1.17 In this instance the committee welcomes that the penalty amount falls beneath the threshold of 60 penalty units set out in the Guide. Further, due to the nature of the offences the committee accepts that strict liability is likely to be appropriate in this context. However, the explanatory memorandum should have set out further information as to how the elements of each of the offences are suitable for the imposition of strict liability with reference to the guidance set out in the Attorney-General's Guide.

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15 Schedule 2, item 15, proposed subsections 10KH(1) – (9). The committee draws senators' attention to these provisions pursuant to Senate standing order 23(1)(a)(i).

16 Schedule 2, item 15, proposed subsection 10KH(1).

17 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (May 2024) p. 24

18 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (May 2024) p. 25

1.18 Further, the bill provides offence-specific defences for these offences which reverse the evidential burden of proof.[19] The defences require that the defendant provide evidence about their mistaken but reasonable belief about certain matters relevant to the offence.

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

1.20 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
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[20]

1.21 The committee reiterates its consistent scrutiny view that adherence to these principles would assist to keep to a minimum the number of provisions that impose a burden of proof on a defendant, and that any such reversal of the evidential burden of proof should be justified with reference to the principles in the Guide.

1.22 In this instance there is no justification provided as to whether these matters are peculiarly within the knowledge of a defendant nor whether they would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. Again, the committee notes that it is likely appropriate for the evidential burden of proof to be reversed in these defences where the defendant needs to provide evidence of their state of mind. However, the explanatory memorandum should have provided detailed justification against the principles in the Guide in order for the committee and the Senate to best assess the appropriateness of these measures.

1.23 The committee requests that an addendum to the explanatory memorandum containing a justification of these strict liability and reverse burden provisions 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.[21]

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19 Schedule 2, item 15, proposed subsections 10KH(4),(7) and (9).

20 Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (May 2024) p. 48

21 See section 15AB of the *Acts Interpretation Act 1901*.

1.24 The committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of the imposition of strict liability for certain offences[22] and the reversal of the evidential burden of proof for certain defences.[23]

[22] See Schedule 2, item 15, proposed subsections 10KH(1),(2),(3),(5),(6) and (8).

[23] See Schedule 2, item 15, proposed subsections 10KH(4), (7) and (9).

Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill 2024[24]

Purpose	The bill seeks to amend the *Paid Parental Leave Act 2010* to add superannuation contributions to the Commonwealth funded Paid Parental Leave Scheme. The bill would also introduce superannuation contributions for paid parental leave (PPL) into other Acts, creating legislative frameworks for entities such as the Commissioner of Taxation and superannuation groups when interacting with PPL.
Portfolio	Social Services
Introduced	House of Representatives on 22 August 2024
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[25]

1.25 This bill seeks to amend the *Paid Parental Leave Act 2010* (the Act) by inserting subsections 115S(2) and 115S(3), which would make it an offence for a superannuation provider:

(a) not to maintain records in writing in English, or maintain them so as to enable them to be readily accessible and convertible into writing in English;[26] and

(b) to fail to retain any records kept or obtained for the purposes of Chapter 3A of this bill until the later of the end of five years after they were prepared or obtained and the completion of the transactions or acts to which those records relate.[27]

1.26 The maximum penalties for these offences would be 30 penalty units. Proposed paragraph 115S(4)(a) provides a defence to these offences where the superannuation provider has been notified by the Commissioner of Taxation (the Commissioner) that the retention of records is not required. By making this an exception to the offence, this reverses the evidential burden of proof. As a

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24 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Paid Parental Leave Amendment (Adding Superannuation for a More Secure Retirement) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 175.

25 Schedule 1, item 5, proposed subsection 115S(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

26 Proposed subsection 115S(2).

27 Proposed subsection 115S(3).

superannuation provider can include the trustee of a complying superannuation fund, the committee understands this defence may be applicable to individuals.[28]

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

1.28 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers* which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[29]

1.29 In relation to this matter, the explanatory memorandum does not provide a justification and only restates the operation of the provisions.

1.30 It is not clear to the committee that the matters relevant to these defences are peculiarly within the defendant's knowledge or would be significantly more costly or difficult for the prosecution to disprove. The committee understands that the defendant would need to provide evidence suggesting a reasonable possibility that the Commissioner had provided a notification to the superannuation provider that records would no longer need to be maintained, which is a matter that would also appear to be within the Commissioner's knowledge.

1.31 The committee considers that where a provision reverses the burden of proof the explanatory memorandum should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[30]

1.32 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[31] the committee considers that a justification for reversing the

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28 Schedule 1, item 6, proposed section 6.

29 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

30 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

31 See *Acts Interpretation Act 1901*, section 15AB.

evidential burden of proof should have been included within the explanatory memorandum.

1.33 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the offences under subsections 115S(2) and 115S(3) of the bill.

Automated decision-making[32]

1.34 The bill seeks to amend the Act to provide that the Commissioner may arrange for the use of computer programs for any purposes for which the Commissioner may make decisions under Chapter 3A of the bill or the Paid Parental Leave Rules, which will be made for the purposes of Chapter 3A.

1.35 The decisions that may be made under Chapter 3A include:

(a) a determination of the amount of a Paid Parental Leave (PPL) superannuation contribution that is payable for an eligible person;[33]

(b) a determination as to where the PPL superannuation contribution must be paid to, including which account;[34]

(c) a determination to revoke a previous determination as to where the PPL superannuation contribution must be paid;[35]

(d) if a person has been paid less than the correct amount of PPL superannuation contribution, a determination of the underpaid amount,[36] and where the underpaid amount must be paid to, including the account;[37] and

(e) a determination to revoke a determination of the underpaid amount.[38]

1.36 Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that

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32 Schedule 1, item 5, proposed section 115ZD. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

33 Proposed subsection 115D(1).

34 Proposed subsections 115F(1) and 115F(2).

35 Proposed subsection 115F(5).

36 Proposed subsection 115K(3).

37 Proposed subsections 115K(4) and (5).

38 Proposed subsection 115K(7).

should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.37 In this instance, the committee understands that a number of the decisions under Chapter 3A of the bill relate to a PPL superannuation contribution, which is dependant on the PPL amount an eligible person has already been paid. These decisions are not discretionary in nature. The committee notes the following explanation provided in the explanatory memorandum:

> Decisions made under Chapter 3A of the PPLA 2010 (and related PPL Rules) are, for the most part, non-discretionary and dictated by the amount of PLP a person has received in a previous income year. In this sense, the calculation of a person's PPLSC entitlement is largely a numerical consideration. It is intended that this provision only be relied upon to automate the Commissioner's functions under Chapter 3A, where those functions are legally amenable to automation.[39]

1.38 The committee notes that while most decisions under Chapter 3A may be non-discretionary in nature, the committee queries whether there are any discretionary decisions that may be made (noting the explanatory memorandum's advice that the decisions are 'for the most part' non-discretionary, and whether these decisions could be made with the assistance of a computer program.

1.39 In relation to decisions that would be subject to automated decision-making, the committee queries what oversight mechanisms are in place to review the suitability of a computer program making these decisions and what other safeguards are applicable. For example, in its comment in *Scrutiny Digest 8 of 2024* in relation to the Telecommunications Amendment (SMS Sender ID Register) Bill 2024, the committee welcomed the inclusion of safeguards that promoted oversight of automated decisions that could be made, including the requirement for the Australian Media and Communications Authority (ACMA) to publish information on automated arrangements on their website and the requirement for the ACMA to include information regarding the number of substituted decisions, the kinds of decisions that were substituted and the kinds of automated decisions that the ACMA was satisfied were not correct in its annual report.[40] The committee considers its assessment of whether automated decisions are appropriate in the context of this bill would be assisted with further information as to applicable oversight mechanisms.

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

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39 Explanatory memorandum, pp. 16–17.

40 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2024* (3 July 2024) pp. 10–15.

- **whether any discretionary decisions can be made under Chapter 3A of the bill and the relevant provisions of the Paid Parental Leave Rules 2021;**
- **what oversight mechanisms are applicable to the use of a computer program in assisting the Commissioner in making decisions under Chapter 3A, and whether these could be included in the bill (such as a requirement to annually review automated decisions or to publish information relating to automated decisions); and**
- **whether the Attorney-General's Department was consulted to ensure a consistent legal framework regarding automated decision-making (as per recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme).**[41]

41 Royal Commission into the Robodebt Scheme, July 2023, p. xvi.

Parliamentary Workplace Support Service Amendment (Independent Parliamentary Standards Commission) Bill 2024[42]

Purpose	The bill seeks to amend the *Parliamentary Workplace Support Service Act 2023* to establish two bodies: the Independent Parliamentary Standards Commission (IPSC) and the Parliamentary Joint Committee on Parliamentary Standards. The bill also seeks to amend a number of other Acts which interact with the IPSC's responsibilities and functions as an investigative entity, such as the *Freedom of Information Act 1982* and the *National Anti-Corruption Commission Act 2022*.
Portfolio	Finance
Introduced	House of Representatives on 21 August 2024
Bill status	Before the House of Representatives

Overview

1.41 This bill seeks to establish the Independent Parliamentary Standards Commission (the IPSC) as a workplace investigation framework for Commonwealth parliamentary workplaces which would be enabled to handle complaints, make findings about misconduct and make recommendations on sanctions for parliamentarians, an employee of a parliamentarian (MOPS employee) and other staff.

1.42 The committee considers the explanatory memorandum accompanying the bill to be of high quality and welcomes the inclusion of numerous examples, and the overall high level of detail. The committee notes that a number of provisions of the bill initially raised scrutiny concerns, however, the explanations provided in the explanatory memorandum largely addressed these concerns.

Reversal of the evidential burden of proof[43]

1.43 The bill seeks to make it an offence for a person to make a record of or disclose information that is obtained in the course of, or the purposes of, performing functions or duties or exercising powers under this framework.[44] The offence would carry a

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42 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Parliamentary Workplace Support Service Amendment (Independent Parliamentary Standards Commission) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 176.

