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Committee for the Scrutiny of Bills

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Committee information

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 83.

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.

Australian Postal Corporation and Other Legislation Amendment Bill 2024[2]

Purpose	The bill is intended to strengthen Australia's legislative framework for the screening, and inspection, of incoming international mail at the border.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof
Significant matters in delegated legislation
Privacy[3]

1.2 Item 50 of Schedule 1 to the bill seeks to substitute existing section 90N of the *Australian Postal Corporation Act 1989* (the Act). Proposed subsection 90N(1) creates an offence of two years imprisonment if a person opens an article or examines the article or its contents.

1.3 Proposed subsection 90N(2) provides that the offence in proposed subsection 90N(1) does not apply if the opening or examination of the article or its contents is permitted by the Act, or another Commonwealth or State or Territory law.

1.4 Proposed subsection 90N(3) provides that the offence in proposed subsection 90N(1) does not apply if the opening or examination of the article or its contents is in the course of the person exercising powers, or performing functions or duties, as:

- an AFP appointee (proposed paragraph 90N(3)(a));
- a member of a State or Territory police force (proposed paragraph 90N(3)(b)); or

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Postal Corporation and Other Legislation Amendment Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 84.

3 Schedule 1, item 50, proposed subsections 90N(2) and (3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

- as a person included in a class of persons determined by legislative instrument (proposed paragraph 90N(3)(c)).

1.5 A note to each of these proposed subsections confirms that the evidential burden of proof is reversed in relation to these offence-specific defences.

1.6 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[4] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.7 Generally, a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[5]

1.8 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.9 In this respect, while the explanatory memorandum notes that these provisions reverse the evidential burden of proof, it does not attempt to justify why it is necessary and appropriate to do so in light of the test set out in the *Guide to Framing Commonwealth Offences*.

1.10 In addition, proposed paragraph 90N(3)(c) provides that the minister can declare further classes of persons who are not subject to the offence in proposed subsection 90N(1) by legislative instrument. This broad discretionary power appears to be unconstrained as there is nothing further in the bill or its explanatory memorandum to limit the types of classes of people who can be declared exempt from the offence provision. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum, and, at a minimum, some guidance should be included on the face of the bill as to the types of classes of person it is expected this exception will be applied to. This is especially the case where powers have the potential to trespass on rights and liberties such as privacy. Proposed paragraph 90N(3)(c) raises privacy concerns as it permits any class of person as declared by a legislative instrument to open and read the contents of postal articles.

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

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

1.11 In addition, the committee's long-standing scrutiny position is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Legislative provisions that may trespass on personal rights and liberties will ordinarily fall into the list of matters more appropriate for parliamentary enactment. This is because delegated legislation, made by the Executive, is not subject to the full range of parliamentary scrutiny inherent in proposing legislative changes in the form of an amending bill.

1.12 The committee notes that the offence provided by section 90N(1) seeks to protect an individual's right to privacy. As such, any exceptions to that offence inherently impact the right to privacy. As proposed subsection 90N(4) seeks to enable the minister to expand the classes of persons that will be exempt from the offence of opening or examining an article or its contents, it appears to the committee that this has an unquantifiable impact on the privacy rights of individuals. Therefore it appears to the committee that any further expansion in the classes of persons that are exempt from the offence may be more appropriately dealt with by parliamentary enactment. At a minimum, the committee's expectation is that the explanatory memorandum to a provision of this nature should address:

- why it is appropriate to include the relevant matter in delegated legislation; and
- whether there is sufficient guidance on the face of the bill to appropriately limit the matters that are to be left to delegated legislation.

1.13 In this instance, the explanatory memorandum does not address either of these matters.

1.14 In relation to privacy, more generally, the statement of compatibility notes:

> The Act provides for a general prohibition on the opening and examination of mail articles. The Bill limits the right to privacy by expanding the range of permissible circumstances in which a mail article may be opened and examined by Australia Post and border agencies.
>
> The Bill contains measures to create a new exception to this prohibited conduct that would apply if the conduct itself is to either be: permitted by another law of the Commonwealth, or a State or Territory; or performed by a member of the Australian Federal Police or other State and Territory police force or service; or a person prescribed by the Minister in a legislative instrument, under strict parameters to assist in the performance of their functions or duties and allow earlier interception of an article.[6]

1.15 The committee notes that, as per the above excerpt from the statement of compatibility, there will be 'strict parameters' imposed on these measures. However, there is no further guidance provided as to what these parameters are and how they

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6 Statement of compatibility, pp. 7–8.

will operate to ensure the privacy of individuals where relevant, nor whether any other privacy protections apply.

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

- **why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 90N(2) and (3) of the *Australian Postal Corporation Act 1989*, noting that the committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*;**
- **why it is necessary and appropriate to provide for the classes of persons who may lawfully open and examine articles to be expanded by delegated rather than primary legislation;**
- **whether examples can be provided of the classes of persons who may be determined by the minister under subsection 90N(4) to not be subject to the subsection 90N(1) offence, including whether consideration could be given to restricting the classes of persons that could be so determined, for instance to those that hold relevant qualifications, training and experience; and**
- **the types of privacy protections or considerations that will be relevant when articles are opened and examined under proposed subsections 90N(2) and (3), including the 'strict parameters' that will be imposed.**

Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024[7]

Purpose	The bill will extend for a further three years the declared areas offence in 119.2 of the Schedule to the *Criminal Code Act 1995* (the *Criminal Code*) that is scheduled to sunset on 7 September 2024.
Portfolio	Attorney-General
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation
Trespass on rights and liberties
Parliamentary scrutiny[8]

1.17 Item 1 of Schedule 1 to the bill seeks to amend subsection 119.2(6) of the Schedule to the *Criminal Code Act 1995* (the *Criminal Code*) to extend the declared areas offence in section 119.2 of the *Criminal Code*. The offence is due to cease at the end of 7 September 2024 and the bill seeks to amend the cessation date to the end of 7 September 2027.

