Senate Standing

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 entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 28.

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.

Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024[2]

Purpose	The Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024 (the bill) forms part of a package of bills that would abolish the Administrative Appeals Tribunal and establish the Administrative Review Tribunal. The bill would support the package, by making consequential amendments to the remaining 110 Commonwealth Acts that interact with the AAT Act, including Acts that have required consultation with states and territories under cooperative schemes or intergovernmental agreements.
Portfolio	Attorney-General
Introduced	House of Representatives on 7 February 2024
Bill status	Before the House of Representatives

Limitation of judicial review[3]

1.2 Item 2 of Schedule 2 to the bill seeks to substitute existing paragraph (y) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act).

1.3 Proposed paragraph (y) would provide that decisions of the Administrative Review Tribunal (the Tribunal) which are conducted by the intelligence and security jurisdictional area of the Tribunal, except for review decisions of exempt security record decisions, are a class of decision that are excluded from the operation of the ADJR Act.

1.4 This has the effect that, except for exempt security record decisions and those made by the National Archives of Australia, no decisions made under the intelligence

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 29.

3 Schedule 2, item 2, paragraph (y) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

and security jurisdictional area of the Tribunal are able to be reviewed under the ADJR Act.

1.5 The explanatory memorandum states:

> This item amends paragraph (y) of Schedule 1 of the ADJR Act so that it captures all Tribunal decisions on review of a security and intelligence decision that are required by clause 134(1) of the ART Bill to be considered in the Intelligence and Security jurisdictional area. Clause 134(1) of the ART Bill provides that the ART's powers in relation to proceedings for review of an intelligence and security decision are to be exercised in the Intelligence and Security jurisdictional area. Intelligence and security decisions are defined in clause 4 of the ART Bill.
>
> However, the item excludes 'exempt security record decisions' within the meaning of the ART Bill. The effect of the amendment is that decisions of the Tribunal made on review of an intelligence and security decision, other than exempt security records decisions, are excluded from ADJR Act review. Judicial review of these kinds of decisions remains available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.
>
> Under the current paragraph (y) of Schedule 1, decisions made on all reviews conducted in the Security Division are exempt from ADJR Act review, except those made on review of decisions of the National Archives of Australia. The item maintains the effect of the existing law with respect to these reviews, but expands the availability of ADJR Act review to all exempt security record decisions, rather than only those made by the National Archives of Australia.

1.6 The committee welcomes that the amendment expands, albeit narrowly, the scope of decisions made by the intelligence and security jurisdictional area to which a person could seek ADJR Act review. However, the committee considers the explanatory memorandum should explain why it is necessary and appropriate for ADJR Act review to be excluded from all other decisions in this area of the Tribunal. This explanation is particularly pertinent in light of the nature of proceedings in the intelligence and security jurisdictional area to which limited procedural fairness protections apply and applicants are limited in their ability to test evidence and are prohibited from receiving reasons for decisions made by the Tribunal.[4]

1.7 The committee notes that it has not generally considered that consistency with existing provisions in legislation is, of itself, sufficient justification for provisions that limit the availability or adequacy of review of decisions that will affect a person's rights and liberties, such as provisions that may impact whether a person would be able to seek ADJR Act review of an administrative decision. The committee considers the introduction of legislation that entirely remakes a federal administrative review

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[4] For more detail see the committee's comments in relation to the Administrative Review Tribunal Bill 2023 in *Scrutiny Digest 2 of 2024*.

body to provide a suitable opportunity for policy-makers to reconsider the impact of existing measures on review rights.

1.8 **The committee requests the Attorney-General's advice as to why it is necessary and appropriate for decisions made by the Administrative Review Tribunal in its intelligence and security jurisdictional area to be exempted from review under the *Administrative Decisions (Judicial Review) Act 1977* with limited exceptions.**

Availability of independent merits review[5]

1.9 Item 9 of Schedule 15 would repeal subsections 105.51(5) to (9) of the Criminal Code Act 1995 (the Criminal Code). These provisions of the Criminal Code provide that an application may be made to the Administrative Appeals Tribunal (AAT) for ex-post facto review of a decision to make or extend a preventative detention order. The AAT is empowered to declare such a decision void or to order compensation. Existing subsection 105.51(7) provides that the AAT may declare a preventative detention order void if the Tribunal would have set the decision aside if an application for review of the decision had been able to be made to the Tribunal while the order was in force.

1.10 The explanatory memorandum states:

> … The effect of this item is to remove the ability for individuals to seek administrative review of PDO decisions, and leave the review of PDO decisions to the purview of the courts, pursuant to existing judicial review mechanisms.
>
> Judicial review of PDO decisions is provided for under existing subsection 105.51(1) and section 105.52 of the Criminal Code, as well as section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution.
>
> Providing for only judicial review of PDO decisions is appropriate and addresses the risk that sections 105.51(5) and (7) of the Criminal Code could be construed as vesting federal judicial power in a body other than a court, contrary to Chapter III of the Constitution. It also reflects the seriousness and extraordinary nature of PDO decisions, and the courts' expertise in handling such matters.
>
> The remedies currently available to an affected individual through the administrative review mechanism (voiding of a PDO decision and an award of compensation) are also available through judicial review.[6]

1.11 Noting the significant scrutiny concerns relating to the preventative detention arrangements contained in Division 105 of the Criminal Code, the committee considers that any alteration to the safeguards contained within the Division requires careful

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5 Schedule 15, item 9. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

6 Explanatory memorandum, pp. 133–134.

consideration by the Parliament, supported by detailed discussion in the explanatory materials to the bill.

1.12 The committee considers that the grounds upon which the Tribunal may declare a decision void are different from the grounds that would be considered by a court in making the same decision. Noting subsection 105.51(7), the Tribunal considers whether to void the decision on the same basis as it would perform any of its merit review functions. This means that the Tribunal has a broader scope to void a preventative decision order decision when compared to the relatively narrow grounds considered by a court on judicial review. The Tribunal could set aside a decision if it was not the correct or preferable one whereas a court could only do so if the decision was made without jurisdiction. It would be similarly more difficult for a person to gain compensation via legal proceedings when compared to review by the Tribunal. Compensation is not an available remedy in judicial review proceedings and any proceedings for an alleged tortious act (such as false imprisonment) would not only be more costly than merits review but would also place a plaintiff at risk of a costs order being made against them. Given these matters, the Committee considers that the continued availability of judicial review is an inadequate justification for the removal of merits review by the AAT.

1.13 In relation to the suggestion that the existing merits review function of the AAT may amount to an exercise of judicial power by a non-Chapter III court (and therefore be unconstitutional) the committee considers that this claim requires further elaboration and justification given that the grounds for a conclusion that a PDO is 'void' is not limited to legal grounds but includes also that the order was wrongly made in the circumstances (ie the making of the decision was not preferable). The committee also notes that the payment of compensation is not solely within the jurisdiction of the courts and that the Executive provides compensation when appropriate, for example, under the Scheme for Compensation for Detriment caused by Defective Administration. It is unclear why monies paid in compensation in circumstances where the tribunal concludes that a PDO was not the correct or preferable decision, cannot be characterised as compensation for defective administration of the particular administrative scheme at issue.

1.14 Finally, the committee notes the comments of the Independent National Security Legislation Monitor (INSLM) in its review of Division 105 of the Criminal Code, who considered the availability of independent merits review by the Tribunal as a contributing factor to the INSLM's decision ultimately not to recommend the removal of the exclusion of ADJR Act review for decisions made under Division 105.[7]

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[7] Independent National Security Legislation Monitor, *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control orders and preventative detention orders* (September 2017), pp. 82–83.

1.15 **The committee therefore requests the Attorney-General's advice as to:**

- **whether more detailed advice can be provided as to the risk that subsections 105.51(5) and (7) of the Criminal Code could be construed as vesting federal judicial power on the Administrative Review Tribunal;**
- **whether consideration was given to alternative constructions that would preserve the right of a person to seek independent merits review (for instance by consideration of alternative remedies that could be ordered by the Administrative Review Tribunal in relation to preventative detention orders); and**
- **if an alternative construction is not possible or otherwise appropriate, whether the removal of independent merits review warrants consideration of whether review under the *Administrative Decisions (Judicial Review) Act 1977* should be provided in respect of decisions made under Division 105 of the Criminal Code relating to preventative detention orders.**

Limitation of merits review – application timeframes[8]

1.16 Item 54 of Schedule 1 to the bill would repeal subsection 40Y(2) of the *Wine Australia Act 2013* (the Wine Act) and substitute it with proposed subsections 40Y(2) and (3). The substance of the amendment is to replace the reference to section 29 of the *Administrative Appeals Tribunal Act 1975* with references to clauses 18 and 19 of the Administrative Review Tribunal Act. In effect this removes the Tribunal's ability to extend the 28 day period during which an applicant may apply for Tribunal review.

1.17 Similarly, item 74 of Schedule 11 to the bill would substitute subsection 77(2) of the *Plant Breeder's Rights Act 1994* to remove the Tribunal's power to extend the timeframe for a review application. In relation to this the explanatory memorandum notes:

> PBR are commercially valuable, exclusive rights of limited duration. PBR give rights of action against third parties for infringement, including the recovery of damages. Administrative decisions under *the Plant Breeder's Rights Act 1994* concern the granting, limitation and revocation of PBR. To allow late review of PBR decisions by the ART would risk changing what were non-infringing acts by third parties into infringing acts retroactively. To balance the interests of applicants, requesters and grantees, with the interests of third parties, it is appropriate to require that ART review of PBR

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8 Schedule 1, item 54, proposed subsection 54(3) of the *Wine Australia Act 2013*; Schedule 11, item 74, proposed subsection 77(2) of the *Plant Breeder's Rights Act 1994*.

decisions always be sought within the period prescribed in the rules under clause 18 of the ART Bill, with no possibility of extension.[9]

1.18 No justification is provided in the explanatory memorandum as to why it is necessary for the bill to remove the Tribunal's ability to extend the application timeframe for decisions in relation to the Wine Act. The committee expects that justification should be provided in light of the impact such a limitation may have on the ability of parties to seek review.

1.19 **The committee requests the Attorney-General's advice as to why it is necessary and appropriate for item 54 of Schedule 1 to the bill to remove the Administrative Review Tribunal's discretion to extend the application timeframe for review of decisions under the *Wine Act 2013*.**

1.20 **The committee notes the explanation in the explanatory memorandum in relation to item 74 of Schedule 11 and leaves to the Senate as a whole the appropriateness of removing the Administrative Review Tribunal's discretion to extend the application timeframe for review of decisions under the *Plant Breeder's Rights Act 1994*.**

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9 Explanatory memorandum, p. 105.

Appropriation Bill (No. 3) 2023-2024
Appropriation Bill (No. 4) 2023-2024[10]

Purpose	The Appropriation Bill (No. 3) 2023-2024 seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government. The Appropriation Bill (No. 4) 2023-2024 seeks to appropriate additional money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government.
Portfolio	Finance
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Parliamentary scrutiny—ordinary annual services of the government[11]

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

1.22 Appropriation Bill (No. 3) 2023-2024 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.23 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[12]

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10 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 3) 2023-2024 and Appropriation Bill (No. 4) 2023-2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 30.

11 Appropriation Bill (No. 3) 2023-2024, various provisions. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

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

1.24 The Senate Standing Committee on Appropriations, Staffing and Security[13] has also actively considered the inappropriate classification of items as ordinary annual services of the government.[14] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[15]

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

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

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

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

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13 Formerly the Senate Standing Committee on Appropriations and Staffing.

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

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

government and new programs and projects or to identify the expenditure on each of those areas.[16]

1.27 The Appropriations, Staffing and Security Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[17]

1.28 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[18]

1.29 Based on the Senate resolution of 22 June 2010, it appears that at least part of the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2023-2024:

- Australian Universities Accord interim report – initial response ($102.6 million over four years and $538.2 million over 11 years);[19]
- Southeast Asia Economic Strategy to 2040 ($95.4 million over four years and $5.3 million ongoing);[20]
- Enabling Australia's energy transformation ($5.7 million over three years);[21]
- Government response to the Royal Commission into the Robodebt Scheme ($22 million over four years and $4.8 million ongoing);[22] and

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

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

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

19 Mid-Year Economic and Fiscal Outlook 2023-24, p. 233.

20 Mid-Year Economic and Fiscal Outlook 2023-24, p. 252.

21 Mid-Year Economic and Fiscal Outlook 2023-24, p. 221.

22 Mid-Year Economic and Fiscal Outlook 2023-24, p. 218.

- Supporting physical activity and equitable access for women and girls to participate in sport ($200 million over four years).[23]

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

1.31 The committee has previously written to Ministers for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;[24] however, the Government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

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

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

1.34 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 3) 2023-2024, which should only contain appropriations of a kind that is not amendable by the Senate).

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23 Mid-Year Economic and Fiscal Outlook 2023-24, p. 266.

24 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* pp. 402–406; *Fourth Report of 2015*, pp. 267–271; *Alert Digest No. 6 of 2015*, pp. 6–9; *Fourth Report of 2016*, pp. 249–255; *Alert Digest No. 7 of 2016*, pp. 1–9; *Scrutiny Digest 2 of 2017*, pp. 1–5; *Scrutiny Digest 6 of 2017*, pp. 1–6; *Scrutiny Digest 12 of 2017*, pp. 89–95; *Scrutiny Digest 2 of 2018*, pp. 1–7; *Scrutiny Digest 2 of 2019*, pp. 1–4, *Scrutiny Digest 3 of 2020*, pp. 1–4, *Scrutiny Digest 15 of 2020*, pp. 10–13, *Scrutiny Digest 8 of 2021*, pp. 5–8, *Scrutiny Digest 2 of 2022*, pp. 12–15; *Scrutiny Digest 7 of 2022*, pp. 10-21; *Scrutiny Digest 1 of 2023*, pp. 78–80; *Scrutiny Digest 6 of 2023*, pp. 2–5.

Parliamentary scrutiny—appropriations determined by the Finance Minister[25]

1.35 Section 10 of *Appropriation Act (No. 1) 2023-2024* (Appropriation Act No. 1) enables the Finance Minister to allocate additional funds to entities when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

1.36 Subsection 10(2) of Appropriation Act No. 1 provides that when the Finance Minister makes such a determination the Appropriation Act has effect as if it were amended to make provision for the additional expenditure. Subsection 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Act No. 1 at $400 million. Identical provisions appear in *Appropriation Act (No. 2) 2023-2024* (Appropriation Act No. 2), with a separate $600 million cap in that Act.[26] After the committee noted that the total amount provided for in the AFM provisions had increased compared to pre-pandemic appropriation bills, the minister advised that the amount, together $1 billion, was 'an appropriate increase to reflect the passage of time since the normal levels were last adjusted in 2008-09'.[27]

1.37 Subclause 10(1) of Appropriation Bill (No. 3) 2023-2024 seeks to provide that any determinations made under the AFM provisions in Appropriation Act No. 1 are to be disregarded for the purposes of the $400 million cap in subsection 10(3) of that Act. The note to subclause 10(1) clarifies that this means that the Finance Minister would have access to the full $400 million for the purposes of making AFM determinations under section 10 of Appropriation Act No. 1, regardless of any amounts that have already been determined under that section. Clause 12 of Appropriation Bill (No. 4) 2023-2024 contains identical provisions, which apply to the $600 million cap in Appropriation Act No. 2.

1.38 While it does not appear any AFM determinations have been made since Appropriation Acts Nos 1 and 2 commenced and as such the provisions are unlikely to have a substantive effect on the total amount of funds that may be allocated by the Finance Minister under the advances over 2023-24, this does not alleviate the committee's fundamental concerns with the AFM mechanism.

1.39 The committee considers that, in allowing the Finance Minister to allocate additional funds to entities via non-disallowable delegated legislation, in this case up

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25 Appropriation Bill (No. 3) 2023-2024, clause 10; Appropriation Bill (No. 4) 2023-2024, clause 12. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iv) and (v).