43 Schedule 1, item 41, proposed sections 24FL, 24FM, 24FN, 24FP and 24FQ. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

44 Schedule 1, item 41, proposed subsection 24FK(1).

maximum penalty of 30 penalty units or 6 months imprisonment.[45] The bill also creates a number of exceptions to this offence, including where the defendant has made a record of, or disclosed information where the recording or disclosure:

(a) is for a purpose connected with the performance or exercise of functions or powers under this bill;[46]

(b) is of information involving conduct that may constitute a serious offence against another person and is disclosed either for purposes connected with the performance or exercise of functions or powers under this bill or is disclosed to the Australian Federal Police or a state or territory police force with the victim's consent;[47]

(c) is required or authorised under the bill or another law;[48] and

(d) is to comply with a requirement to produce documents or answer questions from a court, tribunal authority or another person who has to power to require production or documents or information.[49]

1.44 By making these exceptions to the offence, the evidential burden of proof is reversed as the defendant would have to provide evidence suggesting a reasonable possibility of the above matters.

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

1.46 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers* which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[50]

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45 Schedule 1, item 41, proposed subsection 24FK(2).

46 Proposed subsection 24FL(1).

47 Proposed subsections 24FM(1), (3) and (4).

48 Proposed subsection 24FN(1).

49 Proposed section 24FQ.

50 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

1.47 In relation to the above matters, while the explanatory memorandum provides a detailed explanation of how the provisions are expected to operate, it only provides the following as a justification of why it is appropriate to reverse the evidential burden in these circumstances:

> The defendant would bear an evidential burden in relation to these defences, consistent with subsection 13.3 of the Criminal Code. It is reasonable and appropriate for a defendant to bear the evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that their disclosure was authorised by this Subdivision because the reasons why an entrusted person obtained, recorded or disclosed information would be solely and entirely within the knowledge of the entrusted person, and it would not be onerous for the person to adduce or point to evidence that suggests a reasonable possibility of that purpose. In addition, it would be onerous for the prosecution to disprove matters peculiarly within the knowledge of a defendant, including the reasons why an entrusted person obtained, recorded or disclosed information and it would be unlikely that a prosecution would be brought where information indicating the availability of the defence—that the disclosure was authorised—is available to the prosecution.[51]

1.48 It is not clear to the committee that all of the matters relevant to these defences are peculiarly within the defendant's knowledge or would be significantly more costly or difficult for the prosecution to disprove. For instance, in relation to disclosures that are for the purpose of complying with a requirement under the bill or an Act, the committee queries how matters in relation to compliance with a law can be peculiarly within any person's knowledge.

1.49 The committee also understands that in relation to defences (b) and (d) specified above, the information has been disclosed to another entity, such as a court, tribunal or police body, who would have knowledge of the disclosed information and the purpose for which it was disclosed. From the provisions of the bill and the information provided in the explanatory memorandum, it is does not appear these matters would be peculiarly within the defendant's knowledge or significantly more difficult for the prosecution to prove. It is also not clear why some of these matters could not be made elements of the offence (rather than a defence).

1.50 The committee considers that where a provision reverses the burden of proof the explanatory memorandum should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[52]

1.51 The committee considers it has not been established that reversing the burden of proof for all of the defences in the bill is appropriate, noting the matters

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51 Explanatory memorandum, p. 147.

52 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 48.

do not appear likely to be peculiarly in the defendant's knowledge. The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the exceptions to the offences (as set out above).

Immunity from civil liability[53]

1.52 This bill seeks to confer immunity from liability in civil proceedings to Parliamentary Workplace Support Services (PWSS) and IPSC officials, including the PWSS Chief Executive Officer (CEO), the Commissioners of the IPSC, the staff of the PWSS, persons whose services are made available to the PWSS and IPSC and consultants engaged to assist the IPSC or a Commissioner or the PWSS in the performance of their functions. The immunity from liability is only applicable to an act done or omitted to be done in good faith in the exercise of the person's functions, powers or duties.

1.53 This immunity therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is 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.

1.54 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 soundly justified. In relation to this immunity, the explanatory memorandum states:

> This immunity would ensure that PWSS and IPSC officials are able to perform their functions, powers and duties under the Bill without fear of personal liability for any actions they perform in good faith. Without immunity from civil proceedings, PWSS and IPSC officials may be exposed to civil liability in the performance of their duties. For example, an IPSC Commissioner may be exposed in circumstances where a respondent wishes to bring legal action to seek compensation for damage to their reputation as a result of allegedly defamatory statements contained in a report finding the respondent has engaged in relevant conduct. Such an outcome would be likely to create an actual or perceived risk that a Commissioner may improperly constrain their findings to avoid any risk to their personal interests. By providing an immunity from civil liability for acts or omissions done in good faith in the performance or exercise, or purported performance or exercise, of their functions, powers or duties

[53] Schedule 1, item 51, proposed section 40C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

> under the PWSS Act, this section would reduce the risk that officials would adopt a less rigorous approach to the performance of their functions to protect their personal interests at the expense of the public interest.[54]

1.55 The committee notes this explanation and considers it has been established why individuals in these positions may require immunity from civil liability. However, the committee considers that the explanatory memorandum should also have addressed what, if any, alternative protections are afforded to an affected individual to seek a remedy for any potential damage done as a result of the actions of the PWSS or IPSC officials, given that the normal rules of civil liability have been limited by the bill.

1.56 The committee requests the minister's advice as to what recourse is available for an individual (other than by demonstrating a lack of good faith) affected by actions taken by a PWSS or IPSC official or consultants. In particular, would action be available against the Commonwealth for negligence or defamation for the actions taken by such persons, and if not, why is this appropriate.

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54 Explanatory memorandum, p. 184.

Private senators' and members' bills that may raise scrutiny concerns[55]

The committee notes that the following private senators' and members' bills may raise scrutiny concerns under Senate standing order 24. Should these bills proceed to further stages of debate, the committee may request further information from the bills' proponents.

Bill	Relevant provisions	Potential scrutiny concerns
Building and Construction Industry (Restoring Integrity and Reducing Building Costs) Bill 2024	Various	Various provisions of the bill may raise scrutiny concerns under principles (i) to (iv).
Building and Construction Industry (Restoring Integrity and Reducing Building Costs) (No. 2) Bill 2024	Various	Various provisions of the bill may raise scrutiny concerns under principles (i) to (iv).
Fair Work (Registered Organisations) Amendment (Removing Criminals from Worksites) Bill 2024	Schedule 1, item 3, proposed subsection 226(4)	The provisions may raise scrutiny concerns under principle (i) in relation to strict liability offences.
Fair Work (Registered Organisations) Amendment (Removing Criminals from Worksites) (No. 2) Bill 2024	Schedule 1, item 3, proposed subsection 226(4)	The provisions may raise scrutiny concerns under principles (i) in relation to strict liability offences.

55 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 177.

Bills with no committee comment[56]

The committee has no comment in relation to the following bills:

- Administrative Review Tribunal (Miscellaneous Measures) Bill 2024
- Broadcasting Services Amendment (Prohibition of Gambling Advertisements) Bill 2024
- Housing Investment Probity Bill 2024
- Migration Amendment (Limits on Immigration Detention) Bill 2024
- National Health Amendment (Technical Changes to Averaging Price Disclosure Threshold and Other Matters) Bill 2024

[56] This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 178.

Commentary on amendments and explanatory materials[57]

Fair Work (Registered Organisations) Amendment (Administration) Bill 2024

1.57 On 19 August 2024 the Senate agreed to 19 Opposition amendments, two Jacqui Lambie Network amendments and three Independent (Senator David Pocock) amendments in relation to the bill.

1.58 Amendments to item 9 of Schedule 1 provide that civil penalty provisions will apply retrospectively to conduct from 1 July 2024. The bill previously provided that the civil penalty provisions applied retrospectively to conduct from 17 July 2024.

1.59 Further amendments insert section 323MA to provide for a definition of 'removed persons', who cannot become an officer or employee in an organisation or branch of an organisation without a certificate granted by the Fair Work Commission. The amendments provide that a person can be declared a removed person dependant on conduct taken from 1 July 2024, prior to commencement of the Act. Civil penalties apply for persons who fail to comply.

1.60 The committee reiterates its concerns as set out in *Scrutiny Digest 9 of 2024*[58] as to the appropriateness of retrospectively applying civil penalty provisions to conduct that may have occurred prior to the commencement of the Act. The committee considers that this amendment heightens these concerns by expanding the retrospective application to further past conduct.

1.61 The committee also has concerns about providing that a person can be declared a 'removed person' for conduct that may have occurred prior to the commencement of the Act.

1.62 The bill also provides that a minister may determine a scheme for the administration of the Construction and General Division and its branches of the Construction, Forestry and Maritime Employees Union. It provides that the minister may do so by a legislative instrument that is not subject to disallowance. The committee previously raised scrutiny concerns about leaving these significant matters to non-disallowable delegated legislation. Amendments made to the bill insert new subsection 323B(4A) which provides that the administration scheme can also provide for 'any other matters the minister considers appropriate'.

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57 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 179.

58 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 8–15.

1.63 The committee reiterates its concerns as set out in *Scrutiny Digest 9 of 2024* as to the appropriateness of providing for significant matters in a non-disallowable instrument. The committee considers that this amendment heightens these concerns as it expands the scope of significant matters that can be set out in a legislative instrument that is exempt from parliamentary scrutiny.

1.64 However, in light of the fact that this bill has received the Royal Assent the committee makes no further comment on this bill.

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024

1.65 On 22 August 2024 the Senate agreed to 53 Government amendments, 14 Opposition amendments and 3 Independent (Senator Thorpe) amendments in relation to the bill.

1.66 The committee has concerns in relation to Government amendments which provide for significant matters in relation to the scheme to be left to delegated legislation made under the *National Disability Insurance Scheme Act 2013*. Further, it appears that a range of Government amendments to the bill may relate to discretionary decision-making powers, such as the insertion of proposed new subsections 10(6) – (8). However, there has been no information provided in the supplementary explanatory memoranda relating to the Government amendments to indicate whether merits review exists for these decisions.

1.67 The committee reiterates its concerns as set out in *Scrutiny Digest 7 of 2024*[59] as to the appropriateness of the extensive rule making powers in the *National Disability Insurance Scheme Act 2013*.

1.68 In light of the fact that the bill has passed both Houses of Parliament the committee makes no further comment in relation to this matter.

Net Zero Economy Authority Bill 2024

1.69 On 22 August 2024 the Senate agreed to six Australian Greens amendments and six Independent (Senator Thorpe) amendments in relation to the bill.

1.70 **Clause 68 of the bill has been amended to provide that the minister must table in the Parliament a copy of the report on the review of the operation of Part 5 of the Net Zero Economy Authority Act 2024. The committee welcomes this**

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59 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (14 August 2024) pp. 61 and 96–100.

amendment which addresses one of the scrutiny concerns raised by the committee in *Scrutiny Digest 6 of 2024*.[60]

[60] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 33-37.

Chapter 2
Commentary on ministerial responses

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

Better and Fairer Schools (Information Management) Bill 2024[61]

Purpose	This bill seeks to expand the current requirements under the *Student Identifiers Act 2014* to enable the extension of the system of unique student identifiers for vocational education and training and higher education students to primary and secondary school students.
Portfolio	Education
Introduced	15 August 2024
Bill status	Before the Senate

Privacy[62]

2.2 The *Student Identifiers Act 2014* (the Act) sets out a scheme establishing unique student identifiers. The student identifier scheme (the scheme) commenced from 1 January 2015 for students in national vocational education and training (VET).[63] The purpose of the scheme was described as to allow VET students to create a single identifier to consolidate their education and training transcripts.[64] The scheme was later extended to include all higher education students who commenced higher education from 1 January 2021.[65] At the time the Student Identifiers Bill 2014 (the bill) was introduced, this committee raised concerns in relation to the privacy of personal information as the bill permitted authorised entities to collect, use and disclose student identifiers in specified circumstances.[66]

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61 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Better and Fairer Schools (Information Management) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 180.

62 The concerns relate to the bill as a whole. The committee draws senators' attention to the bill pursuant to Senate standing order 24(1)(a)(i).

63 The scheme was established by the Student Identifiers Bill 2014.

64 Explanatory memorandum to the Student Identifiers Bill 2014, p. 2.

65 Student Identifiers Amendment (Higher Education) Act 2020.

66 See Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2014* (16 July 2014) pp. 368–372.

2.3 The current bill seeks to expand the scheme to apply student identifiers to all primary and secondary students by 2025, with an impact on over 5 million school children (which would increase each year as new students commence their education). The committee requested the minister's advice in *Scrutiny Digest 10 of 2024* on the following matters:

- why it is necessary and appropriate to expand the student identifier scheme to all primary and secondary students, including a detailed explanation of the purpose of the extension of the scheme;
- whether all entities who will be involved with collecting, storing and disclosing relevant student identifier data will be covered by the Australian Privacy Principles, and the privacy protections that will apply to any non-government entities involved in the collection and storage of data;
- the type of information about students that is required to obtain a student identifier and the information that will be linked to the student identifier of primary and high school students, who will keep this data, how long it will be retained for, and who will have access to it;
- whether school students who do not want to be assigned a student identifier may opt out of the scheme, and if not, why not;
- whether consultation on expanding the student identifier scheme to all primary and secondary students was undertaken outside of government, and if not, why not;
- whether a privacy impact assessment was undertaken in relation to the scheme's expansion to all primary and secondary students, and, if so, what that assessment revealed; and
- whether protected information provided for the purposes of school education research will be de-identified, and if not, why not.[67]

Minister for Education's response[68]

Why the scheme is being expanded to all school students

2.4 The minister advised that expanding the scheme to all school students will support student learning and provide evidence on educational progress and pathways to inform stronger education outcomes through policy and investment. The minister also noted that the expansion of the scheme is supported by a number of reviews into education which argued that expanding the scheme is necessary for consistency of

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67 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2024* (21 August 2024) pp.2–6.

68 The minister responded to the committee's comments in a letter dated 5 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

student growth data, maximising and supporting student growth, facilitating innovations in education, tracking student performance and improving teacher interventions on a national level, and to organise and connect data and evidence at a national level to improve capacity for interventions.

Whether all entities involved with the collection, storage and disclosure of student information will be covered by the Australian Privacy Principles

2.5 The minister identified the following APP entities that will be involved in the collection, storage and disclosure of student identifier information:

- the Student Identifiers Registrar;
- the Office of the Student Identifier Registrar; and
- non-government schools.

2.6 The response confirmed that non-APP entities involved in the use of data under the scheme will include State and Territory public bodies and government schools. Relevant State and Territory privacy legislation will govern these non-APP entities. The minister noted that the States and Territories are in consultation with the Department of Education to establish a Data Governance Framework to apply to the scheme, which is intended to include a commitment for States and Territories to manage data in line with the APPs.

2.7 Further, the minister noted that the bill amends the Act to improve privacy protections, including by imposing requirements on data handlers to protect records from 'misuse, interference and loss, and from unauthorised access, modification or disclosure' and banning entities from collecting, using or disclosing protected information without authorisation. However, the minister also noted that the bill limits the application of these protections to exclude public bodies of a State or Territory, who will only be bound by them at the request of the State or Territory. Consultation is underway with the States and Territories in relation to this.

2.8 Finally, in relation to State and Territory privacy legislation, the minister noted that existing legislation will apply to the expansion of the scheme, and that as public bodies in the States and Territories already handle large volumes of protected student information these protections are already in operation. This applies with the exception of South Australia and Western Australia who, the minister noted, have no bespoke privacy legislation.

Whether school students who do not want to be assigned a student identifier may opt out of the scheme

2.9 The minister advised that the Australian Government is currently working on opt out arrangements with a variety of stakeholders. Potential options at this time include parents and carers choosing to opt out from the identifier system in its totality on behalf of their children or choosing to opt out or in for specific uses of the schools identifiers.

The type of information about students that is required to obtain a student identifier, who will keep this data, how long it will be retained for and who will have access to it

2.10 The minister advised that the schools identifier will have 'school identity management information' linked to it which will be maintained by education authorities. The minister advised that the details attached to the identifier will need to be maintained over the course of schooling in line with enrolment arrangements. The minister advised that the school management information will be specified in the regulations and will only include data elements already collected and used by education authorities for school enrolment purposes.

2.11 The minister advised that the schools identifier and school identity management information will be held by the Registrar and the relevant school or education authority, and also noted that this information is already collected by education systems across Australia. The minister noted that this information will be collected as part of enrolment and student transfer purposes and will be provided to the Registrar for the period an individual is enrolled in school education. The minister also advised that the *Archives Act 1983* would apply to the retention of this information.

2.12 The minister finally advised that access to this information is restricted by the Act and detailed protocols and expectations for how the information will be handled will be included in a Data Governance Framework that is being developed by the Commonwealth government in consultation with the states and territories.

Whether consultation on expanding the scheme to schools was undertaken outside of government

2.13 The minister advised that the measures in the bill have been informed by reviews and research over many years.

2.14 In relation to consultation undertaken specifically in relation to the development of unique student identifiers for school students, the minister noted the following:

- in 2019 the Department commissioned consultation with parents, teachers and schools, representative bodies and education researchers
- in 2021 the Department commissioned research which included surveys and interviews with parents of school-aged children which specifically addressed issues around privacy and sharing of information
- in 2023, the NSW Department of Education commissioned specific research for NSW schools to better understand the impact of information sharing on students and their carers

Whether a privacy impact assessment was undertaken in relation to the scheme's expansion to all, and, if so, what the assessment revealed

2.15 The minister informed the committee that a privacy impact assessment (PIA) was completed in May 2024, as commissioned by the Department of Education to the Australian Government Solicitor.

2.16 In the minister's words, the conclusion of the PIA was that:

> … while the implementation of the project will impact on the privacy of individuals through the collection, use and disclosure of their personal information, the project has the potential to deliver considerable benefits to the community through improved education outcomes.

2.17 The PIA did make recommendations focusing on 'transparency measures, data handling, data quality, identifiers, access and correction requests, and guidance' with the Department of Education responding to these recommendations via its development and implementation of the bill.

Whether protected information provided for education research will be de-identified

2.18 The minister advised that the Data Governance Framework will set out the requirements which the Student Identifiers Registrar will need to meet when disclosing protected information. As part of these requirements, the minister advised it is 'anticipated that any protected information released for national research purposes would be de-identified'.

Committee comment

2.19 The committee thanks the minister for this detailed response. In relation to the necessity of the expansion of the scheme, the committee considers that the information provided improves on the quality of the justification set out in the explanatory memorandum. The committee also welcomes the high level of detail that was provided in this response in relation to the broad consultation and research that was undertaken in relation to the bill and the scheme more broadly. The committee notes this information would have been useful had it been provided in the explanatory materials accompanying the bill. The committee reiterates there are significant privacy implications of applying student identifiers to all primary and secondary students by 2025. While the committee notes the importance of improving understanding of student progression and the national education evidence base, this must be balanced against the rights of all children to privacy. Whether the scheme appropriately balances these considerations rests largely on the strength of applicable safeguards.

2.20 The committee welcomes the advice that entities currently not subject to the APPs are currently undergoing consultation with the Department of Education to establish a Data Governance Framework, which is expected to impose the APPs on all relevant bodies. However, a number of concerns arise from this approach, including that it appears the Data Governance Framework will be crucial to the privacy implications of the scheme. Yet it is unclear what status this framework will have and it does not appear that it will be subject to any parliamentary oversight. Given the significance of the scheme's impact on privacy the committee expects that this framework should have been developed in conjunction with the bill in order for the

full picture of the privacy landscape to be available to the Parliament for consideration in making this legislation.

2.21 Further, while the committee welcomes the amendments made by the bill to the Act to improve privacy protections in some respects, these safeguards are limited in their application as they appear to exclude public schools unless specific measures are taken to apply them. The committee notes that while existing State and Territory privacy protections apply, in the context of this national scheme the preferable approach would be for consistency in data handling and management across the country, with appropriate parliamentary oversight. The committee also notes its concerns that Western Australia and South Australia have no specific privacy legislation but would be collecting, using and disclosing information pursuant to this scheme. Again, the committee considers that this matter should have been resolved prior to the implementation of the legislation and suggests that the bill should not commence until such agreements are in place.