26 Section 12 of *Appropriation Act (No. 2) 2023-2024*.

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 38–40.

to a total of $1 billion, the AFM provisions in Appropriation Acts Nos 1 and 2 delegate significant legislative power to the Executive. While this does not amount to a delegation of the power to create a new appropriation, the committee notes that one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[28] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.40 The committee's significant scrutiny concerns in relation to these provisions are heightened given that AFM determinations are not subject to the usual parliamentary disallowance process. In this regard, the committee notes that neither of the explanatory memoranda to Appropriation bills Nos 3 and 4 note that the AFM provisions are exempt from disallowance. The explanatory memorandum to the bill for Appropriation Act No. 1 however suggests that disallowing an AFM determination:

> …would reduce an entity's appropriation to its original level. Yet the urgent expenditure it had already undertaken validly prior to disallowance, in reliance upon the determination, would count towards the newly reduced appropriation…
>
> Accordingly, disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.[29]

1.41 While noting this explanation, the committee is of the view that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless there are exceptional circumstances, and any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[30]

1.42 The committee concurs with the view expressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the disallowance status of AFM determinations. In particular, the committee agrees that if the AFM is

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

29 Explanatory memorandum to Appropriation Bill (No. 1) 2023-2024, p. 10.

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

used for a genuine emergency situation, the likelihood of a determination subsequently being disallowed would be virtually non-existent. This explanation therefore is insufficient, from a scrutiny perspective, to justify an exemption from disallowance. Instead, the potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgent circumstances, as intended by the Parliament.[31]

1.43 The committee reiterates its long-standing scrutiny concerns in relation to the Advance to the Finance Minister provisions contained in the annual Appropriation Acts, which allow the Finance Minister to determine the purposes for which additional funds may be allocated in legislative instruments that are not subject to disallowance.

1.44 In light of the fact that these bills do not appear to have a substantive effect on the total amount of funds that may be allocated by the Finance Minister over 2023-24, the committee makes no further comment on this matter on this occasion.

Parliamentary scrutiny—measures marked as 'not for publication'[32]

1.45 Clause 4 of both Appropriation Bill (No. 3) 2023-2024 and Appropriation Bill (No. 4) 2023-2024 provide that portfolio statements (in this case known as Portfolio Additional Estimates Statements – or PAES) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PAES may be considered in interpreting the provisions of each bill. Moreover, the explanatory memoranda to the bills state that they should be read in conjunction with the PAES.[33]

1.46 Noting the important role of the PAES in interpreting Appropriation Bills Nos 3 and 4, the committee expresses its scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as 'not for publication' (nfp), meaning that the proposed allocation of funding to those budget measures is not published within the PAES. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are legally or commercially sensitive.

1.47 Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative

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

32 Appropriation Bill (No. 3) 2023-2024, clause 4; Appropriation Bill (No. 4) 2023-2024, clause 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

33 Explanatory memorandum to Appropriation Bill (No. 3) 2023-2024, p. 5; Explanatory memorandum to Appropriation Bill (No. 4) 2023-2024, p. 5.

and responsible government that "no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself"'.[34] Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the full amount of funding allocated to each Budget measure. However, where it is considered to be necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the PAES, noting that the onus is on those claiming confidentiality in relation to the provision of information to the Parliament to argue the case for it. The committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as nfp where there is either no, or very limited, explanation as to why it is appropriate to mark the measure as nfp.

1.48 In *Scrutiny Digest 16 of 2021*, the committee requested that future Department of Finance guides on preparing portfolio budget statements be updated to include guidance that, where a measure is marked as nfp, at least a high-level explanation should be included within the portfolio budget statements explaining why this is appropriate.[35] As a result, the Department of Finance updated the Guide to Preparing the Portfolio Budget Statements to reflect the committee's scrutiny concerns.[36] The committee notes that the most recent Department of Finance *Guide to preparing the 2023-24 Portfolio Additional Estimates Statements* also includes similar advice, addressing the committee's scrutiny concerns.[37]

1.49 The committee takes this opportunity to again welcome the inclusion of this advice in the Department's guides. However, the committee notes that despite the inclusion of this advice it nevertheless continues to have scrutiny concerns in relation to the lack of detail in the explanations provided in the PAES. For example, the majority of explanations for measures marked as nfp within the 2023-24 PAES merely state that the funding for a measure is not for publication due to commercial sensitivities.

1.50 The committee notes that the very high-level nature of these explanations makes it difficult to assess whether several of the measures categorised as nfp within the PAES are appropriately categorised as such. More detailed explanations as to why it is appropriate to mark a budget measure as nfp would allow for a greater level of parliamentary scrutiny over these explanations. For example, it is unclear to the committee why it is appropriate not to publish total amounts in relation to the

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34 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61] citing Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed, 1910, pp. 522–523.

35 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021* (21 October 2021) pp. 47–51.

36 See comments on Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) pp. 19–21.

37 Department of Finance, *Guide to preparing the 2023-24 Portfolio Additional Estimates Statements*, p. 32.

decommissioning of the Northern Endeavour floating oil production storage and offtake facility as it is not explained why the provision of any financial information is considered to be commercially sensitive.[38] Similarly, it is also unclear why the implementation of the National Quantum Strategy is considered commercial sensitive and little information is provided as to what the measure involves.[39]

1.51 To this end, the committee notes that the mere existence of a commercial element in relation to a Budget measure is not sufficient, of itself, to justify the non-publication of any of the funding amount for that measure. The lack of detailed explanation makes it difficult for the Parliament and others to interrogate the rationale behind this classification of a measure as nfp. The committee considers that an explanation as to why a measure is marked as nfp, beyond simply stating that commercial elements apply, should be included within the budget documents and that this would not compromise commercial sensitivities.

1.52 The committee is therefore of the view that if it is decided that the financial details of a measure should not be published for public interest reasons, as much detail should be provided in the portfolio budget or additional estimates statement as is necessary to substantiate that decision. For instance, where a claim of commercial confidentiality or sensitivities is to be raised, it would be of assistance to the committee and to the Parliament for detail to be provided of how the publication of the financial details of the measure could 'damage the commercial interests of a commercial trader in the market place, including the Commonwealth'.[40]

1.53 In considering the necessary extent of any such explanation, departments should be mindful of the Parliament's fundamental role in scrutinising the appropriation of money from the Consolidated Revenue Fund and the need to keep to a minimum the number of instances in which the full financial details of a measure are not published.

1.54 In light of the above, the committee reiterates its significant scrutiny concerns that the Parliament is being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual budget measure.

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

- **whether future Department of Finance guides on preparing portfolio budget or additional estimates statements can include guidance that, where a measure is marked as nfp, as much detail should be provided as**

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38 Mid-Year Economic and Fiscal Outlook 2023–24, p. 275; Department of Industry, Science and Resources, *Portfolio Additional Estimates Statements 2023-24,* pp. 18–19.

39 Ibid.

40 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 664.

is necessary to substantiate the decision to not publish the financial details of the measure due to the public interest; and

- **the basis on which the financial details of the measures 'Northern Endeavour decommissioning – future funding' and 'National Quantum Strategy – implementation' have been marked as nfp.**

Parliamentary scrutiny—section 96 grants to the states[41]

1.56 Clause 14 of Appropriation Bill (No. 4) 2023-2024 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*' (emphasis added).

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

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[42] and
- the amounts and timing of those payments.[43]

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

> because these determinations are not altering the appropriations approved by the Parliament. Determinations under subclause 14(2) are administrative in nature and will simply determine how payments to or for a State, ACT, NT or a local government authority will be made.[44]

1.59 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[45]

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41 Appropriation Bill (No. 4) 2023-2024, clause 14 and Schedules 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iv) and (v).

42 Appropriation Bill (No. 4) Bill 2023-2024, paragraph 14(2)(a).

43 Appropriation Bill (No. 4) Bill 2023-2024, paragraph 14(2)(b).

44 Explanatory memorandum to Appropriation Bill (No. 4) 2023-2024, p. 11.

45 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511–516; *Ninth Report of 2015*, pp. 611–614; *Fifth Report of 2016*, pp. 352–357; *Eighth Report of 2016*, pp. 457–460; *Scrutiny Digest 3 of 2017*, pp. 51–54; *Scrutiny Digest 6 of 2017*, pp. 7–10; *Scrutiny Digest 12 of 2017*, pp. 99–104; *Scrutiny Digest 2 of 2018*, pp. 8–11; *Scrutiny Digest 6 of 2018*, pp. 9–12; *Scrutiny Digest 4 of 2019*, pp. 9–12; *Scrutiny Digest 15 of 2020*, pp. 16–17; *Scrutiny Digest 8 of 2021*, pp. 13–14; *Scrutiny Digest 2 of 2022*, pp. 21–22; *Scrutiny Digest 7 of 2022*, pp. 20–21; *Scrutiny Digest 6 of 2023*, pp. 11–12.

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

1.61 The committee notes, and welcomes, that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 Budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[46] These improvements include: the addition of an Appendix E to Budget Paper No. 3, which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them; and a mandatory requirement for the inclusion of further information in PAES where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[47]

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

1.63 Nevertheless, the committee notes that while these measures improve transparency to some degree, the committee remains concerned about the broad discretion provided to ministers to determine terms and conditions for grants to the states. The committee also notes that the Parliament's ability to scrutinise the terms and conditions of these grants varies depending on the appropriation mechanism used for the payments.

1.64 The committee leaves to the Senate as a whole the appropriateness of clause 14 of Appropriation Bill (No. 4) 2023-2024, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

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

47 Department of Finance, *Guide to preparing the 2023-24 Portfolio Additional Estimates Statements*, p. 28.

Autonomous Sanctions Amendment Bill 2024[48]

Purpose	The Autonomous Sanctions Amendment Bill 2024 (the bill) amends the *Autonomous Sanctions Act 2011* to explicitly confirm that individuals and/or entities can be validly sanctioned based on past conduct or status. The bill also ensures the validity of sanctions that were made based on past conduct or status. For the avoidance of doubt, the bill further confirms that sanctions are valid even where it is not explicitly clear that the Minister considered their discretion: • to sanction the person/entity at all, where they meet the criteria for imposing sanctions, or • to decide whether to only designate a person for targeted financial sanctions or only declare them for travel bans, or both.
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 15 February 2024
Bill status	Before the House of Representatives

Retrospective validation[49]

1.65 Part 2 of Schedule 1 to the bill contains validation provisions which would retrospectively validate actions taken prior to commencement of the bill.

1.66 Item 3 would validate regulations made by the Governor-General prior to commencement by assuming that new section 10A as inserted by the bill into the *Autonomous Sanctions Act 2011* (the Act) had been in force when the regulations were made and that the regulations would have been permitted by paragraph 10(1)(a) of the Act.

1.67 Item 4 would validate instruments made by the Minister prior to commencement under regulations made for paragraph 10(1)(a) of the Act which proscribed a person or entity on the basis of specified circumstances or the actions or position held by the person or entity. The item applies to instruments which would otherwise be wholly or partly invalid only because the instrument was not authorised by those regulations because of the period of time that had elapsed between the

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48 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Autonomous Sanctions Amendment Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 31.

49 Schedule 1, Part 2, items 3, 4 and 5. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

circumstances, action or position having existed or been so held, and the proscription of the person or entity.

1.68 Subitem 5(1) would validate instruments made by the Minister prior to commencement under regulation 6 or 6A of the Autonomous Sanctions Regulations 2011 (the Regulations) if the instrument would otherwise be wholly or partly invalid only because the minister did not consider whether they should exercise their discretion to designate a person or entity, or declare a person, or designate and declare a person. Subitem 5(2) would also validate an instrument that was made by the minister before commencement of subregulation 9(3) of the Regulations if the instrument would otherwise be wholly or partly invalid because the minister did not consider whether they should exercise their discretion to declare that a specified designation of a person or entity continues to have effect, or declare that a specified declaration of a person continues to have effect, or declare that a specified designation and a specified declaration of a person continue to have effect.

1.69 Subitems 3(6), 4(4), and 5(5) provide that the items apply in relation to civil and criminal proceedings instituted on or after commencement, civil and criminal proceedings instituted prior to commencement, and proceedings concluded prior to commencement.

1.70 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

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

> The validation provisions in Part 2 of this Bill apply retrospectively in that they validate sanctions and sanctions criteria from the point at which they originally came into force, not just from the point of Part 2 of the Bill coming into force. In addition, the Bill confirms that these validation provisions apply to civil and criminal proceedings instituted before the commencement of Part 2 (subitems 3(6), 4(4) and 5(5)). The validation provisions would be relevant to those individuals and entities sanctioned, as well as Australians and Australian businesses.
>
> The Bill will apply to matters currently before the Court. This is appropriate as the Bill will provide interpretive guidance to the Court on provisions of the Act whose operations may otherwise be in dispute. The validation provisions remove any ambiguity that may exist with regards to sanctions listings decisions. Sanctions non-compliance carries heavy criminal

> penalties. The Bill provides certainty and transparency to individuals and businesses, so that they can effectively comply with sanctions laws.
>
> This Bill does not change the operation of Australia's autonomous sanctions framework or create new sanctions listings. Rather, it clarifies the Minister's power in relation to sanctions listings and confirms the validity of sanctions listings. In short, it confirms that the sanctions framework continues to operate as intended. The Bill does not create new rights or responsibilities that did not already exist. It simply confirms that sanctions made under the existing framework are valid, for the avoidance of doubt. The Bill does not change the list of sanctioned persons and entities which the Australian public and Australian individuals and businesses overseas rely on to avoid sanctions offences.[50]

1.72 While acknowledging the stated intention of the provisions to clarify the minister and Governor-General's power in relation to sanctions listings and to confirm the validity of existing listings, it remains unclear whether the retrospective validation of the listings will, or may, have a detrimental effect of any persons. For example, there may be Australians or Australian businesses who would become exposed to offences due to dealings with sanctioned individuals or entities. The committee notes that the potential detrimental impact of the items is highlighted by the inclusion of item 6, sometimes referred to as a 'historic shipwrecks clause'.

1.73 Individual rights may also be detrimentally affected by extinguishing a person's right to seek judicial review on the basis that an instrument, regulation or action was not enforceable. The committee notes that, while the intention of the bill may be to restore the legal obligations and rights that were intended to exist when the instruments were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified. This is particularly the case in instances where a provision that is the subject of retrospective validation appears to have a significant impact on individual rights and liberties, as in this instance.

1.74 In addition, the committee notes that the explanatory memorandum does not address the context of how this issue regarding validity was identified. The committee's assessment of the scrutiny implications of such measures would be assisted by a full explanation as to how these issues came to light, and whether the courts have already made invalidating orders in relation to particular regulations, instruments, or actions taken in reliance of them.

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

- **whether any persons are likely to be adversely affected (in the broadest sense of the phrase) by the retrospective validation provided for in items**

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50 Explanatory memorandum, p. 4.

3, 4 and 5 of Part 2 of Schedule 1 to the bill, and the extent to which their interests are likely to be affected; and

- **if persons could be detrimentally affected, the justification for the retrospective validation;**
- **why it is necessary and appropriate that the relevant conduct be subjected to sanction on an ongoing basis; and**
- **when and how the department became aware that it would be necessary to retrospectively validate regulations and instruments made under paragraph 10(1)(a), and instruments made under regulation 6 of 6A of the Autonomous Sanctions Regulations 2011.**

Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024[51]

Purpose	The bill amends the *Competition and Consumer Act 2010* to establish a new designated complaints function. The ACCC will be required to assess, and respond to, designated complaints submitted by designated complainants. The ACCC may take further action in relation to a designated complaint if the complaint relates to significant or systemic market issues that affect consumers or small businesses (or both) and relates to either a breach of the Act or a power or function of the ACCC under the Act.
Portfolio	Treasury
Introduced	House of Representatives on 15 February 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation[52]

1.76 Item 2 of Schedule 1 to the bill seeks to introduce a range of provisions which would allow for significant matters to be left to delegated legislation.

1.77 Proposed section 154ZZ would provide that the minister may make a determination by legislative instrument prescribing matters required or permitted by Part XIE of the *Competition and Consumer Act 2010* (the Act) to be prescribed by the designated complaints determination.

1.78 Proposed section 154ZH empowers the Australian Competition and Consumer Commission (the ACCC) to give a designated complainant a notice that no further action will be taken in relation to a complaint. Under this subsection, the ACCC can issue a no further action notice (amongst other grounds) if not satisfied that the complaint meets any requirements prescribed in the designated complaints determination (proposed subsection 154ZH(3)).

1.79 In determining that it is appropriate to take no further action the ACCC must have regard to any matter prescribed for the purposes of paragraph 154ZH(6)(a), and may have regard to any matter prescribed for the purposes of paragraph 154ZH(6)(b), in the designated complaints determination.

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51 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 32.

52 Schedule 1, item 2, proposed sections 154ZH, 154ZK, 154ZN, and 154ZZ. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

1.80 Under proposed section 154ZK the ACCC may give a designated complainant a notice that they are satisfied that further action is required. Proposed subsection 154ZK(4) provides that the ACCC's actions following on from giving a notice as set out in proposed subsection 154ZK(3) can be varied if the ACCC is satisfied that the circumstances prescribed in the designated complaints determination apply.

1.81 Proposed subsection 154ZN(1) sets out circumstances in which the ACCC must publish notices of decisions it has made in relation to a complaint on its website. Proposed paragraph 154ZN(2)(b) provides that the ACCC is not required to publish information if satisfied that circumstances prescribed in the designated complaints determination applies to the publication of the information.