2.22 In relation to the type of information that will be associated with a student identifier, the committee is concerned by the advice that this will be left to the regulations, which limits the ability of the Parliament to scrutinise their appropriateness. Noting that the minister has advised the information will 'only include data elements already collected and used' by schools, it is unclear why these matters cannot be more appropriately set out on the face of the bill as the relevant data should already be known. Further, noting that the data is already known, it is unclear why this specific information could not have been included in the response as this is the information the committee requested. Answers to these issues would have helped the committee in balancing the intrusion on the privacy of children against the justifications and necessity of the scheme. The committee is also concerned that the detailed protocols and expectations for how the information will be handled will be included in a Data Governance Framework, which does not have legal status. Further, the committee is concerned that the bill does not specify any limitation on the duration of time for which the information will be retained. While noting the advice that the *Archives Act 1983* applies to the retention of student identifier information, the committee's understanding is that the minimum retention time under that Act may vary depending on the type of document or body, and the response provided does not indicate with sufficient detail the amount of time for which these specific records would be retained. The committee therefore considers that it is unclear how long personal information is to be retained. The committee considers the bill should provide that personal information be destroyed once it has fulfilled the purpose for which it was obtained (namely the allocation of a unique student identifier).

2.23 Further, the committee welcomes the advice that consideration is being given to potential opt-out processes. Again, given the significant privacy implications for the scheme and the fact that it impacts on minors, the committee considers that full consideration to this issue should have been provided prior to the implementation of this bill. Opt-out processes and procedures should have been set out on the face of

the bill to ensure the protections are in primary law and could be given full parliamentary consideration. This is particularly the case noting no decisions have yet been made as to whether there will be any opt-in or opt-out arrangements (which is highly relevant to assessing whether the trespass on privacy is proportionate).

2.24 In addition, the committee notes the advice that a Privacy Impact Assessment was completed in May 2024 in relation to the bill, which identified that while the bill will impact on individual privacy, this was to be weighed against the 'considerable' benefits to the community at large. It is not uncommon for explanatory materials to facilitate access to Privacy Impact Assessments undertaken in relation to a bill. In this instance, the committee queries why this information was not made available within the explanatory memorandum for the benefit of Parliament in considering the legislation.

2.25 Finally, the committee welcomes the information that it is intended that any protected information disclosed by the Student Identifiers Registrar will be de-identified. However, as noted elsewhere in this entry, the Data Governance Framework does not have legislative status and this protection should be set out in primary legislation. As it stands, the 'intention' to include a protection in a future agreement which may not have legislative status does not afford the level of protection the committee expects. Noting that the intention is for information to be de-identified it is unclear to the committee why the matters are being left to the Data Governance Framework. The committee therefore considers that the bill should be amended to provide that any protected information disclosed by the Student Identifiers Registrar under the scheme for research purposes must be de-identified.

2.26 The committee retains significant scrutiny concerns that, noting the privacy implications of the bill, the bill does not contain sufficient legislative safeguards to protect privacy. The vast majority of the specified safeguards are not set out in primary legislation and are instead left to non-legislative materials such as the Data Governance Framework. As such, this severely limits parliamentary oversight of these measures. The committee is concerned that this is essentially a framework bill that will leave matters of significance relating to the privacy of all school children to non-legislative executive control and delegated legislation, with limited parliamentary involvement.

2.27 The committee is of the view that the bill should be amended to include clear and accessible opt-out procedures for all parents and carers who do not want their children's information collected, used and disclosed under the scheme. The committee also considers the bill should be amended to require the de-identification of any personal information disclosed for research purposes by the Student Identifier Registrar, specification of the type of personal information that can be collected and to provide an appropriate limit on the duration of time for which student identifiers and associated records can be retained.

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

- **important privacy protections being left to the Data Governance Framework, which does not have legislative status and is not subject to any parliamentary oversight;**
- **the apparent lack of consistency in the privacy protections which apply to the scheme at the Commonwealth and State and Territory levels;**
- **the lack of transparency from the minister around the data that will be associated with student identifiers;**
- **the lack of a time limit provided in the bill for retention of student identifiers and associated data;**
- **opt-out procedures for parents, carers and school children being left for consideration separately from the implementation of the scheme;**
- **the exclusion of any reference to the Privacy Impact Statement from the bill's explanatory materials; and**
- **leaving a requirement that any personal information disclosed by the Student Identifier Registrar for research purposes be de-identified to be governed by the Data Governance Framework as opposed to being enshrined on the face of the bill.**

2.29 The committee requests that an addendum to the explanatory memorandum containing the justification for the expansion of the scheme to school children 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.[69]

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

Privacy
Inappropriate delegation of legislative powers
Parliamentary oversight [70]

2.31 Currently the Act provides that the Registrar is authorised to collect, use or disclose a student identifier for purposes specified in section 18 of the Act. These purposes include for research that directly or indirectly relates to education or

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69 See *Acts Interpretation Act 1901*, section 15AB.

70 Schedule 1, item 46, proposed subsection 18(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i), (iv) and (v).

training, or that requires the use of student identifiers or information about education or training and that meets the requirements specified by the Ministerial Council. [71]

2.32 This bill seeks to expand the nature of information the Registrar can disclose to 'protected information', which includes school and student identifier information.[72] The bill also provides that Registrar would be enabled to use or disclose protected information if the use or disclosure is for the purpose of research:

(a) that relates, directly or indirectly, to 'school education' (which is undefined), or that requires the use of protected information or information about school education; and

(b) that meets the requirements specified by the Education Ministerial Council. This bill provides that the Education Ministerial Council (EMC) would be a body that, if it exists, consists of the minister of the Commonwealth and the minister of each state and territory who is responsible for matters relating to school and higher education. If no such body exists, the EMC may be a body prescribed by the regulations.[73]

2.33 As such, in order for protected information to be disclosed for the purposes of research it must meet non-legislative requirements specified by an executive body, namely the EMC. The statement of compatibility states that this will ensure appropriate limits are placed around this disclosure power.[74]

2.34 As such, in *Scrutiny Digest 10 of 2024* the committee requested the minister's as to:

- why it is necessary and appropriate that the education ministerial council or another body prescribed by the regulations are able to determine the requirements to be met before the Registrar is authorised to use or disclose protected information, rather than providing those requirements in primary legislation or, at a minimum, disallowable delegated legislation;
- whether examples can be provided as to the type of requirements that must be met in order for protected information to be used or disclosed; and
- whether guidance can be provided as to when a research purpose will be sufficiently related to 'school education' so as to authorise the use or disclosure of protected information.[75]

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71 *Student Identifiers Act 2014*, subsection 18(2).

72 Schedule 1, item 4, proposed subsection 4(1), definition of 'protected information'.

73 Schedule 1, item 4, proposed subsection 4(1), definition of 'Education Ministerial Council'.

74 Statement of compatibility, p. 8.

75 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2024* (21 August 2024) pp. 7–9.

Minister for Education's response[76]

2.35 In relation to why it is necessary and appropriate for safeguards to be set by the education ministerial council, the minister advised that under the relevant intergovernmental agreements, the Education Ministers Meeting is responsible for overseeing implementation of the agreement and the Commonwealth and jurisdictions commit to working together. The minister advised this is subject to an Education Ministers Meeting considering and agreeing to the cost and cost sharing arrangements, scope and governance of each initiative, acknowledging the different local contexts and starting points of each jurisdiction and that implementing the Schools USI, which is a National Policy Initiative, is a condition of Commonwealth funding provided to states and territories under the Act.

2.36 The minister clarified the definition of Education Ministerial Council (EMC) and advised that the inclusion of a body prescribed in the regulations is included within this definition to ensure that decision-making in relation to the Act can progress in the improbable circumstance in which there was no EMC.

2.37 The minister advised that the Education Ministers are establishing a Schools USI Data Governance Framework that will specify the requirements that must be met for protected information to be disclosed for research purposes. The minister advised this is an important safeguard and will be established and agreed to before school identifiers are assigned to students.

2.38 In relation to whether guidance can be provided as to when a research purpose is sufficiently related to 'school education', the minister advised that matters relating to primary or secondary school education would reasonably fall within the scope of the responsibilities of the Education Ministers. The minister also noted that any use of school identifiers, school identity management information and student identifiers for school education research purposes will require the agreement of Education Ministers.

Committee comment

2.39 The committee thanks the minister for this response. While the committee acknowledges that this scheme is part of an intergovernmental agreement, as set out above, the committee retains scrutiny concerns with allowing the EMC to determine the requirements to be met before the Registrar is authorised to disclose protected information for research purposes. The committee remains concerned that the disclosure of protected information is determined by non-legislative requirements and that these requirements would not be subject to any parliamentary oversight, such as

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[76] The minister responded to the committee's comments in a letter dated 5 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

if it were included in primary legislation or, at a minimum, in a disallowable legislative instrument.

2.40 The committee also does not consider that the inclusion of the requirements within the Schools USI Data Governance Framework is an appropriate safeguard, as this is a non-legislative document that would not be subject to any parliamentary oversight. Further, this is does not address the committee's request for examples as to the types of requirements that must be satisfied prior to disclosure of protected information. As this document has yet to be made available, it is also not possible to refer to the requirements to assess the appropriateness of the requirements for disclosure.

2.41 The committee also reiterates its concern that the EMC would be enabled to determine the circumstances of proposed subsection 18(5) of the bill, rather than being bound by the circumstances detailed in the bill. In addition to the requirements specified by the EMC not being subjected to ordinary parliamentary oversight processes and scrutiny, the committee remains deeply concerned that the EMC requirements may determine the operation of the bill and the Registrar's functions. The committee finally reiterates its view that this is an inappropriate delegation of legislative power and that this aspect of its concerns has not been addressed in the response.

2.42 The committee remains concerned that the disclosure of protected information will be determined by non-legislative requirements that would be agreed on by the Education Ministerial Council, and that these requirements would not be subject to any parliamentary oversight. The committee considers this to be an inappropriate delegation of legislative power and fails to ensure sufficient parliamentary oversight.