1.82 Under proposed subsection 154ZQ(5), the Minister must not grant approval to an entity as a designated complainant if doing so would result in the number of designated complainants being above the limit prescribed in the designated complaints determination.

1.83 These elements, taken together, set up key elements of the overall scheme to provide for a designated complaints process. The committee's view is that significant matters, such as key elements of the operation of a scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.84 In relation to proposed subsection 154ZH(3), the explanatory memorandum explains that '[t]his ability to prescribe additional content requirements is appropriate as such requirements are likely to be technical and detailed.'[53] The committee notes that, as currently framed, proposed subsection 154ZH(3) provides that the ACCC may issue a no further action notice on the basis of 'any requirements' prescribed in the designated complaints determination – arguably broader than only 'content requirements'. In the committee's view, the contention put forth by the explanatory memorandum that these additional requirements relate only to content would be better supported if the bill were amended so that proposed subsection 154ZH(3) specially referred to content requirements as opposed to any requirements.

1.85 In relation to proposed subsection 154ZH(5) the explanatory memorandum states:

> The ability for the Minister to prescribe matters to which the ACCC must or may have regard for the purposes of being satisfied that it is appropriate to take no further action is appropriate to ensure the designated complaints function can be responsive to changes in circumstances, such as changes in operational requirements, market conditions and ACCC regulatory procedures.[54]

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53 Explanatory memorandum, p. 15.

54 Explanatory memorandum, p. 15.

1.86 In relation to proposed subsection 154ZK(4) the explanatory memorandum explains:

> Circumstances prescribed in a designated complaints determination may include circumstances that relate to the nature or scope of the designated complaint or to an administrative circumstance affecting the capability or resourcing of the ACCC. It is necessary to allow the Minister to prescribe circumstances in a designated complaints determination, to ensure updates can be made quickly to account for market changes and ensure the integrity of the designated complaints function.[55]

1.87 The committee considers that the decision made by the ACCC as to whether it will take further action or take no action is integral to the operation of the scheme as introduced by the bill. Noting that, the committee is unconvinced that a need for responsiveness to changes in operational circumstances, market conditions and ACCC regulatory procedures outweighs the importance and value of proper parliamentary consideration, noting that the Parliament has the capacity to respond quickly if legislative action is required.

1.88 In relation to paragraph 154ZN(2)(b), the explanatory memorandum notes that '[t]his is appropriate to ensure the designated complaints function can be responsive to changes in circumstances' with no elucidation provided of what changes in circumstances may be relevant to non-publication of key information.[56] The committee considers that transparency measures such as publication requirements should be put before the Parliament to consider the necessity of the relevant circumstances.

1.89 In relation to proposed subsection 154ZQ(5), the explanatory memorandum states that it is appropriate for the maximum number of designated complainants to be prescribed as it may need to change quickly in response to ACCC resourcing constraints or priorities.[57] While the committee notes this explanation, the number of complainants that may be approved is of central importance to the scheme that the Parliament is to set up by the bill. If the cap on the number of complainants set by the designated complaints determination was very low (or 0) it would have significant impact on the scheme. As such, it appears to the committee that at least some high level guidance would be appropriate, for instance to set a minimum threshold.

1.90 The committee notes that, if it is not considered appropriate to set out the relevant matters referred to above on the face of the legislation, it is, in many instances, unclear why at least high level guidance could not be included. This would act to appropriately constrain the impact of delegated legislation on the overall legislative scheme.

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55 Explanatory memorandum, p. 20.

56 Explanatory memorandum, p. 23.

57 Explanatory memorandum, p. 9.

1.91 **The committee requests the Treasurer's advice as to:**

- **whether proposed subsection 154ZH(5) could be amended to provide guidance as to the mandatory and discretionary factors that will be set out in delegated legislation for the ACCC to consider when deciding to issue a no further action notice;**
- **whether proposed subsection 154ZH(3) could be amended so that it refers to 'content requirements' as opposed to 'any requirements'; and**
- **whether proposed subsection 154ZQ(5) could be amended to provide at least a minimum threshold to the cap on the overall number of complainants that may be approved.**

1.92 The committee draws its scrutiny concerns in relation to proposed paragraph 154ZN(2)(b) and proposed subsection 154ZK(4) to the attention of senators and leaves to the Senate as a whole the appropriateness of these provisions enabling significant matters to be provided for by delegated legislation.

Availability of merits review

Significant matters in delegated legislation[58]

1.93 Proposed section 154ZP provides that an entity may apply to the minister for approval as a designated complainant. An entity may be (amongst other things) an individual as per the relevant definition in proposed section 154ZE.

1.94 Proposed section 154ZQ sets out the conditions under which the minister may grant approval of an application to become a designated complainant. Proposed subsection 154ZQ(2) sets out the considerations that the minister must have regard to, including:

- the experience and ability of the applicant in representing the interests of consumers or small businesses in Australia in relation to a range of market issues that affect them (proposed paragraph 154ZQ(2)(a));
- the extent to which the Minister is satisfied that the applicant will, if approved as a designated complainant, act with integrity in connection with being a designated complainant (proposed paragraph 154ZQ(2)(b)); and
- any other matters as prescribed by the designated complaints determination or that the minister considers relevant (proposed subsection 154ZQ(3)).

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[58] Schedule 1, item 2, proposed subsections 154ZQ(1) and 154ZV(1). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iii) and (iv).

1.1 Proposed subsection 154ZV empowers the minister to vary or revoke an existing approval. Proposed paragraph 154ZV(1)(c) provides (amongst other conditions to be met) that the minister may do so if they are satisfied that it is appropriate to make the variation or revocation. Proposed subsection 154ZV(3) provides that for the purposes of being satisfied that it is appropriate to make the variation or revocation, the minister may have regard to the following matters:

- any matter mentioned in subsection 154ZQ(2) or (3) (proposed paragraph 154ZV(3)(a));
- whether the designated complainant has contravened, or is contravening, a condition to which the approval is subject (proposed paragraph 154ZV(3)(b));
- any matter prescribed in the designated complains determination (proposed paragraph 154ZV(3)(c)); and
- any other matter the minister considers relevant (proposed paragraph 154ZV(3)(d)).

1.2 It is clear to the committee that these considerations allow for a substantial exercise of discretion by the minister when considering whether to grant an application by an entity to be a designated complainant. The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

1.3 In this instance the explanatory memorandum does not outline whether merits review applies or whether consideration was given to providing for independent merits review. These concerns are heightened as the bill provides that matters to be considered by the minister in making these decisions may be set out in delegated legislation.

1.4 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate not to provide for independent merits review of a decision made under proposed subsections 154ZQ(1) and 154ZV(1) of the bill.

1.5 The committee's consideration of this issue would be assisted if the response considers whether merits review is applicable by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024[59]

Purpose	The Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 amends the *Crimes Act 1914* to implement trauma-informed measures that better support vulnerable persons when appearing as complainants and/or witnesses in Commonwealth criminal proceedings, whilst maintaining appropriate criminal procedure safeguards. The Bill implements recommendations 52, 53, 56 and 61 of the 2017 Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).
Portfolio	Attorney-General
Introduced	House of Representatives on 7 February 2024
Bill status	Before the House of Representatives

Procedural fairness[60]

1.95 Item 27 of Schedule 1 to the bill would insert proposed Division 2A into Part IAD of the *Crimes Act 1914* (the Crimes Act), in relation to evidence recording hearings. The Division empowers a court, if it is satisfied that it is in the interests of justice to do so, to order an evidence recording hearing for a vulnerable person to give evidence[61].

1.96 Proposed subsection 15YDG(1) provides that if a vulnerable person gives evidence in an evidence recorded hearing then they need not give further evidence unless the court orders it necessary to clarify or give proper consideration to the evidence, or in the interests of justice. A note to this subsection confirms this applies to further evidence that could otherwise be given on examination in chief, cross-examination, or on re-examination.

1.97 The explanatory memorandum notes that the intent of this provision is to:

> …avoid vulnerable persons from being required to provide evidence further to that provided in an evidence recording hearing unless specific

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59 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 33.

60 Schedule 1, item 27, proposed section 15YDG of the *Crimes Act 1914*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

61 Schedule 1, item 27, proposed subsection 15YDB(1) of the *Crimes Act 1914*.

circumstances are met which warrants the person giving further evidence, and the court is satisfied that those circumstances arise.[62]

1.98 The committee understands and welcomes that the purpose of evidence recording hearings is to prevent the re-traumatisation of vulnerable adults and children. However, it is unclear to the committee, on a reading of the bill and the explanatory memorandum, what impact (if any) proposed subsection 15YDG(1) might have on the rights of an accused person to fully test evidence and material put against them at trial, which is essential to meet the case made against them.

1.99 The committee notes that these impacts may be appropriately addressed by other measures in the bill. For instance, the committee welcomes the safeguards built into proposed section 15YDG which empowers the court to provide for further examination of the evidence in the interests of justice.

1.100 The committee also notes that any impacts on an accused person may appropriately be balanced by public interest justifications. In this light, the committee understands the sensitive policy considerations involved in the measures proposed by the bill and that the purpose of evidence recording hearings is to prevent the re-traumatisation of vulnerable adults and children.

1.101 However, the committee considers that its ability to make an assessment of whether subsection 15YDG(1) trespasses unduly on personal rights and liberties would be assisted by a clear statement of the impact of the provision on the fair hearing rights of an accused person and an identification of any relevant balancing public interest considerations.

1.102 **The committee therefore requests the Attorney-General's advice as to:**

- **what impact (if any) proposed subsection 15YDG(1) could have on the right of an accused person to a fair hearing, including whether there are any safeguards contained elsewhere in the bill; and**
- **if the operation of proposed subsection 15YDG(1) could impact on the fair hearing rights of an accused person, whether further detail can be provided of the way in which the trial rights of an accused person have been balanced in the bill with the policy intent of protecting vulnerable witnesses from being re-traumatised by re-providing evidence.**

Reversal of the evidential burden of proof[63]

1.103 Item 55 of Schedule 1 to the bill substitutes existing subsection 15YR(2) of the Crimes Act. Subsection 15YR(1) of the Crimes Act provides that a person commits an offence if they publish any matter which identifies a vulnerable person in relation to a

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62 Explanatory memorandum, pp, 16- 17.

63 Schedule 1, item 55, proposed subsection 15YR(2) of the *Crimes Act 1914*. The committee draws senators' attention to this provision pursuant to Senate standing orders 24(1)(a)(i).

proceeding as being a child witness, child complainant or vulnerable adult complainant, or the matter is likely to lead to the vulnerable person being identified as such a person. The offence applies where the person did not have leave of the court to publish the matter and the person whom they identify is not a defendant in the proceeding.

1.104 Item 55 amends subsection 15YR(2) to add new offence-specific defences which provide that the offence in subsection 15YR(1) does not apply if:

- the publication is in an official publication in the course of, and for the purpose of, the proceeding (proposed paragraph 15YR(2)(a)); or
- the publication is in a document prepared for use in particular legal proceedings (proposed paragraph 15YR(2)(b)); or
- the vulnerable person is deceased (proposed paragraph 15YR(2)(c)); or
- for an adult vulnerable person, if they have given informed consent to the publication in accordance with subsection 15YR(2A), the publication is in accordance with limits set by the vulnerable person, and the person had capacity to consent at the time (proposed paragraph 15YR(2)(d)); or
- for a child vulnerable person, if they have given informed consent for the publication, the publication is in accordance with any limits set by the vulnerable person, and the consent was accompanied by a supporting statement in accordance with subsection (2B) (proposed paragraph 15YR(2)(e)).

1.105 A note to proposed subsection 15YR(2) confirms that the evidential burden of proof is reversed in relation to these defences.

1.106 Proposed subsection 15YR(2A) provides that a vulnerable person gives informed consent for the purposes of the defence in proposed paragraph 15YR(2)(c) if the person who gives consent understands the options available and the consequences of giving consent. Proposed subsection 15YR(2B) sets out what is classified as a supporting statement for the defence in proposed subsection 15YR(2)(e) which involves, amongst other requirements, that the statement is in writing by a medical practitioner or psychologist (including their name and qualifications).

1.107 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.

1.108 The committee notes that the *Guide to Framing Commonwealth Offences*[64] 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.[65]

1.109 In relation to the defence in proposed paragraph 15YR(2)(a), it is unclear how whether something is an official publication in the course of the proceedings could be peculiarly within the defendants knowledge given that official publications should be published and therefore publicly available.

1.110 For the defence in proposed paragraph 15YR(2)(b), the committee considers that a document prepared for use in legal proceedings should be available to the relevant court and the parties to that proceeding, and also notes that the defence does not apply only to documents protected by legal professional privilege. It is therefore unclear how such matters would be peculiarly within a defendant's knowledge.

1.111 Proposed paragraph 15YR(2)(c) provides a defence which places the evidential burden of proving a person is deceased on the defendant. The committee finds it very difficult to foresee a scenario in which whether or not a specified person is dead is a matter that is peculiarly within the knowledge of a defendant. It should be quite simple for the prosecution to prove that the relevant person is alive.

1.112 The defence in proposed paragraph 15YR(2)(d) requires that the person who is giving the consent understand the decision they are making to give consent. Again, it is unclear to the committee how a defendant would be best placed to provide evidence as to another person's mental considerations and state of mind at a particular point in time. A requirement for a defendant to adduce evidence that a person provided them with consent is different from a requirement that the defendant positively prove what another person's state of mind was at a point in time, and therefore the committee is not convinced that, as worded, this matter would be peculiarly within the knowledge of a defendant.

1.113 Finally, for the defence in proposed paragraph 15YR(2)(e), whether or not a child vulnerable person has given informed consent is determined by the matters in proposed subsection 15YR(2A) which include the existence of written medical or mental health evidence. Such evidence should be easily obtainable by the prosecution and would, in the committee's view, be stronger evidence of a child vulnerable

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

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

person's state of mind than evidence that would be adduced by a non-expert defendant.

1.114 The committee also notes that the explanatory memorandum has made little attempt to justify the appropriateness of these reversed burdens with reference to the *Guide to Framing Commonwealth Offences*:

> *Placing the evidential burden on the defendant in relation to the exemptions in subclause (2) is appropriate because the facts in relation to the exemption would be peculiarly within the knowledge of the defendant. In particular, it would be impracticable to require the prosecution to prove that the defendant had not sought the informed consent of the party and/or had not obtained a certificate as set out in paragraph (e), while it would be straightforward for the defendant to provide this evidence. This evidentiary burden is the same as was included in relation to the more limited defences in the repealed s 15YR(2).*[66]

1.115 The committee notes that these defences do not hinge on whether a defendant *reasonably believed* or *reasonably understood* consent to be given or the circumstances to be met. In light of this, the evidence that would be adduced by a defendant in each of these five defences should be relatively easy and inexpensive for the prosecution to obtain and does not justify a reversed evidential burden.

1.116 **The committee therefore requests the Attorney-General's advice in relation to proposed paragraphs 15YR(2)(a) to (e) as to:**

- **whether the reversed evidential burden defences are justified in reference to the *Guide to Framing Commonwealth Offences*; and**
- **whether the bill could be amended to remove the reversed evidential burdens by, for example, inserting the defences as elements to the offence.**

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66 Explanatory memorandum, p. 26.

Financial Framework (Supplementary Powers) Amendment Bill 2024[67]

Purpose	The bill seeks to amend the *Financial Framework (Supplementary Powers) Act 1997* to clarify that the Commonwealth may make, vary or administer arrangements or grants of financial assistance under the Act even where this power exists in other legislation and to make similar arrangements in respect of the power of the Commonwealth to form a company, participate in the formation of a company, acquire shares in a company, or become a member of a company.
Portfolio	Finance
Introduced	Senate on 7 February 2024
Bill status	Before the Senate

Insufficient parliamentary scrutiny
Inappropriate delegation of legislative powers[68]

1.117 Item 3 of Schedule 1 to the bill seeks to substitute section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the Act) to remove the words '[i]f…apart from this subsection, the Commonwealth does not have power to'. The effect of this is to clarify that the Commonwealth may make, vary or administer arrangements or grants of financial assistance under this Act even where this power exists in other legislation.

1.118 Item 4 of Schedule 1 to the bill similarly seeks to substitute section 39B of the Act to remove the same words, such that the Commonwealth can form, participate in the formation of, acquire shares in, or become a member of, a company, even where the power to do this exists in other legislation.

1.119 The explanatory memorandum explains that these amendments are intended to clarify the operation of the provisions:

> The framework established by the Principal Act and the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) (the FFSP framework) has operated as a source of legislative authority for Commonwealth spending (via arrangements and grants), even in situations

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67 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Financial Framework (Supplementary Powers) Amendment Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 34.