2.43 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsection 18(5) of the bill providing for the disclosure of protected information for the purposes of school education research on the basis of meeting requirements determined by the Education Ministerial Council.

Privacy

Significant matters in delegated legislation[77]

2.44 Further to the above matters, this bill also seeks to amend the Act to provide that an 'entity prescribed by the regulations' is authorised to collect, use or disclose protected information of an individual if the collection, use or disclosure is for a purpose or circumstances relating to school education and prescribed by the regulations. As set out above, the collection, use or disclosure of protected personal

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77 Schedule 1, item 47, proposed section 18D. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

information raises significant privacy concerns and the entity that is authorised to do this is a significant matter over which Parliament should exercise control.

2.45 As such, in *Scrutiny Digest 10 of 2024* the committee requested the minister's advice to following:

- why it is necessary and appropriate for entities to be prescribed by the regulations as authorised to collect, use and disclose protected information, and guidance as to the type of entities it is proposed would be prescribed for such purposes;
- why it is necessary and appropriate for the circumstances in which protected information may be collected, use or disclosed to be prescribed in the regulations; and
- whether guidance can be provided as to the circumstances in which it is intended for protected information to be collected, used or disclosed by an entity prescribed by the regulations.[78]

Minister for Education's response[79]

2.46 The minister advised that the bill provides authority to key legal structures and entities that are expected to administer unique school identifiers. The minister advised this also includes legal entities in the non-government school sector that are not 'approved authorities' under the *Australian Education Act 2013* which could be used to support administration activities for schools. The minister advised that the intention is that the regulations will identify any such specific legal structures to be used in the administration of schools identifiers.

2.47 In relation to the circumstances in which protected information may be collected, used or disclosed, the minister advised that the Education Ministers agreed in 2022 to a single use case for the scheme (which is to support the transfer for student information where individuals move between schools) and that the regulations will make provision for this agreed use. Further, the minister advised that it is necessary and appropriate for other future uses of the scheme to be prescribed in the regulations as this reflects the nature of the scheme as a joint initiative. The minister also noted that it is not possible to pre-empt the future uses that Education Ministers will decide for the scheme, nor would it be appropriate for the Commonwealth to bind the states and territories to future uses which they have not agreed to. The minister advised that the regulations for school identifiers can only be made with agreement from the Education Ministerial Council.

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78 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2024* (21 August 2024) pp. 9–10.

79 The minister responded to the committee's comments in a letter dated 5 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

Committee comment

2.48 The committee thanks the minister for this response. The committee notes the minister's advice that the bodies intended to be prescribed by regulations include legal entities and structures that could be used to support administration activities for schools and makes no further comment on this issue.

2.49 The committee does not consider that prescribing broad circumstances in the regulations to allow for the use, collection and disclosure of protected information, that may be consistent with future uses that may be agreed to by Education Ministers, is an appropriate use of delegated legislation or is a justification for why prescribing these circumstances in the regulations is necessary or appropriate. The committee considers that the known circumstance (that of a single use case for the Schools USI scheme) should be included on the face of the bill. In the event that the Education Ministers agree to a separate use for the scheme in the future, the committee considers that the Act should be amended at that time to capture these future uses. As stated by the minister, since it is not possible to pre-empt future uses at this stage, it is inappropriate to legislate on the basis of these unknown future uses.

2.50 Additionally, the committee considers that at the very least, the primary legislation should indicate that regulations in relation to school identifiers should also provide some guidance as to the circumstances in which protected information will be collected, used or disclosed by an entity prescribed by the regulations. The committee considers that this would provide some certainty as to the circumstances in which the protected information of children may be collected, use and disclosed by prescribed entities.

2.51 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed section 18D of the bill, which allows for the circumstances in which protected information may be collected, used or disclosed to be prescribed in the regulations.

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

Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024[80]

Purpose	This bill seeks to amend the *Customs Act 1901* with the aim of modernising and strengthening the customs licensing regime and seeks to make amendments to streamline administrative processes including digitisation of forms. The customs licensing regime encompasses depot, warehouse and customs broker's licences. The bill also seeks to amend the *AusCheck Act 2007* to support these reforms by allowing for the disclosure of security identity card information to an officer of Customs for the purposes of the Customs Act.
Portfolio	Home Affairs
Introduced	House of Representatives on 26 June 2024
Bill status	Received the Royal Assent 5 September 2024

Coercive powers[81]

2.53 This bill seeks to amend the *Customs Act 1901* (Customs Act) to provide that a collector may, at any time, gain access to and enter, if necessary by force, any place covered by a depot licence and examine any goods at the place.[82] A collector is taken to be either the Comptroller-General or a Customs officer under the Customs Act.[83]

2.54 In *Scrutiny Digest 9 of 2024* the committee requested the minister's advice as to:

- why subsection 77N(10) of the Customs Act, which currently makes it a condition for licence holders to permit authorised officers to enter and search premises is insufficient, and whether consideration was given to amending this provision (rather than allowing a general right of warrantless entry at any time);
- why seeking a warrant would be impractical (noting the bill could provide no requirement for prior notification to be given regarding the warrant);

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80 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 181.

81 Schedule 1, item 121, proposed paragraph 15(2)(e). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

82 Schedule 1, item 162, proposed section 77ZAA.

83 *Customs Act 1901*, subsection 8(1).

- what safeguards would apply if a collector were to enter premises without consent and without a warrant, including oversight of the officer's actions and reporting requirements;
- in what circumstances is it envisaged that an officer would need to use force to enter premises;
- whether training will be provided to any officer exercising these proposed powers in relation to the use of force; and
- why is there no requirement that a licence holder be notified after a search has occurred.[84]

Minister for Home Affairs' response[85]

2.55 In relation to why the current permit conditions are insufficient, the minister advised that subsection 77N(10) is limited to review and inspection of documents and does not include the power to inspect goods under customs control in the depot or to ensure compliance with other conditions imposed upon the depot licence under the Customs Act.

2.56 The minister highlighted subsection 77N(11) of the Customs Act, which permits licence holders to refuse access to the depot unless the authorised officer produces written evidence that the person requesting access is an authorised officer. However, the minister noted that if a licence holder is not present it may not be possible to seek permission for entry into the depot, and if a licence holder asserts there are no commercial documents, it may be difficult to establish that an officer had reasonable grounds to believe commercial documents were present.

2.57 The minister advised that subsection 77N(6) could be amended to give, as a condition of the licence, the Australian Border Force (ABF) authority to enter and access a licenced place. However, the minister advised this would not account for circumstances where a licence holder may refuse the ABF's request to shield either non-compliant or criminal behaviour.

2.58 In relation to why seeking a warrant would be impractical, the minister advised that the ABF requires timely powers of access and examination due to the speed and complexity of supply chain operations, as once goods under customs control are released for home consumption the ABF has limited jurisdiction over them. The minister also advised that currently the ABF can only access the defined licensed places or Customs controlled areas whereas if entry and access is required to other places a warrant would be required in relation to non-customs controlled areas.

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84 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 4–7.

85 The minister responded to the committee's comments in a letter dated 22 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

2.59 In relation to what safeguards would apply if a collector entered premises without consent or warrant, the minister advised that an existing provision of the Customs Act provides an identical entry and search power but in relation to warehouse premises. The minister also advised that the ABF Operational Safety Order 2021 sets out the ABF operational safety and use of force practice, reporting, training, assessment, qualification and administration requirements. The minister stated that an ABF employee would need to complete a Basic Operational Safety Training Course (BOST) to be issued with a use of force permit. However, the minister also noted that this training qualification does *not* cover forced entry capability (as provided for in the proposed new entry and search power).

2.60 In relation to when an officer may need to use force to enter premises, the minister advised where a licence holder is not present, an ABF officer will first exhaust all options to seek permission, including requesting consent from the licence holder, requesting the licence holder attend the place to allow access, or requesting the licence holder facilitate access. The minister advised that in most cases the licence holder will provide consent or facilitate access remotely. The minister advised force may be necessary where a license holder refuses permission to enter a licenced place, noting this may indicate criminal behaviour or intent to interfere with goods subject to customs control prior to ABF intervention.

2.61 Finally, in relation to the lack of any statutory requirement for a licence holder to be notified after a search has occurred, the minister advised that the ABF will use various powers to seek licence holder compliance when attending licensed places such as announcing the ABF officers' presence and requesting permission to enter. The licence holder would have an opportunity to provide consent, permit entry and seek confirmation of the ABF officers' credentials.

Committee comment

2.62 The committee thanks the minister for this response. The committee acknowledges the minister's advice regarding the need for the ABF to gain access and examine goods in a timely manner, but considers it has not been established why stronger licence conditions requiring access would not be sufficient, or why a warrant could not be sought (noting that warrants for other matters can be made urgently where necessary).

2.63 In relation to the existing power imposing conditions on a depot licence, the committee notes the advice that subsection 77N(6) could be amended to give the required search and entry power. It is not clear to the committee why amending subsection 77N(6) to require licence holders to grant access to examine goods would not be sufficient, noting the Customs Act already provides that it is a criminal offence to breach a condition of a depot licence.[86] Further, it is unclear why, if this was considered insufficient, the Customs Act could not have been amended to include

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86 See *Customs Act 1901*, section 77R.

standard warrant provisions, such as triggering the provisions of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). The Regulatory Powers Act provides for a standard suite of provisions in relation to monitoring and investigation powers, which if triggered can be used to check compliance with a regulatory regime. The Regulatory Powers Act is an Act of general application and represents best practice in relation to regulatory powers, providing a standard baseline of regulatory powers while protecting important common law privileges.