68 Schedule 1, item 3, section 32B; and Schedule 1, item 4, subsections 39B(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iv) and (v).

> where the spending may have been supported by a general spending power in other legislation. The FFSP framework has been used to support a broad range of spending, including emergency payments during the COVID-19 pandemic, and the 2020 bushfires and floods.
>
> The amendments will put beyond doubt that the FFSP framework operates consistently with how it has been understood to operate in circumstances where another general power may be available. The amendments would clarify the operation of the FFSP framework and put beyond doubt the validity of government spending programs that rely on section 32B of the Principal Act, as well as any government involvement in companies in reliance on section 39B of the Principal Act, in circumstances where other general powers could also be relied on.[69]

1.120 The committee has long standing scrutiny concerns with section 32B of the Act. The committee commented on the provision when it was initially introduced in the *Financial Framework Legislation Amendment Act (No. 3) 2012* (FFLA Act No. 3) in response to the High Court decision in *Williams v Commonwealth*[70] (*Williams*), which held that the Executive requires statutory authority before it can enter into contracts with private parties and spend public money. The FFLA Act No. 3 amended the *Financial Management and Accountability Act 1997* (now the *Financial Framework (Supplementary Powers) Act 1997*) to retrospectively validate spending for over 400 non-statutory funding schemes and provide, in paragraph 32B(1)(b), the power for additional arrangements or grants to be specified in regulations.

1.121 A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. In this case, the regulations authorise the expenditure of public money. The committee expressed its view that such important matters be included in primary legislation and sought further justification as to 'whether it is appropriate to delegate to the Executive (through the use of regulations) how its powers to contract and to spend are to be expanded'.[71]

1.122 The committee reiterated its concerns about the inclusion of important matters in delegated legislation in the Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014, which made minor modifications to, but largely retained, section 32B. In doing so, the committee sought the minister's advice as to whether consideration had been given to amending the bill to include important matters in primary legislation and ensure the opportunity for sufficient parliamentary oversight of these types of arrangements and grants, and went on to note that:

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69 Explanatory memorandum, p. 2.

70 *Williams v Commonwealth* (2012) 248 CLR 156.

71 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2012* (27 June 2012) p. 5.

if new spending activities are not to be authorised by primary legislation it would be possible to provide for scrutiny in a number of ways, for example by:

- requiring the approval of each House of the Parliament before new regulations come into effect (see, for example, s 10B of the *Health Insurance Act 1973*); or
- incorporating a disallowance process such as requiring that regulations be tabled in each House of the Parliament for five sitting days before they come into effect (see, for example, s 79 of the *Public Governance, Performance and Accountability Act 2013*);

and the committee also seeks the Minister's advice about these, or other possible options.[72]

1.123 The committee also notes that, in its inquiry into parliamentary scrutiny of delegated legislation, the Senate Standing Committee for the Scrutiny of Delegated Legislation similarly recommended that the *Financial Framework (Supplementary Powers) Act 1997* be amended to provide for an affirmative resolution procedure for legislative instruments which specify expenditure.[73] This would provide for positive authorisation by the Parliament of expenditure, rather than negative approval through the absence of disallowance.

1.124 In light of the above, the committee reiterates its concerns regarding the regulation making power to specify arrangements and grants authorising public expenditure in section 32B of the Act. The committee notes that the explanatory memorandum provides limited justification for leaving these matters to delegated rather than primary legislation. Although reference is made to the framework being used to support 'emergency payments during the COVID-19 pandemic, and the 2020 bushfires and floods',[74] the use of the power is not restricted to authorising expenditure of public money for the purposes of emergencies.

1.125 In this regard, the committee notes that it has not generally considered that consistency with existing provisions in legislation is, of itself, sufficient justification for provisions that inappropriately delegate legislative powers or insufficiently subject the exercise of legislative power to parliamentary scrutiny. The committee considers the remaking of the power to specify arrangements and grants in delegated legislation provides a suitable opportunity for the Executive and the Parliament to reconsider the appropriateness of the power and whether its exercise should be subject to additional constraints or parliamentary scrutiny measures.

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72 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 8 of 2014* (9 July 2014) pp. 31–33.

73 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation* (3 June 2019) p. 111.

74 Explanatory memorandum, p. 2.

1.126 The committee remains of the view that, consistent with the views expressed by the High Court in *Williams* about the need for parliamentary scrutiny of expenditure[75], authorisation of expenditure is more appropriately enacted in primary legislation rather than delegated to the Executive.

1.127 If this is not to be the case, the committee considers that, at a minimum and in line with its previous comments and the views of the Standing Committee for the Scrutiny of Delegated Legislation, uses of the power should be subject to approval or disallowance processes in order to enhance parliamentary oversight over the authorisation of public expenditure.

1.128 In relation to section 39B, the committee notes it has previously commented on this provision when it was introduced in the *Financial Framework Legislation Amendment Act (No. 2) 2013*. In *Alert Digest 5 of 2013*, the committee commented on the difficulty 'for the Parliament to assess the appropriateness of pursuing Commonwealth purposes through the formation of, or participation in, a company (as opposed to using alternative institutional arrangements) unless the purposes to be pursued by the company are specified to an appropriate level of detail'.[76] The committee further raised concern about the insufficient parliamentary scrutiny over the measure, particularly in relation to the appropriateness of specifying via regulation the companies through which the Commonwealth may pursue its objectives.[77]

1.129 In light of the importance of ensuring adequate parliamentary scrutiny of and oversight over expenditure, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to delegate to the Executive the power to authorise the expenditure of public money rather than for such matters to be proposed to the Parliament for consideration and approval (subject to any agreed amendments) in primary legislation;**
- **if the minister considers that there is sufficient justification for such delegation, whether consideration can be given to:**
    - **alternative approval or disallowance mechanisms for regulations made under section 32B of the *Financial Framework (Supplementary Powers) Act 1997* as suggested previously by the committee and the Standing Committee for the Scrutiny of Delegated Legislation; or**

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75 See, for instance, the remarks of Hayne J in *Williams v Commonwealth* (2012) 248 CLR 156 [288] that 'sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in this case by legislation'.

76 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 5 of 2013* (15 May 2013) p. 53.

77 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 5 of 2013* (15 May 2013) pp. 52–55.

- **any other possible options to provide for additional parliamentary scrutiny of such matters;**

and, in each case, if not, why not.

1.130 The committee draws its scrutiny concerns in relation to section 39B of the *Financial Framework (Supplementary Powers) Act 1997* to the attention of senators and leaves to the Senate as a whole the appropriateness of specifying, via regulation, the companies through which the Commonwealth may pursue its objectives.

Retrospective validation
Parliamentary scrutiny[78]

1.131 Item 20 of Schedule 1 to the bill seeks to provide that where, before the commencement of the item, the Commonwealth purported to make, vary or administer an arrangement or grant under section 32B and it also had the power to do so under other legislation, the Commonwealth is taken to have had, at the relevant time, the power to make, vary or administer that arrangement or grant. This provision provides for the retrospective operation of section 32B to ensure that past spending which may have been authorised under the Financial Framework (Supplementary Powers) Regulations 1997 is legally valid.

1.132 Items 22 and 23 seek to provide retrospective validation in a similar effect in respect of the formation of companies and acquisition of shares, with respect to the amendments proposed to section 39B of the *Financial Framework (Supplementary Powers) Act 1997*.

1.133 Retrospectivity challenges the basic rule of law principle that the law should be capable of being known in advance. Underlying this principle is the importance of enabling people to rely on the law at the time of a relevant action or decision and protecting those affected by government decisions from arbitrary decision-making. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.134 Generally, where proposed legislation will have a retrospective effect, the committee expects the explanatory materials to set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and, if so, the extent to which their interests are likely to be affected.

1.135 In this case, the explanatory memorandum explains, in relation to item 20, that:

> This item regularises the position in respect of spending in which the Commonwealth has previously engaged in reliance on section 32B, in the event that section 32B may not have been available to support that

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78 Schedule 1, items 20, 22 and 23. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (v).

> spending merely because of the availability of another spending power. This ensures that there is no uncertainty in relation to the legal status of that past spending.
>
> From the date of commencement, the validation provisions, including for items 22 and 23 below, validate past spending which may have been authorised under an item specified in the FFSP Regulations when it might also have been authorised under an alternative legislation. This confirms the existing and historical application of the FFSP framework that provides that more than one source of legislative authority may be valid at the same time. The changes are wholly beneficial in operation by negating any risk of invalidity of payments.[79]

1.136 It is unclear to the committee how retrospectively validating past arrangements and grants is wholly beneficial in operation. The committee raised this same concern in response to the FFLA Act No. 3 which sought to retrospectively validate spending activities.[80] While retrospective operation may aid in providing certainty and be beneficial to recipients of grants, it may disadvantage others, and the explanatory memorandum has not explained this further and to what extent other interests may be affected.

1.137 In relation to the retrospective impact of items 22 and 23, the explanatory memorandum merely refers readers to the discussion of the retrospective impact of item 20, quoted above.[81] It is unclear to the committee how that explanation is relevant to the retrospective impact of either item 22 or 23.

1.138 In this light it would assist the committee for a clear explanation to be provided of the detrimental impact that the retrospective validation of the particular matters provided for in items 20, 22 and 23 could have on any right or interest (in the broadest sense of the terms) held by any individual.

1.139 It is also unclear to the committee on a reading of the bill and the explanatory memorandum why it was considered that the proposed amendments are necessary. As the necessity of the amendments could shed light on the nature of any detriment that may be suffered by an individual, any detail that could be provided to the committee on how it was identified that the amendments may be required would be of assistance.

1.140 On a final note, the committee observes that the explanatory memorandum sheds no light on the number of instances in which the Commonwealth made, varied or administered an arrangement or grant under existing section 32B of the Act in instances where, but for the retrospective validation provided by item 20 of the bill,

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79 Explanatory memorandum, p. 9.

80 Senate Standing Committee for the Scrutiny of Bills*, Eleventh Report of 2012* (19 September 2012) pp. 378–380.

81 Explanatory memorandum, p. 9.

the Commonwealth did not have the power to do so. The committee considers that as an exercise of the power under section 32B is an exercise of the legislative power of the Commonwealth it would be appropriate to provide such details to the Parliament. This should include the detail of how much money was spent pursuant to the exercises of power that are proposed to be retrospectively validated by the bill.

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

- **whether any persons are likely to be detrimentally affected by the retrospective validation of the matters provided for in items 20, 22 and 23 of Schedule 1 to the bill, noting, for instance, that the validity of arrangements or grants entered into, varied or administered by the Commonwealth may impact individuals other than grant recipients;**
- **the necessity of the amendments and the circumstances by which it became apparent to the minister that the amendments, and the retrospective operation of the amendments, may be necessary;**
- **in any case, why it is appropriate to retrospectively apply the legislation;**
- **the number of instances in which the Commonwealth made, varied or administered an arrangement or grant under existing section 32B of the Act in instances where, but for the retrospective validation provided by item 20 of the bill, the Commonwealth did not have the power to do so; and**
- **the detail of how much money was spent pursuant to such exercises of power as are proposed to be retrospectively validated by the bill.**

Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024[82]

Purpose	The bill seeks to amend the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 to: increase the fee cap amount; revise indexation provisions; and increase foreign investment application fees for the purchase of established dwellings, and vacancy fees for all foreign-owned dwellings purchased on or after 7.30 pm on 9 May 2017.
Portfolio	Treasury
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Taxes and fees in delegated legislation[83]

1.142 Item 1 of Schedule 1 to the bill seeks to amend subsection 6(3) of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* to increase the cap on the amount of a fee that can be made in regulations for the purposes of the Act from $1,045,000 to $7,000,000.

1.143 The committee's consistent view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is offered. These include prescribing the amount of a tax or the method for working out such an amount. Where a bill leaves the setting of a rate of a tax to delegated legislation, the committee expects the enabling Act to provide some guidance in relation to the amount of tax that may be imposed and for the explanatory memorandum to the bill to address why it is appropriate to leave the setting of the rate of a tax to delegated legislation.

1.144 The explanatory memorandum explains:

> The increase is six times the current indexed amount, rounded up to the nearest $1 million.
>
> The increased fee cap reflects changes to the fee amounts in the Regulations (including the six-fold increase for vacancy fees for established dwellings purchased from the commencement of the Fees Imposition Bill). The

82 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 35.

83 Schedule 1, item 1, subsection 6(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

> rounded fee cap amount allows further indexation to be applied to the fee cap in the future without requiring further legislative amendments to the Act, thereby simplifying future indexation processes.
>
> …
>
> Amendments to the Regulations, in Schedule 2 to the Fees Imposition Bill, triple application fees for the purchase of established dwellings and double vacancy fees for residential dwellings. Together, these changes result in a six fold increase in vacancy fees for established dwellings which are purchased from the commencement of the Fees Imposition Bill, and a doubling of future vacancy fees for all dwellings (including established dwellings) purchased on or after 7.30 pm on 9 May 2017 (including future purchases of new dwellings). The amendments to the Act in Schedule 1 to the Fees Imposition Bill increases the maximum fee cap to enable the operation of the amendments to the Regulations in Schedule 2 to the Fees Imposition Bill.[84]

1.145 In assessing whether a provision delegating to the Executive the power to set fees inappropriately delegates legislative powers, one of the factors the committee will ordinarily look to is whether the provision provides sufficient guidance as to how the fee is to be set. In doing so, this may be seen to sufficiently constrain the exercise by the Executive of legislative power. In this light, the committee has previously indicated that the inclusion, on the face of the legislation, of a cap on the amount of fees that may be imposed in the regulations may provide sufficient guidance.

1.146 The committee acknowledges that the bill retains a cap on the amount of tax that can be set in the regulations. In this case, however, the cap is notably very high and therefore potentially gives great scope for makers of delegated legislation to set a rate of tax. Given the high fee cap proposed in this case, the committee takes this opportunity to indicate that there may be some situations in which a fee cap is so high that it could not be seen to provide sufficient guidance and would therefore amount to an inappropriate delegation of legislative power.

1.147 The committee acknowledges, however, that the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 provide for the various set rates and formulas to determine fee amounts and that the regulations are further amended by the bill to provide additional guidance as to how fees are to be worked out.

1.148 In light of the above, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of setting amounts of tax in delegated legislation, limited by a high cap of $7,000,000.

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[84] Explanatory memorandum, pp. 6–7.

National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024[85]

Purpose	The bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* to provide that the National VET Regulator has the regulatory tools to take action against non-genuine National VET Regulator registered training organisations and support the regulation of the VET sector.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Exemption from disallowance[86]

1.149 Item 22 of Schedule 1 to the bill seeks to insert proposed sections 231C and 231D into the *National Vocational Education and Training Regulator Act 2011* (the Act). Under proposed subsections 231C(1) and (3), the minister may, by legislative instrument, determine that the National VET (vocational education and training) Regulator is not required to do any processing activity, or may determine that the National VET Regulator must not do any processing activity, respectively. Proposed subsection 231C(6) provides that an instrument made under subsection (1) or (3) is a legislative instrument but section 42 of the *Legislation Act 2003* does not apply, meaning that these instruments are exempt from disallowance.

1.150 Similarly, proposed subsection 231D(1) provides that the minister may, by legislative instrument, suspend the making of initial applications for registration and proposed subsection 231D(4) provides that an instrument made under subsection (1) is a legislative instrument but section 42 of the *Legislation Act 2003* does not apply.

1.151 Disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate

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85 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 36.

86 Schedule 1, item 22, proposed subsections 231C(6) and 231D(4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[87]

1.152 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*,[88] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[89]

1.153 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum.

1.154 The explanatory memorandum explains:

> The reason for this exemption is that subsection 44(1) of the Legislation Act provides that an instrument will not be subject to disallowance where a legislative instrument:
>
> - facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; and
> - authorises the instrument to be made by the body or for the purposes of the body or scheme.
>
> New section 231F requires the Minister to obtain the agreement of the Ministerial Council in accordance with process set out in section 191 of the Act. This means that, before making a determination under section 231C, the Minister must obtain the agreement of the Ministerial Council, which must consist of resolution of the Council passed in accordance with the procedures determined by the Council.
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> …
>
> Given the requirements under section 191 of the Act, any potential disallowance of legislative instruments made under section 231C of the Act may discourage State and Territory support for the VET regulatory framework, given that substantial and robust consultation is required to be undertaken with States and Territories. A disallowance might be perceived to be the Commonwealth Parliament unilaterally disallowing an instrument that is part of a multilateral scheme and, on that basis, the better view is that a legislative instrument made under section 231C is exempt from

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

88 See Chapter 4 of Senate Standing Committee for the Scrutiny of Bills, *Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021* (12 May 2021) pp. 33–44; and *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 7686.