2.64 The committee notes the advice provided that the officer of the ABF conducting the search will exhaust all available options to seek permission to enter the licensed premises before using force to enter the location, yet notes that none of these are statutory requirements. Overall, the committee considers the provision should better align with the requirements of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, *Infringement Notices and Enforcement Powers.*[87]

2.65 Further, in relation to the committee's request for applicable safeguards, the committee notes the advice that the ABF operational safety and use of force practice, reporting, training, assessment, qualification and administration requirements are contained within the ABF Operational Safety Order 2021. However, while the committee notes the advice in relation to Basic Operational Safety Training that all ABF employees must successfully complete, it is not clear to the committee how this is intended to operate as a safeguard on the use of force to enter and search licensed premises, as the advice provided also indicates this training does not cover forced entry capability, which the new power intends to provide ABF officers with. Effectively, it would appear customs officers are not trained to use force to enter and search licensed premises even though the new section 77ZAA allow for officers to use such force.

2.66 The committee notes the minister's advice that the new section 77ZAA aligns with existing section 91 of the Customs Act. However, section 91 of the Customs Act was inserted in 1980 and has not been amended since. As the power is identical to the one that would be introduced by new section 77ZAA, the committee considers that existing section 91 demonstrates similar scrutiny concerns to what has been detailed in relation to new section 77ZAA. The committee does not consider either of these provisions sufficiently protect individual rights and liberties – allowing an overly broad power, without relevant safeguards regarding the use of such powers.

2.67 The committee also notes that the advice provided does not address the question of why license holders cannot be notified after a search has occurred. Although the committee notes the advice that every effort will be made to seek permission from the licence holder prior to the search, the advice states that there are situations where the licence holder is not present to provide consent. The committee's query was in relation to these circumstances where permission cannot be sought from

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87 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 79.

the licence holder and consequently, why there are no reporting obligations placed on customs officers on the face of the bill.

2.68 The committee considers that both section 91 of the *Customs Act 1901* and new section 77ZAA are overly broad in allowing for customs officers to enter licensed depot and warehouse premises to search goods without any requirement to seek consent or do so under a warrant.

2.69 The committee notes that this bill has now passed both Houses of Parliament. As such, the committee considers the entry and search powers in the Customs Act should be reviewed to ensure the provisions are in line with best practice and the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Future Made in Australia (Omnibus Amendments No. 1) Bill 2024[88]

Purpose	This bill seeks to support domestic projects in the national interest consistent with the Future Made in Australia National Interest framework. The bill also includes technical measures on eligible activities with new definitions and seeks to make minor amendments to modernise legislation.
Portfolio	Treasury
Introduced	House of Representatives on 3 July 2024
Bill status	Before the Senate

Broad delegation of administrative powers[89]

2.70 Currently the *Australian Renewable Energy Agency Act 2011* (the ARENA Act) provides that the Australian Renewable Energy Agency (ARENA) may delegate all or any of its powers or functions under the ARENA Act to a member of its Board or to its Chief Executive Officer (CEO). The CEO may, in writing, subdelegate a power or function to the Chief Financial Officer or a member of staff who is an SES employee, acting SES employee or an Executive Level 2 employee or equivalent. This bill seeks to amend this to allow the CEO to, in writing, subdelegate to 'a senior member of the staff referred to in section 61'.[90] The bill also seeks to replace existing sections 61 and 62 to allow ARENA to employ 'such persons as it considers necessary'. It does not provide a definition of 'senior members of staff'.[91]

2.71 The provision does not specify which senior members of staff the powers or functions may be subdelegated to. It is also noted that the ARENA Act currently provides that the CEO may subdelegate to members of the SES or EL2. As such, this amendment would appear to indicate an intention to subdelegate to levels lower than that of an EL2. Further, there is also no requirement for powers and functions to be subdelegated to members of staff with the requisite skills, qualification or experience to exercise those powers or perform those functions.

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88 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Future Made in Australia (Omnibus Amendments No. 1) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 182.

89 Schedule 2, item 51, proposed subsection 73(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

90 See Schedule 2, item 51, proposed amendment to subsection 73(1) of the *Australian Renewable Energy Agency Act 2011*.

91 See Schedule 2, item 43.

2.72 In *Scrutiny Digest 9 of 2024* the committee sought the Treasurer's advice as to:

- why it is necessary and appropriate for any of the CEO's powers to be subdelegated to any 'senior member of staff' under proposed subsection 73(1) of the bill;
- whether proposed section 61 of the bill can be amended to include a definition of 'senior member of staff'; and
- whether proposed subsection 73(1) of the bill can be amended to provide that the CEO's powers or functions can only be subdelegated where the CEO is satisfied that the subdelegate possesses the appropriate skills, qualifications or experience to exercise the powers or perform the functions.[92]

Treasurer's response[93]

2.73 The Treasurer advised that the current limitation on sub-delegations to those at the EL2 level of the APS or members of the SES has led to a long-term shortage of delegates, and that amending the delegation power would enable ARENA to have a sufficient number of delegates. However, the Treasurer explained that the reference in the bill's explanatory memorandum to senior members of staff reflects the intention to 'maintain the equivalent level of seniority in ARENA's future delegation arrangements as is currently the case'.

2.74 The Treasurer also advised that it is appropriate for the bill to provide for delegations to senior members of staff as not all staff employed by the ARENA will be employed under the APS Act. Using the definition of 'a senior member of staff' will allow the legislation to provide for delegations to senior ARENA employees engaged through the APS or through ARENA's future right to employ.

2.75 The Treasurer noted that amending the bill to provide for a definition of a senior member of staff would restrict the delegation power and 'risk frustrating the objectives of the Bill to allow ARENA to employ staff and delegate responsibilities in appropriate circumstances'.

2.76 Further, the Treasurer advised that safeguards are in place to ensure the correct operation of this delegation power including that the Board maintains oversight and control of delegations.

2.77 In relation to the skills and experience of those to whom the functions are delegated, the Treasurer advised that it is not necessary for the bill to have an explicit

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92 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 16–18.

93 The minister responded to the committee's comments in a letter received on 29 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

provision requiring that the CEO be satisfied that the subdelegate possesses appropriate skills, qualifications or experience, as the CEO as a holder of public office would be expected to exercise their power properly, which would include ensuring they only subdelegate to persons who have the necessary skills, qualifications or experience.

Committee comment

2.78 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the term 'senior member of staff' is necessary to accommodate the range of APS and non-APS employees who are, or will be, employed by the ARENA.

2.79 While noting this advice, the committee retains its views that it would be possible for the bill to be drafted so as to ensure that delegations are made to suitably senior members of staff with appropriate flexibility for non-APS members, while also providing a legislative definition of a senior member of staff. The committee notes that the intention is for the delegation to remain at EL2 and higher, and a non-APS equivalent of senior staff. It does not appear to the committee that it would be difficult to accommodate these different categories of employees in defining a senior staff member within the context of the ARENA.

2.80 Further, the committee considers that, given the confidence that the Treasurer has in the ARENA CEO ensuring that delegations are made to staff with appropriate skills, experience and training, there is no reason why such a requirement could not and should not be included on the face of the bill. Safeguards such as these are stronger protections when enshrined in law and the committee's view is that this is the preferable approach.

2.81 The committee notes its scrutiny concerns would be addressed if the bill were amended to provide:

(a) a definition of 'senior member of staff', to make clear that in relation to APS employees this applies to those at the EL2 and SES level, and for non-APS employees this applies to those with equivalent seniority; and/or

(b) the CEO's powers or functions can only be subdelegated where the CEO is satisfied that the subdelegate possesses the appropriate skills, qualifications or experience to exercise the powers or perform the functions.

2.82 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsection 73(1) which empowers the CEO to delegate their powers to any senior member of staff.

Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024[94]

Purpose	This bill seeks to amend the *Migration Act 1958* by legislating income threshold requirements for skilled workers and amending the labour market testing provisions in the Migration Act. The amendments also include introducing a public register of approved sponsors.
Portfolio	Home Affairs
Introduced	House of Representatives on 4 July 2024
Bill status	Before the House of Representatives

Instruments not subject to an appropriate level of parliamentary oversight[95]

2.83 Currently, the *Migration Act 1958* (the Migration Act) provides that the minister must approve a nomination from a person who is, or has applied to be, an approved work sponsor or a person who is a party to negotiations for a work agreement if certain criteria are met.[96] This bill seeks to insert proposed subsection 140GB(2A) to provide three income threshold requirements (being the income an applicant for the visa must earn before they can be sponsored) that must be met before the minister must approve of a nomination.

2.84 In relation to one of these thresholds, the bill provides the minister with flexibility to estimate the earnings an applicant must earn per year in order to be sponsored for a Core Skills stream. In particular, it provides that the income threshold amount that must be met is an amount that is either calculated in accordance with the regulations[97] or is an amount specified in writing by the minister under proposed subsection 140GB(2B). This bill would also provide that such a specification would not be a legislative instrument.[98]

2.85 In *Scrutiny Digest 9 of 2024*, the committee requested the minister's advice as to the necessity and appropriateness of instruments made under proposed subsection

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94 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 183.

95 Schedule 1, item 3, proposed subsections 140GB(2AB) and 140GB(2B). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

96 *Migration Act 1958*, subsection 140GB(2).

97 Proposed paragraph 140GB(2A)(c).

98 Schedule 1, item 4, proposed subsection 140GB(6)

140GB(2B) not being legislative instruments and whether the bill can be amended to properly classify the instruments to ensure appropriate parliamentary oversight.[99]

Minister for Home Affairs' response[100]

2.86 The minister advised that the purpose of paragraph 140GB(2A)(c) and subsection 140GB(2B), when taken together, is to provide that the income threshold for the proposed Essential Skills stream of the Skills in Demand visa will either be found in the Migration Regulations 1994 or be specified in writing by the minister.

2.87 The minister stated that this approach of defining the income threshold in the regulations or in writing recognises that wages and conditions in various sectors may be less than the temporary skill migration income threshold. The minister advised that the amount prescribed in the regulations would be for lower paid workers in the Essential Skills stream. This would be made by a disallowable legislative instrument and would be subject to parliamentary scrutiny.

2.88 However, the minister noted that the amount defined in accordance with regulations does not apply where the minister has specified an amount in writing under proposed subsection 140GB(2B). The minister advised that this is intended to provide the minister with an administrative power to specify an income threshold with proposed employers of visa applicants seeking to satisfy the criteria in the Essential Skills stream. The minister further explained that the income threshold specified by the minister would be in writing within work or labour agreements entered with individual employers, who are defined as being in Australia and authorised to recruit or employ persons in Australia. The minister specified that this written agreement is not a legislative instrument as it is an administrative matter settled as part of the detail of the agreement reached between the minister and an individual employer and is not legislative in character.