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

disallowance under subsection 44(1) of the Legislation Act. This is made clear by subsection 231C(6).[90]

1.155 The explanatory memorandum provides the same justification for instruments made under subsection 231D(1).[91]

1.156 While the committee acknowledges the consultation requirements included in the bill before an instrument can be made, the committee does not consider the fact that an instrument is made to facilitate the operation of an intergovernmental scheme is reason, in itself, for exempting an instrument from the usual parliamentary disallowance process. Moreover, the committee does not consider the fact that a number of executive governments have reached agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such agreement.

1.157 The committee is of the view that the importance of a matter set out in an instrument to the overall operation of an intergovernmental scheme would be appropriately weighed by a house of the Parliament and would inevitably be a subject of debate should a proposal to disallow the instrument be put to that house.

1.158 In light of the above, the committee requests the minister's advice as to whether the bill could be amended to omit subsections 231C(6) and 231D(4) so that legislative instruments made under subsections 231C(1), 231C(3) and 231D(1) are subject to appropriate parliamentary oversight through the usual disallowance process.

Privacy[92]

1.159 Section 17A of the Act provides that the National VET Regulator must prepare a report of an audit conducted in relation to an application for registration and, under subsection 17A(3), the report must not include personal information, unless the personal information is the name of the applicant or an NVR registered training organisation. Section 35 of the Act provides that the National VET Regulator may, at any time, conduct a compliance audit of an NVR registered training organisation's operations, must prepare a report of the compliance audit and, under subsection 35(1C), the report must not include personal information, unless the personal information is the name of the NVR registered training organisation to which the report relates.

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90 Explanatory memorandum, p. 39.

91 Explanatory memorandum, pp. 40–41.

92 Schedule 1, item 67, subsection 17A(3); and Schedule 1, item 69, subsection 35(1C). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

1.160 Items 67 and 69 of Schedule 1 to the bill seeks to provide that, for both subsections 17A(3) and 35(1C), the requirement for the report to not include personal information only applies if the report is published.

1.161 The committee considers that where a bill provides for the collection, use or disclosure of personal information, the explanatory materials to the bill should address why it is appropriate to do so and what safeguards are in place to protect the personal information, and whether these are set out in law or policy (including whether the *Privacy Act 1988* applies).

1.162 In relation to both subsections, the explanatory memorandum explains:

> The purpose of this amendment is to streamline Commonwealth interactions by ensuring personal information can be included in non-published Regulator audit and compliance audit reports while appropriately protecting the privacy of affected individuals and entities. This will allow for more transparent engagement with regulated entities and lead to improved regulatory outcomes.[93]

1.163 The committee is unclear as to what kinds of personal information might be collected and included in these reports and what safeguards are in place to ensure the protection of this personal information.

1.164 The committee requests the minister's advice as to:

- **what kinds of personal information are expected to be included in audit and compliance audit reports under sections 17A and 35 of the *National Vocational Education and Training Regulator Act 2011*; and**
- **what safeguards are in place to protect personal information, including whether the *Privacy Act 1988* applies.**

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[93] Explanatory memorandum, pp. 53–54.

Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Bill 2024[94]

Purpose	The bill seeks to amend the *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to confirm the income support treatment of certain military invalidity pensions affected by the Full Federal Court decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220.
Portfolio	Social Services
Introduced	House of Representatives on 15 February 2024
Bill status	Before the House of Representatives

Retrospective validation[95]

1.165 Schedule 1 to the bill seeks to amend the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to clarify the classification of military invalidity pensions within the social security and veterans' entitlements means test respectively, following the decision in *Commissioner of Taxation v Douglas* [2020] FCAFC 220. Items 37 and 39 of Schedule 1 to the bill seek to validate past assessments of the military invalidity payment to ensure the payments continue to be treated as exempt from the assets test in both the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*.

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

1.167 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.168 In this instance, the explanatory memorandum states that:

> Item 37 ensures that the means testing of an affected payment, which commenced on or after 20 September 2007, will not be impacted

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94 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Social Services and Other Legislation Amendment (Military Invalidity Payments Means Testing) Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 37.

95 Schedule 1, items 37 and 39. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

> retrospectively as a result of the Douglas decision. For example, if an affected payment was previously assessed under section 1099A of the Social Security Act on the basis that it was then considered to be an asset-test exempt income stream that is a defined benefit income stream, and the deductible amount (as defined in subsection 9(1) of the Act) was applied, such actions will be taken to have always been valid and effective.
>
> This validation provision extends to decisions made after commencement to work out the ordinary income of an affected payment for periods prior to commencement. This may include circumstances where, for example, a payment is reclassified to a military invalidity pension income stream with a start date prior to commencement of the amendments made by Part 1 of Schedule 1 to the Bill. In this instance, item 37 validates the working out of the ordinary income pursuant to the understanding of the law as it was intended to operate prior to the Douglas decision, until the commencement of Part 1, by which time the affected payment could be treated as a military invalidity pension income stream.[96]

1.169 A similar explanation is provided for item 39.[97]

1.170 While the explanatory memorandum has provided a justification for why the legislation is intended to operate retrospectively, it is unclear to the committee whether any persons may be detrimentally impacted by the amendment. Such information is critical for the committee's determination of whether retrospective validation could be said, in this case, to trespass on personal rights and liberties.

1.171 The committee requests the minister's advice as to whether any persons are likely to be detrimentally affected by the retrospective application of the legislation and, if so, to what extent their interests are likely to be affected.

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96 Explanatory memorandum, pp. 9–10.

97 Explanatory memorandum, pp. 10–11.

Treasury Laws Amendment (Foreign Investment) Bill 2024[98]

Purpose	The bill seeks to provide an express ordering rule to ensure the law imposing non-Australian tax prevails in the event of any inconsistency with the provisions of Australia's bilateral tax treaties.
Portfolio	Treasury
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Retrospective application[99]

1.172 Item 1 of Schedule 1 to the bill seeks to insert subsection 5(3) into the *International Tax Agreements Act 1953*, which provides that the operation of a provision of an agreement provided for in subsection 5(1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a state or territory, that imposes a tax other than Australian tax,[100] unless expressly provided otherwise in that law. Item 2 of Schedule 1 clarifies that the amendment applies in relation to taxes (other than Australian tax) payable on or after 1 January 2018, and in relation to tax periods that end on or after 1 January 2018.

1.173 The effect of this amendment is that where a provision of a tax treaty listed in subsection 5(1) of the *International Tax Agreements Act 1953* is inconsistent with a law of the Commonwealth, state or territory, the provision of the tax treaty will not operate to the extent of the inconsistency. The explanatory memorandum explains that this is to clarify any uncertainty and to ensure that the Commonwealth, state or territory tax continues to apply as intended and that taxes collected since 1 January 2018 are valid.[101]

1.174 Retrospective application challenges a basic principle of the rule of law that laws should only operate prospectively. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying

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98 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Foreign Investment) Bill 2024, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 38.

99 Schedule 1, item 2. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

100 Section 3 of the *International Tax Agreements Act 1953* defines Australian tax to mean: income tax imposed as such by an Act or fringe benefits tax imposed by the *Fringe Benefits Tax Act 1986*.

101 Explanatory memorandum, p. 35.

retrospectively. These concerns are particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.175 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.176 In this instance, the explanatory memorandum states that:

> The retrospective nature of this amendment provides certainty for affected taxpayers by preserving the status quo that these taxes have been validly imposed and collected. The retrospective period broadly aligns with the six-year statute of limitation periods generally provided under state and territory legislation. This ensures certainty for affected taxpayers throughout these statutory periods.
>
> …
>
> It is necessary that the amendment apply retrospectively to ensure that there has been no unintended expansion of the Agreements Act which may undermine other Australian taxation regimes and the intended policy position. Retrospective application is appropriate to reassure taxpayers who have been applying the law as intended have a sufficient level of certainty both for previous years and into the future. This provides certainty for taxpayers that these other Commonwealth, state and territory taxes are not affected by the tax treaty provisions.[102]

1.177 The committee notes that, ordinarily, significant scrutiny concerns will arise in relation to measures that seek to retrospectively validate the potentially unlawful collection of a tax. It is a fundamental principle that no pecuniary burden can be imposed on individuals without clear and distinct legal authority, and retrospective validation of the imposition of tax undermines this principle.

1.178 The committee acknowledges, however, that there may be justifiable policy reasons for the retrospective operation of amendments of this nature (to provide certainty to taxpayers collectively). Nonetheless, it is difficult for the committee to reach a conclusion as to the impact that retrospective application of the amendment will have on personal rights and liberties in the absence of further detail. In this sense, it would assist the committee for a clear explanation to be provided of the detrimental impact that retrospective application could have on any interest (in the broadest sense of the term), held by any individual.

1.179 If the retrospective application of the amendment could result in a situation less beneficial to individual taxpayers, further explanation of the policy justification for retrospectivity in this case would assist the committee to reach a conclusion as to whether it would *unduly* trespass on personal rights and liberties.

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[102] Explanatory memorandum, pp. 35–36.

1.180 In light of the above, the committee requests the Treasurer's detailed advice as to:

- **whether any persons are likely to be detrimentally affected by the retrospective application of the legislation and, if so, to what extent their interests are likely to be affected; and**
- **why it is considered necessary and appropriate for the amendment to operate retrospectively.**

Private senators' and members' bills that may raise scrutiny concerns[103]

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
Criminal Code Amendment (Telecommunications Offences for Suicide Related Material—Exception for Lawful Voluntary Assisted Dying) Bill 2024	Schedule 1, item 2	This provision may raise scrutiny concerns under principle (i) in relation to provisions that apply retrospectively.
Prohibition on the Purchase of Residential Property by Foreign Entities Bill 2024	Subsection 4(3); and paragraph 6(2)(c)	These provisions may raise scrutiny concerns under principle (iv) in relation to the inclusion of significant matters in delegated legislation.
	Subsection 6(2)	This provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
	Subsection 6(1)	This provision may raise scrutiny concerns under principle (i) in relation to provisions that contain significant penalties.

103 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 39.

Bills with no committee comment[104]

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

- Appropriation (Parliamentary Departments) Bill (No. 2) 2023-2024
- Broadcasting Services Amendment (Community Television) Bill 2024
- Criminal Code Amendment (Genocide, Crimes Against Humanity and War Crimes) Bill 2024
- Fair Work Amendment Bill 2024
- Passenger Movement Charge Amendment Bill 2024
- Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024
- Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024.

104 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 40.

Commentary on amendments and explanatory materials[105]

Defence Capability Assurance and Oversight Bill 2024

1.181 On 7 February 2024, the Senate agreed to 7 amendments proposed by the bill's proponent, Senator Fawcett, and an additional two Australian Greens amendments.

1.182 The committee notes that as a result of the Senate agreeing to amendment no. 7 on sheet 2289, circulated by Senator Fawcett, Part 4 of the bill was removed, which contained a number of offence provisions subject to significant penalties. The committee previously noted, in *Scrutiny Digest 6 of 2023*,[106] that, as the penalties had not been justified within the explanatory memorandum, those provisions may raise scrutiny concerns under Senate standing order 24(1)(a)(i).

Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023

1.183 On 7 December 2023, the Senate agreed to divide the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the first bill) into two bills, with particular measures in the bill to be contained in a bill to be titled the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (the second bill).

1.184 On 8 February 2024, the Senate agreed to 196 amendments to the second bill, having been proposed by the Government, Australian Greens, Jacqui Lambie Network and Senators David Pocock and Thorpe. The Minister for Agriculture, Fisheries and Forestry (Senator the Hon Murray Watt) tabled a supplementary explanatory memorandum relating to the amendments proposed by the Government, and an addendum to an explanatory memorandum[107] responding to certain matters raised by the committee in *Scrutiny Digest 13 of 2023*.[108]

1.185 Although not addressed in the addendum, the committee also commented on a provision in the bill that empowered the regulations to provide for internal merits review by the Fair Work Commission (FWC) of decisions to make or vary minimum standards orders. The committee sought advice from the minister as to the possibility of the bill itself, rather than regulations, providing for merits review of decisions. The minister responded acknowledging the committee's concerns and undertook to

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105 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 41.

106 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (14 June 2023) p. 86.

107 The addendum was confined only to matters originally contained in the first bill that, by division of the bill, were now contained in the second bill.

108 Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023), pp. 12–14.

consider amending the bill to include a failsafe or internal review mechanism on the face of the bill.[109]

1.186 Government amendment no. 6 on sheet ZC259 removed from the bill proposed Division 5 of Part 3A-2 of the *Fair Work Act 2009*, which contained the regulation-making power referred to above. The supplementary explanatory memorandum provides no explanation for the removal.[110]

1.187 The committee considers that it is possible that the ability of parties to make an application to the FWC for a deferral or suspension determination (added to the bill by Government amendment no. 5 on sheet ZC259) was seen to be an alternative to internal merits review such that it was no longer necessary for the regulations to provide for internal merits review. However, the committee is of the view that, given the committee's previous dialogue with the minister on the matter, it would have been more appropriate for the supplementary explanatory memorandum to clearly explain the decision to remove the regulation-making power to provide for internal merits review from the bill.

1.188 **However, in light of the fact that the bill has passed both houses of the Parliament the committee makes no further comment.**

Migration Amendment (Strengthening Employer Compliance) Bill 2023

1.189 On 6 February 2024, the Senate agreed to 25 Government amendments to the bill and the Assistant Minister for Education (Senator the Hon Anthony Chisholm) tabled a supplementary explanatory memorandum relating to those amendments.

1.190 Government amendment no. 20 amended proposed subsection 245AK(5) of the *Migration Act 1958* to remove the power of the regulations to prescribe the additional matters to be considered by the minister in exercising the power to declare a person to be a prohibited employer, instead setting out those matters on the face of the legislation. This amendment addressed concerns raised by the committee in *Scrutiny Digest 8 of 2023*[111] in line with a commitment made by the minister, reported on in *Scrutiny Digest 10 of 2023*.[112]

1.191 **The committee welcomes the Senate amendment to the bill which partially addresses the committee's scrutiny concerns relating to the inclusion of significant matters in delegated legislation.**

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109 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2023* (7 December 2023), pp. 18–19.

110 Supplementary explanatory memorandum, p. 77.

111 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023), pp. 21–26.

112 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2023* (6 September 2023), pp. 35–39.

Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023

Undue trespass on personal rights and liberties[113]

Introduction

1.192 On 5 December 2023, following the publication on 28 November 2023 of the reasons for the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[114] (*NZYQ*), the Senate agreed to five amendments to the bill. The House of Representatives agreed to those amendments on 6 December 2023.

1.193 In order to give context to the scrutiny concerns arising from the amendments, a history of recent legislative actions taken in response to the *NZYQ* decision is provided below.

1.194 On 16 November 2023, the Migration Amendment (Bridging Visa Conditions) Bill 2023 (the first bill) was introduced in the House of Representatives and ultimately passed both Houses of the Parliament on the same day. The first bill amended the *Migration Act 1958* to create a new framework for Subclass 070 Bridging (Removal Pending) Visa ('BVR') holders for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The first bill was introduced in response to the High Court's decision in *NZYQ* (but prior to the reasons for the decision being published) and the new regime for BVRs was intended to apply to the *NZYQ* cohort and future cohorts.

1.195 A number of new conditions were attached to the BVR, including requirements to report at specified locations or report specified information to the Minister, requirements to remain at a specified address at certain times (curfews) and requirements to wear monitoring devices.[115] It also created new offences for breach of certain BVR conditions, each carrying maximum penalties of 5 years imprisonment and mandatory minimum sentences of 1 year.[116]

1.196 On 27 November 2023, the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (the bill to which this entry relates) was introduced in the House of Representatives. This bill created three additional offences, each carrying the same maximum penalties and mandatory minimum sentences.[117] The bill also introduced powers for authorised officers to administer monitoring devices worn by

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113 Schedule 2, item 5, Division 395. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

114 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

115 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, item 7, subclause 070.612(1).

116 Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 1, item 4, subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4) and section 76DA.

117 Schedule 1, item 1, subsections 76DAA(1), 76DAB(1) and 76DAC(1), and item 2.

non-citizens, and retrospectively validated any actions already undertaken (after the passage of the first bill) to administer monitoring devices.[118]

1.197 The committee noted its scrutiny concerns in relation to both bills in *Scrutiny Digest 15 of 2023*.[119] These scrutiny concerns included the significant penalties for breaching BVR conditions, the undue trespass on personal rights and liberties in relation to the imposition of curfews and monitoring devices, the infringement of privacy through the use of monitoring devices and the retrospective authorisation of officers to administer monitoring devices. The committee also noted the speed at which the first bill passed and expressed concern at the impact this necessarily had on the level of parliamentary scrutiny that could be afforded.

1.198 On 5 December 2023, as noted at [1.192], the Senate agreed to five government amendments to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023, including to change the short title of the bill to the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023. These amendments were agreed to by the House of Representatives on 6 December 2023. The most substantial amendment, to which these comments relate (amendment (5)), proposed the addition of a new Schedule 2 to the bill, providing for the establishment of a Community Safety Order (CSO) scheme that would allow for detention and other measures to be imposed on non-citizens preventatively.[120] The scheme is applicable to non-citizens who hold a BVR under the *Migration Act 1958*.[121]

The Community Safety Order scheme

1.199 Item 5 of Schedule 2 to the bill amends the Criminal Code to insert Division 395, which establishes the CSO scheme. The object of the scheme is to protect the community from serious harm by providing that non-citizens who pose an unacceptable risk of committing serious violent or sexual offences[122] are subject to either a Community Safety Detention Order (CSDO) or Community Safety Supervision Order (CSSO).[123]

1.200 A serious violent or sexual offence is defined as an offence that is punishable by life imprisonment or for a period, or maximum period, of at least seven years and the conduct constituting the offence involved, involves or would involve:

- loss of a person's life or serious risk of loss of a person's life; or

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118 Schedule 1, item 4, section 76F.

119 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 7–27.

120 Schedule 2, item 5, section 395.1.

121 Schedule 2, item 5, section 395.1.

122 Schedule 2, item 5, paragraph 395.1(a).

123 Schedule 2, item 5, paragraphs 395.1(c) and (d).

- serious personal injury or serious risk of serious personal injury; or
- sexual assault; or
- sexual assault involving a person under 16; or
- the production, publication, possession, supply or sale of, or other dealing in, child abuse material; or
- consenting to or procuring the employment of a child, or employing a child, in connection with child abuse material; or
- acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16.[124]

1.201 Serious foreign violent or sexual offences are also intended to be captured by the CSO scheme and include offences that are punished by imprisonment for life or for a period, or maximum period of at least 7 years and includes conduct that forms an offence against a law of a foreign country that would constitute a serious violence or sexual offence if engaged in Australia.[125]

Community Safety Orders generally

1.202 CSOs may be made on application by the minister to a Supreme Court of a state or territory.[126] They may be made in relation to a non-citizen of adult age who has been convicted of a serious, or serious foreign, violent or sexual offence where there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.[127]

1.203 Prior to making a CSO, the court must hold a preliminary hearing to determine whether to appoint one or more relevant experts.[128] If an expert is appointed, the expert must conduct an assessment of the risk of the offender committing a serious violent or sexual offence and must provide a report containing the expert's assessment to the Court, the minister and the non-citizen.[129]

1.204 A number of mandatory matters that the Court must have regard to in determining an application for a CSO are listed in section 395.11 and include any report received from an expert appointed to assess the non-citizen and the level of the non-citizen's participation in the assessment, any treatment or rehabilitation programs the non-citizen has had an opportunity to participate in, the level of the non-citizen's compliance with any conditions attaching to a visa the non-citizen holds,

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124 Schedule 2, item 5, subsection 395.2(1).

125 Schedule 2, item 5, subsection 395.2(1).

126 Schedule 2, item 5, subsection 395.8(1).

127 Schedule 2, item 5, subsection 395.5(1).

128 Schedule 2, item 5, subsection 395.9(1).

129 Schedule 2, item 5, subsection 395.9(5).

and the non-citizen's history of prior convictions for serious violent or sexual offences.[130]

Community Safety Detention Orders

1.205 The effect of a CSDO is that the non-citizen is detained in custody for the period specified in the order by the Court.[131]

1.206 In making a CSDO, the Court must, after having regard to the matters discussed at [1.13], be satisfied to a high degree of probability (rather than merely on the balance of probabilities), on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence.[132] The Court must also be satisfied that there is no less restrictive measure available under Division 395 that would be effective in protecting the community from serious harm by addressing the unacceptable risk.[133]

1.207 A CSDO may be made for a maximum of 3 years. The Court may make successive detention orders, similar to a supervision order.[134] A CSDO must be reviewed before the end of the 12-month period after the order began.[135]

Community Safety Supervision Orders

1.208 A CSSO may be made on direct application by the minister or if the minister has applied for a CSDO but the Court is not satisfied that a CSDO is appropriate.[136] Such an order allows the Court to impose any conditions considered, on the balance of probabilities, reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the community from serious harm by addressing the unacceptable risk of the offender committing a serious violent or sexual offence.[137] 'General' conditions that may be imposed by the Court as part of a CSSO are listed in subsection 395.14(5) and include conditions that the non-citizen not be present at specified areas or places; that the non-citizen reside at specified premises; that the non-citizen not leave a specified State or Territory; that the non-citizen not access or use specified forms of telecommunication or other technology, including the internet; and that the non-citizen provide specified information to a specified authority.[138] The Court is not, however, confined to this inclusive list of conditions.

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130 Schedule 2, item 5, section 395.11.

131 Schedule 2, item 5, subsection 395.5(3).

132 Schedule 2, item 5, paragraph 395.12(1)(b).

133 Schedule 2, item 5, paragraph 395.12(1)(c).

134 Schedule 2, item 5, subsections 395.12(5) and 395.12(6).

135 Schedule 2, item 5, subsection 395.23(1).

136 Schedule 2, item 5, subparagraph 395.13(1)(a)(ii).

137 Schedule 2, item 5, subsection 395.14(1).

138 Schedule 2, item 5, subsection 395.14(5).

1.209 In addition to the above, as part of a CSSO, subsection 395.14(7) clarifies that the Court may impose conditions relating to monitoring and enforcement, such as the requirement to submit to testing by a specified authority in relation to the possession or use of certain articles or substances or that the non-citizen be subject to electronic monitoring and comply with directions given by a specified authority in relation to electronic monitoring.[139]

1.210 Prior to making a CSSO, after having regard to the matters discussed at [1.204], the Court must be satisfied on the balance of probabilities (rather than a high degree of probability, as with a CSDO), on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence. The Court must also be satisfied that each of the conditions and the combined effect of all conditions imposed on the non-citizen is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community.[140]

1.211 It is possible for a non-citizen subject to a CSSO to apply for exemptions to certain conditions that are imposed as part of the order, provided that the Court has specified these conditions to be exemption conditions.[141] However, this process requires the non-citizen to apply to a specified authority, who may either grant or refuse the exemption or grant the exemption subject to any 'reasonable' directions specified in writing by the specified authority.[142]

1.212 A CSSO may be made for a maximum of 3 years and must be reviewed before the end of the 12 months after the order began to be in force.[143] The Court is able to make successive supervision orders directly following from the completion of a previous CSSO.[144] A breach of a condition imposed as part of a CSSO is an offence carrying a mandatory 1 year sentence of imprisonment, up to a maximum penalty of 5 years, or 300 penalty units.[145]

Scrutiny concerns

1.213 The committee acknowledges that, as an exercise of judicial power, the CSO scheme ensures that an individualised assessment of risk is undertaken as a result of court processes. The committee also notes that any order made by the Court must be reasonably necessary and reasonably appropriate and adapted to achieve the objects of the CSO scheme.

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139 Schedule 2, item 5, subsection 395.14(7).

140 Schedule 2, item 5, paragraph 395.13(1)(d).

141 Schedule 2, item 5, subsections 395.15(1) and 395.15(2).

142 Schedule 2, item 5, subsection 395.15(5).

143 Schedule 2, item 5, subsections 395.5(3), 395.5(4) and 395.23(1).

144 Schedule 2, item 5, subsection 395.13(6).

145 Schedule 2, item 5, subsection 395.38(1) and section 395.40.

1.214 Nevertheless, from a scrutiny perspective, the committee remains concerned that there is potential for significant deprivations of personal rights and liberties that are not the result of criminal liability, but rather, are preventative in nature. It is a fundamental principle of the common law that no person should be punished except for a breach of the law. Although the stated purpose of detention and liberty restricting conditions in the bill is to mitigate the risk a person may commit a serious offence, the committee is concerned that allowing preventative detention for such a purpose threatens to subvert the above principle. In reaching that conclusion, the committee is mindful that the line between risk prevention, which is triggered by previous offending, and punishment is unclear.

1.215 The committee is also concerned that assessments of risk which go beyond generalised predictions based on past offending will depend upon expert evidence about likely human behaviour, which will inevitably be contestable, and difficult judicial determinations about whether the risk is unacceptable.

1.216 The existence of preventative detention regimes in other Australian jurisdictions does little to assuage the committee's scrutiny concerns. In the committee's view, preventative detention triggered by past offending is in conflict with the basic ordering of Australia's criminal justice system (which incorporates the principle that a criminal sentence should reflect the objective seriousness of a crime and is set firmly against double jeopardy).[146]

1.217 Although the committee is mindful that there is a process to review Community Safety Orders under section 395.23[147], the committee's scrutiny concerns about the CSO scheme are exacerbated by provision for the Court to make successive CSSOs and CSDOs, with no limitation provided in the legislation as to how many successive orders may be made. The committee notes that this creates the potential for a non-citizen to be indefinitely detained or subject to continuing conditions that seriously trespass on personal rights and liberties, such as a condition to remain at a specified address at specified times or a condition to be subject to electronic monitoring.

1.218 As noted above, the line between preventative detention triggered by prior offending to guard against the risk of reoffending and punishment is not always clear. In this regard, the committee further notes that section 395.7 provides that a serious offender who is detained in custody under a CSDO must be treated in a way that is 'appropriate to the offender's status as a person who is not serving a sentence of imprisonment'.[148] However, the committee is concerned that the bill does not provide specificity about this obligation. The practical enforcement of this obligation is critical given that, from a scrutiny perspective, detention on a non-punitive basis can only be

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146 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [477].

147 Schedule 2, item 5, subsection 395.23(1).

148 Schedule 2, item 5, subsection 395.7(1).

justified as an extremely narrow exception to the general rule that persons should only be detained on the basis of proven offending and not based on judgments about their future risk of offending.

1.219 Notably, the obligations concerning people detained in custody under a CSDO apply subject to broad exceptions, including in relation to the management and good order of the prison.[149] It is unclear what steps must be taken by prison administrators and staff as part of this obligation. As such, the obligation does not ameliorate the committee's scrutiny concerns or sufficiently justify the use of preventative detention. It is also unclear whether measures will be put in place to reduce the risk detainees pose to the community, for instance access to rehabilitation programs, thus reducing the likelihood for the need for successive detention orders to be made.

1.220 The committee draws senators' attention to the significant scrutiny concerns relating to preventative detention and other measures (such as monitoring and curfew conditions) outlined above, and requests that the minister provide a detailed justification for the approach taken in the legislation which addresses these concerns.

Parliamentary scrutiny[150]

1.221 From a scrutiny perspective, the committee notes with concern the speed at which the amendments to the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 were passed. These scrutiny concerns are heightened due to the nature of the amendments, which introduced an entirely new scheme, rather than modified the proposed scheme contained within the existing bill. The amendments were agreed to by the Senate under a limitation of debate, which allowed for only 90 minutes for the consideration of all circulated amendments in committee of the whole. The amendments were then considered and agreed to by the House of Representatives the following day.

1.222 The committee considers that such a rapid process limits parliamentary scrutiny and debate, and that this may have limited an appropriate consideration of all matters within the amendments, particularly in relation to serious impacts on personal rights and liberties. The committee also considers, from a scrutiny perspective that, due to the significant changes proposed by the amendments, it would have been more appropriate for them to be introduced in a separate bill, rather than made as amendments to an existing bill.

1.223 In this respect, the committee notes that the standing orders of both houses of the Parliament provide for built in delays in the stages of the passage of bills that provide members of the Parliament with appropriate time to reconsider the proposals

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149 Schedule 2, item 5, paragraphs 395.7(1)(a), 395.7(1)(b) and 395.7(1)(c).

150 The committee draws senators' attention to this matter pursuant to Senate standing order 24(1)(a)(v).

contained in the bills. This includes the Senate standing order known as the bills cut-off order, which is aimed at ensuring that senators have adequate time to examine bills and to avoid an end of sittings rush of bills. The purpose of the standing orders may be frustrated in instances where significantly new schemes are introduced by way of amendments to existing bills. Amendments are also not subject to the same level of parliamentary scrutiny and debate as bills are. For instance, the standing orders provide for multiple opportunities for senators to propose the reference of bills to legislation committees for inquiry.

1.224 The committee reiterates its scrutiny view that the rapid and frequent legislative amendments to the Subclass 070 (Bridging (Removal Pending)) visa scheme prevent certainty in the law, which is of concern noting that these changes have resulted in significant trespasses on rights and liberties.

1.225 **The committee reiterates its consistent scrutiny view that legislation, particularly legislation that may unduly trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.**

Chapter 2
Commentary on ministerial responses

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

Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023[151]

Purpose	The Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (the bill) seeks to amend the *Citizenship Act 2007* (Citizenship Act) and other Commonwealth Acts to establish a revised citizenship cessation regime that would enable the Minister to make an application to request that a court exercise its power to make an order to cease a dual citizen's Australian citizenship, where the person has been convicted of a serious offence or offences.
Portfolio	Home Affairs
Introduced	House of Representatives on 29 November 2023
Bill status	Received the Royal Assent on 7 December 2023

Procedural fairness
Undue trespass on rights and liberties
Significant penalties[152]

2.2 The Act provides that the minister can apply to the courts to assess and make an order as to whether a dual citizen should be stripped of their Australian citizenship on the basis of a criminal conviction.[153]

2.3 Item 4 of Schedule 1 to the Act substitutes section 36D of the *Citizenship Act 2007* (Citizenship Act). Subsection 36D(1) provides the minister with the power to make an application for an order to be made by a court under proposed

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151 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 42.

152 Schedule 1, item 4, section 36C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

153 Previously, the minister was authorised to revoke citizenship on the basis of amendments inserted into the *Citizenship Act 2007* (Citizenship Act) by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020*. These provisions were found to be invalid by the High Court of Australia in *Alexander v Minister for Home Affairs* [2022] HCA 19 (*Alexander*) and *Benbrika v Minister for Home Affairs* [2023] HCA 33 (*Benbrika*).

subsection 36C(1) that a person cease to be an Australian citizen.[154] Subsection 36D(2) provides that an application by the minister may be made before or after a person is convicted of one or more serious offences[155] but must be made before sentencing. In making such an order the court must be satisfied that the person is aged 14 years or older, is an Australian citizen, and the person's conduct to which the conviction(s) relate is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia (proposed subsection 36C(4)).

2.4 An application under subsection 36D(1) by the minister to the court must be made in the jury's absence, must not be referred to in the presence of the jury, and must only be heard after the person is convicted of one or more serious offences, as per subsection 36D(5). Subsection 36D(6) provides that the minister must give the person written notice of the application as soon as practicable after the application is made.

2.5 Item 1 of Schedule 1 to the Act also substitutes existing section 36C of the Citizenship Act. Subsection 36C(3) sets out the specific offences that allow the minister to apply for the revocation of a person's citizenship. It also provides that an application may only be considered when a person is convicted of one of these offences and sentenced to a period of imprisonment of at least 3 years; or sentenced to periods of imprisonment that total at least three years (as per paragraph 36C(1)(b)).

2.6 In *Scrutiny Digest 16 of 2023* the committee sought the minister's advice as to:

- the nature of the process associated with an application made under subsection 36D(1) and how that process will ensure procedural fairness;
- whether the consideration of the minister's application will necessitate a substantive hearing where an individual will be provided an opportunity to respond to any arguments progressed by the minister that their citizenship will be revoked;
- why the significant penalty of revocation of citizenship is considered necessary and appropriate, referring in particular to the matters relating to proportionality identified in para [1.11][156]; and
- the impact of subsection 36C(11), which provides that Part IB of the *Crimes Act 1914* which deals with sentencing, imprisonment and release of federal offenders does not apply to an order made under section 36C.

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154 Subsection 36C(2) provides that an order to revoke citizenship cannot be made by the court if it would result in the person becoming stateless.

155 As defined in subsection 36C(3), as inserted by the Act.

156 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2023* (7 December 2023) p. 4.

Minister for Home Affairs' response[157]

2.7 The Minister for Home Affairs (the minister) responded to the committee's concerns in a letter, dated 6 February 2024.

2.8 The minister advised that, prior to commencement of the Act, the discretionary power to make a citizenship cessation order was vested in the minister, and that the Act now vests this power in the courts because of recent litigation which found the previous provisions invalid.

2.9 In relation to the process under subsection 36D(1), the minister advised that procedural fairness will be afforded to a defendant in line with the protections available in all judicial proceedings and during sentencing. The minister explained that '[t]his includes the right to put relevant material before the court following a conviction and the right to appeal the sentence…'. The minister advised that it would be up to the court to determine whether there will be a separate hearing in relation to citizenship cessation. The minister further noted that as the Act requires notice of a citizenship application order be provided to a defendant, this process would in effect provide an opportunity for a defendant to make submissions to the court against the making of a citizenship cessation order.