Committee comment

2.89 The committee thanks the minister for this response. The committee notes the minister's advice that the amount determined by the minister would relate to a written agreement between the minister and individual employers. The committee considers that this would therefore determine particular cases or particular circumstances in which the law is to apply, rather than itself determining the law or altering the content of the law more broadly.[101]

2.90 The committee considers, on the basis of the minister's advice, these written agreements would not be legislative in character. As such the committee considers

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99 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 19–20.

100 The minister responded to the committee's comments in a letter dated 30 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

101 See *Legislation Act 2003*, subsection 8(4).

its scrutiny concerns have been addressed and has concluded its examination of this matter.

2.91 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.[102]

[102] See *Acts Interpretation Act 1901*, section 15AB.

Nature Positive (Environment Protection Australia) Bill 2024
Nature Positive (Environment Information Australia) Bill 2024
Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024[103]

Purpose	These bills establish Environment Protection Australia as a statutory Commonwealth entity to undertake regulatory and implementation functions and the statutory position of the Head of Environment Information Australia to provide access to, assess and report on environmental information and data. Various transitional provisions and amendments to the *Environment Protection and Biodiversity Conservation Act 1999* and other Acts are also made.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 29 May 2024
Bill status	Before the Senate

Instruments not subject to an appropriate level of parliamentary oversight[104]

2.92 The Nature Positive (Environment Protection Australia) Bill 2024 (EPA bill) seeks to provide that the CEO of Environment Protection Australia (EPA) may establish an advisory group by written instrument to provide the CEO advice or assistance in relation to the performance of the CEO's functions and the exercise of the CEO's powers. Subclause 54(9) seeks to provide that instruments made under subclause 54(1) are not legislative instruments. An instrument made under subclause 54(1) must also determine the terms and conditions of the appointment of the members, the terms of reference of the advisory committee and procedures to be followed while providing advice or assistance.[105]

2.93 In *Scrutiny Digest 8 of 2024* the committee requested the minister's advice as to the necessity and appropriateness of specifying that instruments made under

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103 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Nature Positive (Environment Protection Australia) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 184.

104 Subclauses 54(1) and 54(9), EPA bill. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

105 Subclauses 54(6) and 54(7) of the EPA bill.

subclause 54(1) are not legislative instruments, including why the instruments are not considered legislative in character.[106]

Minister for the Environment and Water's response[107]

2.94 The minister advised that an instrument which establishes an advisory group would not determine the law or alter the content of the law as such a group is unable to make, give content to, or affect the content of any laws. As such, the minister concluded that, for this reason, 'an instrument to establish an advisory group should not be considered legislative in character.'

2.95 The minister also advised that these instruments are not appropriate as legislative instruments as they only function in relation to purely administrative matters for the establishment of an advisory group. As the instruments would not create rights, obligations, privileges, nor other characteristics found in legislative instruments, the minister concluded that it is appropriate that the instruments made under subclause 54(1) would not be considered legislative in character.

Committee comment

2.96 The committee thanks the minister for this advice and the notes the minister's advice that an instrument under subclause 54(1) would only establish the advisory group and not alter or determine the content of the law.

2.97 In light of the minister's advice, the committee considers its scrutiny concerns have been addressed and makes no further comment in relation to this matter.

Immunity from civil liability[108]

2.98 The Nature Positive (Environment Information Australia) Bill 2024 (the EIA bill) seeks to provide that the Head of Environment Information Australia (the Head), the staff assisting the Head and persons engaged by the Secretary are not liable to actions or proceedings for damages for, or in relation to, an act or matter done in good faith in the performance of their functions or exercise of their powers.

2.99 In *Scrutiny Digest 8 of 2024* the committee requested the minister's advice as to the circumstances requiring immunity to civil liability as provided by clause 50 of the Nature Positive (Environment Information Australia) Bill 2024 as well as the

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106 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2024* (3 July 2024) pp. 5–6

107 The minister responded to the committee's comments in a letter dated 13 August 2024 (received on 26 August 2024). A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

108 Clause 50. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

options of recourse available for affected individuals besides demonstrating a lack of good faith by the Head, staff assisting the Head or persons engaged by the Secretary.[109]

Minister for the Environment and Water's response[110]

2.100 The minister advised that the Head of Environment Information Australia (the Head) would be responsible for providing information and data to a range of stakeholders and the public, and this role creates the potential for civil proceedings seeking damages. The minister provided examples of instances which may lead to such proceedings, such as a person or entity alleging that harm has been caused by the unauthorised disclosure of protected information, breach of copyright or intellectual property rights, or breaches of confidence or defamation. The minister also provided an example of individuals relying on information, or the absence of information, provided by Environment Information Australia (EIA) in good faith to their detriment, and attempted to recover their losses against the Head or persons assisting the Head.

2.101 The minister advised that without protection from civil liability, individuals may be reluctant to be appointed to roles within the EIA for fear of personal liability in relation to acts or omissions relating to their performance of functions or exercise of powers, even those done in good faith. The minister also advised that it is important high quality environmental information and data can be made available to inform policy, project, investment and regulatory decision-making.

2.102 The minister also noted that acts or omissions not performed in good faith would not be provided immunity from civil liability. Further, the immunity does not extend to immunity from criminal proceedings. The minister finally advised that an affected individual would be able to make a complaint to the Commonwealth Ombudsman.

Committee comment

2.103 The committee thanks the minister for this advice. The committee notes the minister's advice regarding the necessity of this immunity and the examples of the circumstances the immunity is seeking to avoid. The committee appreciates the importance of ensuring the Head of the EIA is not held personally liable, noting the difficulty otherwise in filling the role. The committee also welcomes the advice that affected individuals would be able to make a complaint to the Commonwealth Ombudsman.

2.104 However, the committee notes that this immunity would appear to leave a person affected by the actions of the Head, or their staff, in disclosing confidential

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109 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2024* (3 July 2024) pp. 6–7

110 The minister responded to the committee's comments in a letter dated 13 August 2024 (received on 26 August 2024). A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

information, or defamatory information, so long as this was done in good faith, without any remedy. The minister's response did not indicate any recourse for any potential harm done other than the ability to complain to the Ombudsman, but the committee notes that the Ombudsman has no powers other than to make recommendations, which would not necessarily ensure an affected person would receive a remedy.

2.105 The committee understands that where power is conferred on a named officer of the Commonwealth, such that the officer exercises the power independently, then the employer (the Commonwealth) is not vicariously liable for the actions of that officer.[111] Therefore, in this instance, the Head, others assisting the Head as part of the EIA, and by implication the Commonwealth more broadly, are immune from liability for civil proceedings.

2.106 The committee notes that in some instances, this principle regarding the liability of the Commonwealth has been abrogated in statute. One example is in relation to officers of the Australian Federal Police, where the Commonwealth is held to be liable in tort for the actions of individual officers (but not the officer personally).[112] The committee notes that in order to ensure affected persons are able to seek legal remedy, it would be possible for a similar provision to be included in the bill to provide that the Commonwealth is liable in respect of a tort committed by the Head, staff assisting the Head and persons engaged by the Secretary, while ensuring no personal liability applies to those persons.

2.107 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing immunity from civil liability to individuals in circumstances where there appears to be no provision for an affected person to seek a remedy against the Commonwealth itself.

Availability of independent merits review[113]

2.108 The Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 seeks to introduce a provision which would allow the minister to issue environment protection orders if the minister reasonably believes that the person has engaged, is engaging in, or is likely to engage in conduct that is causing or poses an imminent risk of serious damage to the environment (or another protected matter) and that it is necessary to issue the order to ensure the person's future compliance with legislative requirements or prevent or mitigate the damage caused

111 *Enever v The King* (1906) 3 CLR 969, 980.

112 See *Australian Federal Police Act 1979*, sections 64B(1) and 66.

113 Schedule 11, item 2, proposed subsection 474D(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

or risk posed. This provision also imposes an obligation on the minister to revoke an environment protection order if the minister reasonably believes that the order is no longer necessary. The environment protection order can impose any requirements on the person that the minister reasonably believes are necessary for the purposes detailed above. Contravening an order under this provision can be either a fault-based or strict liability offence.

2.109 In *Scrutiny Digest 8 of 2024* the committee requested the minister's advice on whether an independent review of the minister's decision to not revoke an environment protection order, under proposed subsection 474D(2), can be made available.[114]

Minister for the Environment and Water's response[115]

2.110 The minister advised that merits review is not appropriate as subsection 474D(2) is a mandatory decision arising from a statutory obligation to act in a certain manner on the instance of a specified set of circumstances. The minister provided further explanation, stating, 'if the Minister reasonably believes that the environment protection order is no longer necessary, the Minister must revoke the order; that is, the revocation would be mandatory'.

2.111 However, should the minister reasonably believes that the environment protection order is still necessary then it would mean that the urgent circumstances which caused the order to be issued are ongoing. In this circumstance, the minister advised it is necessary and appropriate to exclude merits review due to the urgency of the situation, and the potential for serious damage to the environment caused by a person's actions. These factors mean that it is likely the decision's effect would be spent by the time of review.

Committee comment

2.112 The committee thanks the minister for this advice. Although the committee notes that there is a statutory obligation to act in a certain way (that is, to revoke the environment protection order), this is contingent on the minister's reasonable belief that the order is no longer necessary for the purposes it was issued for. As such, the consideration of whether the order remains necessary is a decision that is amenable to merits review, noting it is not one that automatically follows from the happening of a set of circumstances.

2.113 The committee remains concerned that there is no means of independently reviewing whether the minister's belief that the environmental protection order is still necessary is reasonable. The committee's concerns relate to the minister deciding not

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114 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2024* (3 July 2024) pp. 7–9

115 The minister responded to the committee's comments in a letter dated 13 August 2024 (received on 26 August 2024). A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

to revoke an environment protection order, not to the initial making of the order. As such, the committee does not agree that the decision's effect would be spent by the time of the review, as at that time the order would remain on foot. Further, the urgency of the situation would not appear to preclude merits review, noting that the order would remain in force during the review.