2.10 In relation to the proportionality of citizenship cessation as a penalty, the minister reiterated advice similar to that provided in the explanatory memorandum, noting the measures are necessary to address threats posed to Australia by people who have demonstrably repudiated their citizenship. The minister noted that the Government considers a three-year aggregate term of imprisonment for the listed serious offences is appropriate to demonstrate and justify citizenship cessation on the basis of conduct. Further, the minister noted that the minimum age for criminal responsibility is 14 and that the court would be required to have regard to the best interests of the child where the defendant is aged under 18.

2.11 In relation to the application of Part 1B of the *Crimes Act 1914* the minister advised that while these sentencing principles include mitigating factors, the factors for consideration set out in the Act go beyond these measures and afford greater advantage to a defendant than if they were solely able to rely on the factors in Part 1B. The minister advised that the factors for the court to consider as listed in the Act (for example, the person's connection to their other country of citizenship and the availability of citizenship rights) do not limit the factors that a court may have regard to in making a citizenship cessation order.

Committee comment

2.12 The committee thanks the minister for providing further information on how the citizenship cessation determination process will operate in practice.

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157 The minister responded to the committee's comments in a letter, dated 6 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

2.13 As a general comment, the committee welcomes the changes made by the Act to vest this broad and significant discretionary power to make citizenship cessation orders in the courts, as opposed to the minister. The decision to revoke Australian citizenship is life-altering and the committee considers that these matters are more appropriately dealt with by the courts than as an exercise of executive power. As such, the committee recognises that, in this respect, the Act ameliorates the scrutiny concerns raised by the committee when the measures were first introduced.[158]

2.14 The committee welcomes the advice that opportunities will be provided by the court for a defendant to make submissions in relation to a citizenship cessation application made by the minister, as separate to the relevant criminal proceedings. However, it does not appear that this right is enshrined in the legislation. While the committee acknowledges that the conduct of court proceedings is appropriately a matter for the courts to determine, the committee is concerned, taking into account the serious impact of the decisions in question, that the ability of individuals to fully contest applications for citizenship cessation does not appear to be guaranteed by the legislation.

2.15 While welcoming the minister's advice concerning the appropriateness of citizenship cessation as a penalty, the committee would have appreciated further elaboration as to how the approach taken in the legislation appropriately balances the need for community protection against the significant impact on personal rights and liberties in question and any potential unfairness involved.

2.16 With this in mind, the committee retains its scrutiny concerns in relation to the Act. The committee is of the view that it would have assisted the Parliament's consideration of the legislation, and the committee's key role in the legislative process, if the information provided by the minister in response to the committee's concerns had been included in the explanatory memorandum to the bill.

2.17 Noting the significance of these measures, and that the bill for the Act was introduced to and passed the Parliament within a week, the committee considers that, from a scrutiny perspective, it would have been more appropriate for the bill to have been subject to full consideration by the Parliament to enable the measures to be appropriately scrutinised.

2.18 **The committee reiterates its significant scrutiny concerns in relation to the measures in the Act, but in light of the fact that the Act has now passed both Houses of the Parliament, the committee makes no further comment on this matter.**

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158 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 7 of 2015* (12 August 2015) pp. 3–17; and *Scrutiny Digest 7 of 2019* (17 October 2019) pp. 5-15.

Australian Research Council Amendment (Review Response) Bill 2023[159]

Purpose	The Australian Research Council Amendment (Review Response) Bill 2023 (the bill) amends the Australian Research Council Act 2001 (ARC Act) to enhance the Australian Research Council's (ARC) role to better support Australia's dynamic research landscape. The amendments in the bill are in response to the *Final report of the trusting Australia's ability: Review of the Australian Research Council Act 2001*.
Portfolio	Education
Introduced	House of Representatives on 29 November 2023
Bill status	Before the Senate

Broad discretionary power(s)

Availability of merits review[160]

2.19 Item 6 of Schedule 3 to the bill introduces proposed subsection 50(1) into the *Australian Research Council Act 2001*, which provides that the Chief Executive Officer (CEO) of the Australian Research Council (ARC) may terminate or vary a funding agreement if the CEO is satisfied that the organisation that is a party to the agreement has breached a term or condition of the agreement. Proposed subsection 50(2) provides that the CEO may vary the funding agreement in any other circumstances.

2.20 Similarly, proposed subsections 50(4) and 50(5) provide that the ARC Board (the board) or the minister may terminate or vary a funding approval in relation to an organisation if: the CEO gives the board or the minister notice of a term or condition of the funding agreement that relates to the funding approval; and if the board or the minister is satisfied that the organisation has breached the term or condition. Under proposed subsections 47(5) and 48(4), the board and CEO respectively have general powers to vary a funding approval.

2.21 New subsection 50(1) provides that, if the CEO is satisfied that the organisation that is a party to a funding agreement has breached a term or condition of the funding agreement, the CEO may, on behalf of the Commonwealth:

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159 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Research Council Amendment (Review Response) Bill 2023, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 43.

160 Schedule 3, item 6, proposed subsections 50(1), 50(2), 50(4) and 50(5). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(ii) and 24(1)(a)(iii).

terminate the funding agreement (paragraph (a)); or

vary the funding agreement (paragraph (b)). For example, the CEO may vary the terms and conditions relating to the periods in which payments of financial assistance are made to an organisation.

2.22 It is unclear when the board or minister are able to vary funding approvals and in what ways they are able to vary funding approvals. It appears that only the CEO is constrained by the requirement to be satisfied of a breach of a condition of the funding agreement, but may vary a funding agreement even in other circumstances. Further, there is no guidance provided as to what would satisfy the CEO that a breach of a condition of a funding agreement has occurred.

2.23 The committee's concerns are heightened in this instance in the absence of a provision that allows for merits review of a decision to vary a condition of or terminate a funding agreement. The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

2.24 In *Scrutiny Digest 1 of 2024* the committee sought the minister's advice as to:

- why it is necessary and appropriate to provide the minister and the board with a broad power to vary funding approvals under proposed subsections 47(5) and 48(4);
- why it is necessary and appropriate to provide the CEO with a broad power to vary funding agreements under proposed subsection 50(2);
- whether guidance can be provided as to how the CEO must be satisfied that a breach of a condition of the funding agreement has occurred under proposed subsections 50(1);
- whether independent merits review will be available in relation to a decision made under proposed subsections 50(1), 50(4) and 50(5) of the bill, or if not, why not; and
- why it is necessary and appropriate to exclude independent merits review of a decision made under proposed subsections 50(1), 50(4) and 50(5) of the bill, with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

Minister for Education's response[161]

2.25 The Minister for Education (the minister) advised the committee that it is necessary and appropriate for the minister and the board to have the power to vary funding approvals in order to manage long-lived projects. The minister noted that '[v]ariations are an essential part of grants administration' and that generally it would be the grant organisation that would request a variation to the funding approval to avoid breaches of the terms and conditions of the funding agreement.

2.26 In relation to the CEO's power to vary funding agreements under proposed subsection 50(2), the minister advised that the CEO '…has the responsibility to ensure the efficient day-to-day administration' of the grant agreements, and that, again, it will generally be the grant organisation requesting the variation to avoid a potential breach. The minister elaborated that the power is broadly framed to '…ensure it can cover all circumstances in which a variation to an agreement may be given'. Further, the minister noted the large number of variations processed in 2022-23 (10,946) and that most variations were minor.

2.27 In providing guidance as to how the CEO would be satisfied that a breach of a condition had occurred under proposed subsection 50(1), the minister advised that whether or not the CEO is satisfied that a breach has occurred will be assessed on a case-by-case basis. The minister outlined various means by which the CEO may discover that an organisation has breached a term or condition of the funding agreement, including by the organisation self-reporting or through the conduct of an audit by the ARC. The minister further noted that the '…funding agreements include termination and dispute resolution clauses that impose an obligation on the ARC to act reasonably or in good faith – and in many instances there is a requirement to give the research organisation an opportunity to remedy the breach'.

2.28 Finally, in relation to the provision of independent merits review for decisions made under proposed subsections 50(1), 50(4) and 50(5), the minister advised that merits review is excluded on the basis of paragraphs 4.56 and 4.57 of the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (decisions which have such limited impact that the costs of review cannot be justified).

2.29 The minister explained that, in recognition of the impact that terminating an agreement may have, proposed subsection 50(6) provides procedural fairness requirements in relation to these decisions[162] that the CEO, board or minister must follow before making a decision.

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161 The minister responded to the committee's comments in a letter, dated 5 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

162 With the exception of proposed paragraph 50(1)(b).

Committee comment

2.30 The committee thanks the minister for providing further advice as to the operation of proposed subsections 50(1), 50(4) and 50(5) and the processes through which ARC funding grants are varied.

2.31 The committee notes the minister's advice that variations of funding agreements are generally done at the request of the grant recipient, and that many variations are granted each year. However, the committee considers that the minister's response would have benefitted from a discussion as to the relevant factors involved in a process for varying or terminating a grant agreement in instances where the variation or termination was *not* at the request of the grant recipient.

2.32 In addition, the committee notes the minister's advice that it is appropriate that decisions of this nature not be subject to independent merits review, in accordance with paragraphs 4.56 and 4.57 of the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

2.33 The committee notes that paragraphs 4.56 and 4.57 of the guidance document are concerned with instances where the cost of merits review would be vastly disproportionate to the significance of the decision under review, with an example provided of merits review of a decision not to waive a filing fee of $150. A decision to vary or terminate a funding agreement would potentially have significant impact on a grant organisation and it is not clear whether such decisions are analogous to a decision not to waive a small filing fee. As such, the committee is not convinced that paragraphs 4.56 and 4.57 of the guidance document provide sufficient justification for not subjecting such decisions to merits review.

2.34 The committee further notes the minister's advice that the large number of the decisions to which the committee has sought advice are decisions to vary funding agreements in a minor way in accordance with a request made by a grant organisation. As it is unlikely a grant organisation would seek merits review of a decision that the organisation had requested or variations that are minor in nature, it appears to the committee that the relevant decisions in question are those that were not made at the request of a grant organisation and would be of significance to the organisation. As such, the committee would have appreciated if the minister's response addressed how this justification was relevant in the context of grant agreements which are varied or terminated where the variation or termination was not at the request of the grant recipient.

2.35 **In light of the above, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:**

- **providing broad discretionary powers to the CEO and Board of the Australian Research Council and the relevant minister in relation to varying and terminating grant agreements; and**

- **the lack of provision for independent merits review of decisions made under proposed subsections 50(1), 50(4) and 50(5).**

Digital ID Bill 2023[163]

Purpose	The Digital ID Bill 2023 seeks to establish an accreditation scheme for entities providing digital ID services; provide additional privacy safeguards for the provision of accredited digital ID services; establish an Australian Government Digital ID System (the AGDIS); and strengthen the oversight and regulation of accredited digital ID providers, entities participating in the AGDIS and the integrity and performance of the AGDIS.
Portfolio	Finance
Introduced	Senate on 30 November 2023
Bill status	Before the Senate

Immunity from civil and criminal liability[164]

2.36 Clause 84 of the bill seeks to provide that accredited entities participating in the Australian Government Digital ID System (AGDIS) are protected from civil and criminal liability in certain circumstances. Subclause 84(1) provides that an accredited entity[165] is not liable to an action or other proceeding in relation to the provision or non-provision of an accredited service[166] to another accredited entity participating in the AGDIS, or to a participating relying party.[167] The immunity from civil and criminal liability is applicable where:

- the accredited entity provides or does not provide the accredited service in good faith in compliance with the bill;[168] or
- the accredited entity does not comply with the bill in relation to the accredited service and the non-compliance is not the ground or the cause for the action or the other proceeding.[169]

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163 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Digital ID Bill 2023, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 44.

164 Clause 84. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

165 Clause 9. An accredited entity includes an accredited attribute, identity exchange or identity service provider or an entity that is accredited to provide services of a kind prescribed by the Accreditation Rules.

166 Clause 9. An accredited service is the service provided or proposed to be provided by an accredited entity in the entity's capacity as a particular kind of accredited entity.

167 Subclause 84(1).

168 Paragraph 84(1)(a).

169 Paragraph 84(1)(b).

2.37 Accordingly, in *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to why it is considered necessary and appropriate to provide an accredited entity immunity from civil and criminal liability so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.[170]

Minister for Finance's response[171]

2.38 The Minister for Finance (the minister) advised that the bill seeks to create a liability regime that provides incentives for Digital ID service providers, once accredited, to participate in the AGDIS. Although clause 84 of the bill grants accredited entities a protection from liability, this is limited in a number of ways.

2.39 The minister advised that the protection only applies in relation to the provision or non-provision of accredited services to other accredited entities and relying parties participating in the AGDIS and does not apply to individuals using their Digital ID to access services within the AGDIS. Further, the minister advised that clause 85 creates a statutory contract between accredited entities participating (and participating relying parties) in the AGDIS, and that a limit on liability is common in a commercial contractual relationship. An accredited entity is also only able to claim the protection from liability if it has complied with the Act and rules and acted in good faith.

2.40 Finally, the minister advised that the department will work with the Office of Parliamentary Counsel to ensure that the provision applies only the parties to the statutory contract as intended.

Committee comment

2.41 The committee thanks the minister for this advice.

2.42 The committee welcomes the additional context that clause 84 of the bill is intended to apply only to parties to the statutory contract as created by clause 85 of the bill, and that the department will work with the Office of Parliamentary Counsel to ensure the provision only applies to parties to the statutory contract.

2.43 In light of the above, the committee makes no further comment on this issue.

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170 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 29–30.

171 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

Tabling of documents in Parliament[172]

2.44 Subclause 145(1) provides that the Minister for Finance (the minister) must cause periodic reviews of provisions in the Digital ID Rules that relate to the charging of fees by the Digital ID Regulator[173] to be undertaken.[174] Subclause 145(4) provides that the minister must cause a written report about each review to be prepared and published on the Digital ID Regulator's website.[175] The provision does not require any such report to be tabled in both Houses of the Parliament.

2.45 In *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to whether the bill could be amended to provide that reports prepared under subclause 145(4) be tabled in Parliament in order to improve parliamentary scrutiny.[176]

Minister for Finance's response[177]

2.46 The minister advised that should the committee express a preference for tabling in Parliament, the minister has no reservations about doing so.

Committee comment

2.47 The committee thanks the minister for this advice.

2.48 The committee considers that the tabling of documents in the Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are only published online.

2.49 In light of the above, the committee requests that the minister move amendments to clause 145 of the bill to require the tabling in Parliament of reports prepared under subclause 145(4), and seeks the minister's further advice on this point.

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172 Subclause 145(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

173 Subclause 144(1).

174 Subclause 145(1).

175 Subclause 145(4).

176 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) p. 31.

177 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

Significant matters in delegated legislation

Instruments not subject to an appropriate level of parliamentary oversight[178]

2.50 Subclause 150(1) of the bill seeks to provide that the minister may establish, in writing, advisory committees to provide advice to the minister, the Secretary, the System Administrator and the Digital ID Data Standards Chair.[179] This advice may relate to any matters within the bill, including but not limited to the performance of the Digital ID Regulator's powers and functions under the bill.[180] The minister may determine the persons appointed to the advisory committee and must also determine various matters in relation to the operation and members of the committee, which are provided by subclause 150(3).[181]

2.51 In *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the matter of establishing an advisory committee under subclause 150(1), and determining matters relating to the operation and members of such committees under subclause 150(3), to written instruments, rather than these matters being included in the primary legislation; and
- why it is considered necessary and appropriate to specify that instruments made under subclauses 150(1) and 150(3) are not legislative instruments (including why it is considered that the instruments are not legislative in character); and
- whether the bill could, at a minimum, be amended to provide that these instruments are legislative instruments, to ensure that they are subject to appropriate parliamentary oversight.[182]

Minister for Finance's response[183]

2.52 The minister advised that the composition, purpose and terms of Advisory Committees are appropriately left to executive control to ensure committees are able to be established as required with appropriate subject-matter experts and terms of reference. Committees may also be short-term, set up to advise on a particular issue as an emerging threat or measures to implement a new digital ID technology, and in

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178 Subclauses 150(1) and 150(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

179 Subclause 150(1).

180 Subclause 150(1).

181 Subclause 150(3).

182 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 31–33.

183 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

some cases, there may be no remuneration to a committee member (if a committee member is a government employee).

2.53 The minister also advised that instruments establishing committees, their composition, purposes and terms are administrative in character as they do not determine the law or alter the content of the law. The minister advised that these instruments deal with administrative matters relevant to setting up a committee and that it is appropriate those matters remain within executive control.

Committee comment

2.54 The committee thanks the minister for this advice.

2.55 The committee acknowledges that committees may need to be set up on a short-term basis in response to fast-paced changes in digital ID technology and would need to be established by instrument. However, the committee reiterates its concern that as these committees are established to provide advice about matters arising under the Act, including in relation to the Digital ID Regulator's powers and functions, the establishment of these committees forms a significant part of the overall legislative scheme. In this instance, the instruments establishing these committees are not subject to any parliamentary oversight, including the tabling, disallowance and sunsetting processes as they are not legislative instruments.

2.56 The committee also notes that while subsection 8(4) of the *Legislation Act 2003*[184] provides that an instrument is a legislative instrument if it determines or alters the law, this does not preclude the minister from prescribing these matters be set out in legislative instruments under subsection 8(3).[185]

2.57 In light of the above, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of establishing Advisory Committees by written instruments under subclauses 150(1) and 150(3), noting that these instruments are not subject to parliamentary oversight.

Reversal of the evidential burden of proof[186]

2.58 Subclause 151(1) of the bill seeks to provide that a person commits an offence if the person is or has been an entrusted person,[187] obtains protected information in the course of or for the purposes of performing functions or exercising powers under

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184 *Legislation Act 2003*, subsection 8(4).

185 *Legislation Act 2003*, subsection 8(3).

186 Subclause 151(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

187 Under subclause 151(2) of the bill, an 'entrusted person' includes: the Digital ID Regulator, the System Administrator, a member, associated member or member of staff of, or consultant for, the Australian Competition and Consumer Commission, and departmental employees assisting the Chief Executive Centrelink.

the bill, and discloses the protected information.[188] Paragraph 151(1)(d) provides a further stipulation that the offence only applies to personal information about an individual, or that there must be a risk that the use or disclosure might substantially prejudice the commercial interests of another person. The offence carries a penalty of imprisonment for up to two years or 120 penalty units, or both.

2.59 Subclause 151(3) provides that the offence does not apply if the use or disclosure is authorised by clause 152. Clause 152 provides a list of circumstances in which an entrusted person may use or disclose protected information. A note to subclause 151(3) clarifies that a defendant bears an evidential burden of proof in relation to the offence-specific defence in subclause 151(3).

2.60 Accordingly, in *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to why it is proposed to use an offence-specific defence in subclause 151(3), which reverses the evidential burden of proof, in relation to the offence under subclause 151(1).[189]

Minister for Finance's response[190]

2.61 The minister advised that the entrusted person in this instance would be required to raise evidence about the matter that brings the use or disclosure within one of the authorised uses listed in clause 152. The entrusted persons, before using or disclosing protected information, would need to ensure that use or disclosure is for an authorised purpose. The minister advised that the facts in relation to that authorised purpose would be peculiarly within the entrusted person's knowledge and could be readily and cheaply provided by that person.

2.62 Further, the minister addressed each set of circumstances in clause 152 and provided justification as to how those matters would be within the knowledge of the defendant. One example provided by the minister is that when acting as required or authorised by or under a law, the entrusted person would have the knowledge of what law, at Commonwealth, state or territory level, required or authorised the particular use or disclosure of protected information in those circumstances.

Committee comment

2.63 The committee thanks the minister for this advice.

2.64 The committee acknowledges that there are a range of circumstances in clause 152 which determine when the use or disclosure of protected information is authorised and that the entrusted person would be able to provide evidence as to which circumstance was relied on for the disclosure. However, it is unclear to the committee that all of these circumstances would require evidence that is *peculiar* to

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188 Subclause 151(1).

189 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) pp. 33-34.

190 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

the defendant's knowledge. The committee notes that, as a general principle, a matter should not be included in an offence-specific defence merely because that matter may be in the knowledge of a defendant if there are other people from whom the prosecution could adduce evidence concerning the matter.

2.65 The committee notes that one circumstance under clause 152 relates to disclosure that is in the performance of a power, function or duty under the bill or its rules. In this instance, the committee notes that there is a relatively narrow legislative scheme for the prosecution to consider in determining whether the entrusted person disclosed information in an authorised circumstance. Similarly, it remains unclear to the committee how the compliance with or enforcement of a law can be peculiarly within any person's knowledge.

2.66 In light of the above, 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 offence under subclause 151(1).

Incorporation of external materials as existing from time to time[191]

2.67 Subclause 167(2) of the bill provides that the Accreditation Rules, the Digital ID Data Standards and the Digital ID Rules, which are core instruments that will be made pursuant to the bill, may apply, adopt or incorporate any matter contained in other material as in force or existing from time to time. The explanatory memorandum provides examples of material that may be incorporated, which includes Commonwealth documents relating to protective security and cyber security, international standards and digital identity standards set by internationally recognised organisations.[192]

2.68 Accordingly, in *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to whether documents applied, adopted or incorporated by reference under clause 167 will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.[193]

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191 Clause 167. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

192 Explanatory memorandum, pp. 120–121.

193 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) p. 35.

Minister for Finance's response[194]

2.69 The minister advised that the Digital ID Bill and legislative rules seek to adopt existing frameworks, standards or policies that are appropriate for digital ID. These standards and policies change over time as circumstances, risks and threats change. The minister advised that the draft Accreditation Rules include a provision stating accredited entities will have 12 months to comply with changes in any incorporated standard or policy unless the incorporated document itself sets out a longer timeframe.

2.70 The minister advised that there will be two kinds of incorporated documents in the legislative rules, one of which includes standards relating to security, biometric technology operation and biometric technology testing which are not freely and publicly available in full and are unable to be made publicly available due to copyright. The minister advised summaries and previews of each of these standards are publicly available and the legislative rules will include links to where the public information may be accessed.

Committee comment

2.71 The committee thanks the minister for this advice.

2.72 The committee remains concerned that entities will be required by the Accreditation Rules to comply with standards that are incorporated by those rules but are not fully and freely accessible to those entities, particularly as these standards relate to the handling of highly sensitive biometric information. Further, access to all materials which form the content of the law is essential for public confidence in the operation of regulatory schemes. Documents which are incorporated into the law should be freely available not only to the entities that are directly required to comply with these measures, but also to members of the public who have an interest in oversight and understanding of the law, particularly as it pertains to public health and safety and the use of Australian resources.

2.73 The committee understands that it is not uncommon for incorporated documents that may be subject to copyright to be made available by Departments in other manners, such as via access through public library systems, the National Library of Australia, or at Departmental offices, for free viewing by interested parties.[195]

2.74 Although the committee notes summaries and previews of each standard are available, this is inadequate to properly comply with the standards in full, which the committee understands will be a requirement of the regulations.

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194 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

195 See, for example, correspondence between the Attorney-General and the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245].

2.75 In light of the above, the committee requests the minister's further advice as to whether free access to documents that will be applied, adopted or incorporated by reference into legislative instruments as a result of clause 167 can be provided via other means such as display in public libraries or departmental offices.

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023[196]

Purpose	The National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023 (the bill) seeks to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979* and the *Archives Act 1983* to support intelligence agencies.
Portfolio	Home Affairs
Introduced	House of Representatives on 30 November 2023
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[197]

2.76 Item 39 of Schedule 2 to the bill seeks to amend existing section 92 of the ASIO Act by repealing and substituting it with an amended offence provision. The offence relates to making information public or causing or permitting information to be made public if the information identifies a person as being an Australian Security and Intelligence Organisation (ASIO) employee, a former ASIO employee or an ASIO affiliate, or could reasonably lead to establishing the identity of a person as such, or the identity of a person as being as such could reasonable be inferred from the information.[198]

2.77 Proposed subsection 92(2) introduces a defence to this offence. Proposed subsection 92(2) provides that the offence does not apply if the Minister or the Director-General has consented, in writing, to the information being made public.[199] A note to the defences clarifies that the evidential burden of proof is reversed.

2.78 In *Scrutiny Digest 1 of 2024*, the committee requested the minister's advice as to:

- why it is proposed to use an offence-specific defence in proposed subsection 92(2) (which reverses the evidential burden of proof) in relation to the offence under proposed subsection 92(1);

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196 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 45.

197 Schedule 2, item 39, proposed subsection 92(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

198 Proposed subsection 92(1).

199 Proposed subsection 92(2).

- why the matters in proposed subsection 92(2) cannot remain as an element of the offence under proposed subsection 92(1);
- whether further guidance can be provided as to the operation of the defence.[200]

Minister for Home Affairs response[201]

2.79 The Minister for Home Affairs (the minister) advised that if an individual has received written consent the written approval should be in their knowledge and possession and they should be able to produce such evidence without incurring significant cost or delay.

2.80 The minister further advised that if the prosecution bore the burden of proof, the prosecution would be required to prove the individual's recklessness as to the absence of written consent from the Minister or Director-General, which would be very challenging.

2.81 The minister further advised that, in the context of the offence under proposed section 92, the Director-General had noted that those who identify themselves as security clearance holders or intelligence community workers were 'high value targets' to malicious actors. Accordingly, there is potential for ASIO's operations to be exposed and for Australia's security to be undermined as a result of the publication of identities of current or former ASIO employees. The minister advised that the reversal of the burden of proof is justified on the basis of the conduct proscribed in the offence posing a grave danger to public health or safety, in accordance with paragraph 4.3.1 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (*Guide to Framing Commonwealth Offences*).[202]

2.82 Finally the minister advised that approval to publish an ASIO officer's identity is a rare occurrence and consent to do so is only given in exceptional circumstances. If a defendant had obtained such written consent, it would be readily apparently and accordingly, could be easily produced.

Committee comment

2.83 The committee thanks the minister for this response.

2.84 In relation to the first element referred to in the *Guide to Framing Commonwealth Offences* (whether the matter contained within the defence is

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200 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 18–20.

201 The minister responded to the committee's comments in a letter, dated 6 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

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

peculiarly within the defendant's knowledge), the committee notes that, as acknowledged by the minister, written consent to publish an ASIO officer's identity is provided by the minister or the Director-General. As such, it is unclear to the committee how written consent is, or may be, peculiarly within the defendant's knowledge, as a record of the written authorisation would just as readily be available to the minister or the Director-General.

2.85 Further, in relation to the second element (whether it would be significantly more difficult and costly for the prosecution to disprove the matter), it is not clear to the committee that it would be significantly more costly or difficult to disprove the existence of a written authorisation given, as acknowledged by the minister, such authorisation is provided very rarely.

2.86 The committee acknowledges the additional justification provided in the minister's response as to the appropriateness of reversing the evidential burden of proof in this case, due to the danger to public health or safety at large that could arise as a result of the publication of an ASIO officer's identity.

2.87 The committee queries whether there is a demonstrable need to separate proposed subsection 92(2) as a defence to the offence under proposed subsection 92(1), noting that the existing section 92 creates substantially the same offence but requires the prosecution to disprove the existence of written authorisation to publish the identification of an ASIO officer as an element of the offence. The committee notes that there is no suggestion in the explanatory memorandum or in the minister's response that there has been any difficulty prosecuting people for offences against the existing provision. As such, it remains unclear to the committee why the relevant matter could not remain part of the proposed new offence rather than included separately as an offence-specific defence.

2.88 As a final point, the committee reiterates that an important aspect of the presumption of innocence is the duty imposed on the prosecution to prove every element of an offence. In this regard, the *Guide to Framing Commonwealth Offences* provides useful guidance as to when it may be appropriate for a matter to be included in an offence-specific defence. Adherence to these principles, unless there is a demonstrable need to depart from them, assists to keep to a minimum the number of provisions that impose a burden of proof on a defendant.

In light of the above, 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 offence under proposed subsection 92(1).

Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023[203]

Purpose	The Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023 (the bill) seeks to amend the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Competition and Consumer Act 2010* to refine the operation of the statutory infrastructure provider (SIP) regime. It also seeks to make technical and other amendments to legislation to improve the operation of telecommunications regulation outside the SIP regime, including changes that would enhance the enforcement and reporting powers of the Australian Communications and Media Authority and the Australian Competition and Consumer Commission.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 7 December 2023
Bill status	Before the House of Representatives

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)[204]

2.89 The bill proposes amendments to the *Telecommunications Act 1997* (the Tel Act), which would enable delegated legislation to modify the operation of primary legislation.

2.90 Proposed subsection 360HB(2) requires that where a facility is installed in, or in proximity to, the project area of a real estate development or building redevelopment project that is not part of an existing nominated service area, a carrier service provider (CSP) must declare that area as a provisional nominated service area where the specified conditions are met. However, proposed subsections 360HB(4) and 360HB(5) would also respectively enable the minister, by legislative instrument, to

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203 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 46.

204 Schedule 1, Part 1, item 74, proposed subsections 360HB(4) and 360HB(5); Schedule 1, Part 1, item 76, proposed subsections 360J(3) and 360J(4); Schedule 1, Part 1, item 78, proposed subsection 360K(1B); Schedule 1, Part 1, item 82, proposed subsections 360KB(2) and 360KB(4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

exempt a project from subsection 360HB(2) and to specify circumstances where the obligations do not apply.

2.91 Currently, section 360J of the Tel Act provides that 33 'development areas' described in three carrier licence condition declarations, are nominated service areas under the Act. However, proposed subsections 360J(3) and 360J(4) would enable the minister, by legislative instrument, to make a declaration which would have the effect of revoking or varying the 'nominated service area'.

2.92 Proposed subsection 360K(1A) provides that if an area is a provisional nominated service area because of a declaration made by a CSP under section 360HB, the carriage provider is the statutory infrastructure provider (SIP) for the service area. However, proposed subsection 360K(1B) would enable the minister, by legislative instrument, to declare that subsection 360K(1A) does not apply to a specified nominated service area and that another specified CSP is the SIP for the nominated area.

2.93 Proposed section 360KB establishes how the SIP for an anticipated service area is determined. It provides that a carrier who gives a notice under subsections360HA(1) or 360HC(1) of the Act, in relation to an anticipated service area, will be the SIP for the area. However, proposed subsections 360KB(2) and 360KB(4) would enable the minister, by legislative instrument, to declare that these provisions do not apply and that a specified carrier is the SIP for the area.

2.94 In *Scrutiny Digest 1 of 2024* the committee requested the minister's advice as to why it is necessary and appropriate to allow delegated legislation made under proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360KB(2) and 360KB(4) to modify the operation of the *Telecommunications Act 1997*.

Minister for Communications response[205]

2.95 The Minister for Communications (the minister) provided further information as to the operation of proposed sections 360HB, 360J and 360KB in support of the necessity of providing for instruments made under proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360KB(2) and 360KB(4) to modify the operation of the Tel Act:

- section 360HB should be modified to allow for circumstances in which the Act requires a CSP to declare a provisional nominated service area but changes in market circumstances, which are difficult to predict, mean it is inappropriate for a development to be subject to SIP obligations;

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205 The minister responded to the committee's comments in a letter, dated 8 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

- section 360J should be modified to allow for when nominated service areas no longer match the areas deemed by the Act where the carrier that owns the network infrastructure is not specified as the SIP for that area; and
- section 360KB should be modified to allow variations to anticipated service areas where the relevant SIP has exited the market or on-sold infrastructure.

2.96 Overall, the minister noted that these modification powers are necessary to ensure that the regime functions appropriately in light of the need to take into account changing market conditions. These changes would make it difficult for SIPs to meet their obligations and requirements and could lead to a lack of industry certainty and poor consumer outcomes.

Committee comment

2.97 The committee thanks the minister for these justifications as to the necessity for allowing legislative instruments to modify the operation of primary law.

2.98 While noting this further advice, the committee reiterates its view that it does not generally accept a desire for flexibility alone to be a sufficient justification for allowing delegated legislation to modify the operation of primary legislation. Changing market conditions explain why the minister may wish to quickly modify the operation of these provisions but does not explain why Parliament should accept its enactments to be modified without oversight.

2.99 The committee also considers that those same changing market conditions for which the minister may wish to vary the operation of provision could also lead to such legislative instruments becoming redundant due to another change. As such, the committee considers that it would be more appropriate if modification instruments were time limited to ensure that they are clearly addressing transient market conditions. In the alternative, if the provisions as modified are determined as being necessary for long-term effect, the committee considers that such matters should be dealt with via amendment to the primary legislation.

2.100 **In light of the above, the committee requests the minister's further advice as to:**

- **whether the explanatory memorandum to the bill can be amended to include the justifications for the appropriateness of proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360KB(2) and 360KB(4); and**
- **whether the bill can be amended to ensure that legislative instruments made under proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360K(1B), 360KB(2) and 360KB(4) are time limited to five years duration.**

Chapter 3
Scrutiny of standing appropriations[206]

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.[207] 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.[208]

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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206 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 3 of 2024*; [2024] AUSStaCSBSD 47.

207 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*.

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