2.114 The committee therefore remains concerned that independent review of the minister's decision not to revoke an environment protection order[116] would not be available, and draws this matter to the attention of senators and leaves the appropriateness of this to the Senate as a whole.

[116] Under proposed subsection 474D(2) of the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024.

Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024[117]

Purpose	The bill seeks to set out a framework for the entities that are liable to pay top-up tax in a way that seeks to achieve outcomes consistent with the GloBE Rules.[118] This includes establishing the entities that are within scope of the GloBE Rules, relevant definitions that are used to support the framework and the description of taxes that may be charged to an entity.
Portfolio	Treasury
Introduced	House of Representatives on 4 July 2024
Bill status	Before the Senate

Significant matters in delegated legislation[119]

2.115 The bill sets out a framework for certain multinational enterprises operating in Australia to pay a minimum top-up tax rate consistent with the Organisation for Economic Co-operation and Development (OECD) GloBE Model Rules. The bill provides that tax is payable by an entity if it has one of more of the following type of amounts for a fiscal year:

- IIR Top-up Tax Amount;
- Domestic Top-up Tax Amount; and
- UTPR Top-up Tax Amount.[120]

2.116 The bill then provides that the amount of tax payable by the entity is the sum of the relevant amounts.[121] What those amounts mean would be set out in the rules,[122] effectively meaning that the rate of taxation would be set by delegated legislation.

2.117 In *Scrutiny Digest 9 of 2024* the committee requested the assistant minister's advice as to the necessity and appropriateness of the meanings of the IIR, Domestic,

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117 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 185.

118 This term is defined in the explanatory memorandum as the OECD GloBE Model Rules (as modified by the Commentary, Agreed Administrative Guidance and Safe Harbour Rules).

119 Clauses 7, 9 and 11. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

120 Subclauses 6(1), 8(1) and 10(1).

121 Subclauses 6(2), 8(2) and 10(2).

122 Clauses 7, 9 and 11.

and UTPR Top-Up Tax being left to delegated legislation and whether guidance could be provided in the explanatory materials as to the anticipated starting rate for each tax amount as well as how the amounts would be calculated.[123]

Assistant Minister for Competition, Charities and Treasury's response[124]

2.118 The assistant minister advised that the definitions of the three taxes should be set out in delegated legislation to allow for efficiency in incorporating changes at the OECD level. The assistant minister advised that it has been agreed that all multinational enterprise groups operating within the scope of the GLoBE Rules should be paying a minimum 15 per cent effective tax rate in all jurisdictions in which they operate.

2.119 The assistant minister advised that computations for an effective tax rate are best placed in delegated legislation as they rely on accounting information which may be subject to change at the OECD level.

2.120 In relation to whether guidance could be provided as to the anticipated starting rate of tax, the assistant minister stated that the minimum rate of taxation is well established in the official Pillar-Two documents and throughout the explanatory materials, and additional guidance in the explanatory memorandum on these matters is not required.

Committee comment

2.121 The committee thanks the assistant minister for this response. The committee acknowledges the assistant minister's advice that it is necessary for the rates of tax to be defined in delegated legislation to allow for changes reflecting changes made at the OECD levels.

2.122 However, the committee remains of the view that the bill is essentially providing that the executive government may set the rates of tax in legislative instruments with minimal parliamentary involvement.

2.123 While the committee understands that the rates of top up tax need to remain consistent with international GloBE Rules, the committee has longstanding concerns about the inclusion of rates of tax in delegated legislation as a matter of principle.

2.124 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the rates of IIR, UTPR and Domestic top-up tax to delegated legislation.

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123 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 21–22.

124 The minister responded to the committee's comments in a letter dated 3 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

Incorporation of external materials as existing from time to time[125]

2.125 Subclause 3(1) of the bill provides that the bill is to be interpreted in a manner consistent with the GloBE Rules, the Commentary, Agreed Administrative Guidance, and the *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)* published by the OECD on 20 December 2022, and a document or part thereof prescribed by the rules. Subclause 3(4) provides definitions for the Agreed Administrative Guidance, the Commentary and the GloBE Rules.

2.126 In addition, paragraph 31(1)(a) provides that the rules may apply, adopt or incorporate any matter contained in any other instrument or writing as in force from time to time. In relation to this the explanatory memorandum provides limited information as to the types of additional documents it is intended the rules may incorporate and does not clarify whether they will be freely accessible to the public and affected parties.

2.127 In *Scrutiny Digest 9 of 2024* the committee requested the assistant minister's advice on the following matters:

- whether the GloBE Rules, the Commentary, Agreed Administrative Guidance, Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two) published by the OECD on 20 December 2022 are freely and publicly available; and
- whether the accompanying explanatory statement to any relevant rules will provide for the manner of access and use of the GloBE Rules, the Commentary, Agreed Administrative Guidance, Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two) published by the OECD on 20 December 2022; and
- the type of documents that it is envisaged may be applied, adopted or incorporated by reference under paragraph 31(1)(a), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time in addition to as in existence when an instrument is first made.[126]

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125 Clause 3. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

126 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 22–24.

Assistant Minister for Competition, Charities and Treasury's response[127]

2.128 The assistant minister advised that the documents referred to are publicly available on the OECD website, and that this information was set out in the explanatory memorandum.

2.129 Further, the assistant minister confirmed that where delegated legislation incorporates these materials the explanatory statements will provide for manner of access.

2.130 In response to the committee's query on the incorporation of documents under paragraph 31(1)(a), the assistant minister advised that section 31 is intended to ensure that additional documents released by the OECD, which are not organised under the heading of Agreed Administrative Guidance, can be incorporated. Any documents related to Pillar Two which will be incorporated will be freely and publicly available.

2.131 The assistant minister concluded that it is necessary and appropriate for these documents to apply both at the time they are made and from time to time to satisfy the objective of ensuring that Australia's qualification status is not jeopardised. The assistant minster gave the example of where a new GloBE Information Return document is released by the OECD but an appropriate instrument had not yet been made. Finally, the assistant minister advised that it is necessary for the documents to be incorporated as in force from time to time to ensure that Australia is up to date with any changes.

Committee comment

2.132 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that the explanatory memorandum to the bill confirms that OECD Agreed Administrative Guidance and related official documents of the Two-Pillar solution will be freely and publicly available on the OECD website. The committee also welcomes the assistant minister's advice that any explanatory materials related to any delegated legislation will explain the manner of access to any official Pillar Two documents. Further, the committee welcomes the assistant minister's advice that any further documents to be incorporated under paragraph 31(1)(a) are intended to be freely and publicly available.

2.133 The committee thanks the assistant minister for this advice. Noting the advice that incorporated documents will be publicly and freely available, the committee considers its concerns have been addressed and makes no further comment in relation to this matter.

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127 The minister responded to the committee's comments in a letter dated 3 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

Broad delegation of administrative powers[128]

2.134 The bill provides that the rules may confer on a person or body a power or function of determining any matter that may be dealt with by the rules, or a power or function relating to the operation, application or administration of the rules. Paragraph 30(2)(b) empowers the person or body to delegate the power or function, subject to a list of limitations to confine powers to make delegated legislation to vest in persons such as the relevant minister, departmental secretary, the Commissioner of Taxation and SES level departmental employees.[129]

2.135 In *Scrutiny Digest 9 of 2024* the committee requested the assistant minister's advice as to the necessity and appropriateness of clause 30 allowing the delegation of all functions or powers under the bill, which persons, classes or entities are intended to be delegated these powers, as well as requirements of relevant skills, training or experience to exercise said powers or functions, and finally whether the bill may be amended to provide legislative guidance for the scope of powers delegated or the categories of people who would be appropriate for delegation.[130]

Assistant Minister for Competition, Charities and Treasury's response[131]

2.136 The assistant minister advised that only SES employees within the Australian Taxation Office (ATO) or Department of Treasury can be delegated powers or functions under the bill.

2.137 Within the ATO, specifically, the assistant minister noted that delegations to SES employees must be consistent with the general delegation provision in section 8 of the *Taxation Administration Act 1953*, which provides that the Commissioner may delegate powers or functions under a taxation law.

2.138 Finally, the assistant minister noted that it would be inappropriate to provide further guidance as to the types of functions or powers that may be delegated due to the 'novelty' of this context and to prevent inconsistency with the model rules.

Committee comment

2.139 The committee thanks the assistant minister for this response. However, the committee considers that the response does not address the concerns raised.

2.140 As drafted, proposed section 30 provides that the rules may confer functions or powers relating to the operation, application or administration of the rules on a

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128 Clause 30. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

129 See subclause 30(3).

130 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 24–25.

131 The minister responded to the committee's comments in a letter dated 3 September 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 11 of 2024*).

person or body, in addition to the power to make legislative instruments. As the committee noted in *Scrutiny Digest 9 of 2024*, the clause provides that the power to make legislative or notifiable instruments cannot be delegated to any person below an SES level.[132] The committee is not concerned with this aspect of the delegation.

2.141 The committee's concerns, as set out in *Scrutiny Digest 9 of 2024*, centre on the other functions and powers that the rules may confer on a body or person, beyond those to make delegated legislation.[133] Paragraph 2.78 of the explanatory memorandum, to which the assistant minister referred in their response, only addresses the delegation of powers to make instruments. In the committee's assessment there is no information available in either the explanatory memorandum or the assistant minister's response which addresses the powers and functions more generally which may be delegated to any person or body under the rules.

2.142 The committee therefore reiterates its preference 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 as to why these are considered necessary should be included in the explanatory memorandum.

2.143 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed clause 30 of the bill that provides that the rules may allow a person or body to delegate a power or function relating to the operation, application or administration of the rules, with no apparent limits on the delegation (other than delegations relating to instruments).

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132 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 21–22.

133 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024* (14 August 2024) pp. 21–22.

Chapter 3
Scrutiny of standing appropriations[134]

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.[135] 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.[136]

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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134 This section can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 11 of 2024*; [2024] AUSStaCSBSD 186.

135 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*.

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