1.18 The declared areas provisions make it an offence for a person to enter or remain in an area declared by the Minister for Foreign Affairs to be an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity.

1.19 The committee has previously raised concerns regarding the breadth of the offence of entering, or remaining in, declared areas, and the broad delegation of power in allowing the Minister for Foreign Affairs to make this declaration.[9] In particular, the committee has noted its concerns that the offence could apply even if a person did not know the area was subject to a relevant declaration and they had no intention to commit any particular crime or activity.

1.20 The extraordinary nature of the regime is recognised in the current legislation by the inclusion of a sunset period. In extending these significant powers by a period

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7 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 85.

8 Schedule 1, item 1, proposed subsection 119.2(6) of the *Criminal Code*; and Schedule 1, item 3. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i), (iv) and (v).

9 Senate Scrutiny of Bills Committee, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (23 October 2014); and *Scrutiny Digest 12 of 2021* (11 August 2021), pp. 1–4.

of three years, the committee expects that the explanatory materials accompanying the bill should provide a comprehensive justification for the continued need for such powers. In relation to this the explanatory memorandum states:

> The effect of this amendment would be to extend the operation of the offence for entering or remaining in a declared area by three years to 7 September 2027. Extending the offence by three years reflects the continued appropriateness of the provisions and is consistent with the previous two extensions made in 2018 and 2021 in accordance with recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS). This would allow for continued, periodic review of the appropriateness of this framework.[10]

1.21 The committee's expectations will also be higher where the sunsetting date has been repeatedly extended. The explanatory materials accompanying such a bill should provide a comprehensive justification for the continued need for extraordinary measures, including outlining what exceptional circumstances justify the extension and whether those exceptional circumstances are expected to continue into the future.

1.22 The committee has previously commented on past extensions to the sunsetting date for the offence and notes that similar explanations were provided to justify extending the sunsetting date until September 2021 and then to September 2024.[11] The committee reiterates its previous concerns that there is a risk that measures that were originally introduced on the basis of being a temporary response to an emergency situation may become permanent, in effect, by their continual renewal without sufficient scrutiny of the rationale for their continued appropriateness.[12] The committee considers the measures being extended by this bill raise significant scrutiny concerns and may, in some instances, unduly trespass on personal rights and liberties.

1.23 Sunset provisions can be an important safeguard for the imposition of significant measures which trespass on rights and liberties such as the declared area provisions as they require the Parliament to consider at regular intervals whether the measures remain necessary and appropriate, or should be repealed or amended. However, the justification for the extension of sunsetting in this instance, being to 'allow for continued, periodic review of the appropriateness of this framework'[13] may be undermined if the body tasked to undertake this periodic review, the Parliamentary Joint Committee on Intelligence and Security (the PJCIS) has a discretion to not

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10 Explanatory memorandum, p. 13.

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2018* (20 June 2018), pp. 13–16; *Scrutiny Digest 12 of 2021* (11 August 2021), pp. 1–4.

12 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2023* (6 September 2023), p. 6.

13 Explanatory memorandum, p. 13.

undertake that review. The committee notes that, in this instance, the PJCIS did not resolve to undertake the review.

1.24 These concerns are exacerbated by the proposed changes to the previous arrangement for regular reviews by the PCJIS of the offence prior to its sunsetting. The committee notes the legislative history surrounding review of the declared areas offence, as follows:

- the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* provided for a mandatory review of the offence (amongst other matters) by the PJCIS by 7 March 2018, prior to the sunsetting of the offence on 7 September 2018;
- the *Counter-Terrorism Legislation Amendment Act (No. 1) 2018* provided for a mandatory review of the offence (amongst otpher matters) by the PJCIS by 7 January 2021, prior to the sunsetting of the offence on 7 September 2021; and
- the *Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Act 2021* provided for the PJCIS to review the offence by 7 January 2024, prior to the sunsetting of the offence of 7 September 2024, if it resolved to do so.

1.25 As noted above, the PJCIS did not resolve to conduct the second review referred to above. Item 3 of Schedule 1 to the current bill seeks to repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001*, which provided for that review, without replacing it with a new mandate to review the declared area offence. Instead, as noted in the explanatory memorandum to the bill, it is the intention to replace the PJCIS's specific mandate with the a broader discretion for the PJCIS to inquire into any counter-terrorism or national security legislation prior to its sunsetting.[14][15]

1.26 Noting that the decision to impose a sunset period on legislative provisions is only taken by the Parliament in extraordinary cases, mandated reviews appear to the committee to be the most appropriate avenue for review. This would ensure that the Parliament is provided with sufficient advice concerning the continued appropriateness of measures that are subject to sunsetting. This advice would be of critical importance to the Parliament in considering any proposal to extend the sunsetting date. The committee is of the view that providing for a discretion for a review to be conducted of the continued appropriateness of such measures rather

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14 Explanatory memorandum, p. 14.

15 The bill to give effect to this change, the Intelligence Services Legislation Amendment Bill 2023, is currently before the House of Representatives, having last been considered by that house on 22 June 2023. The Parliamentary Joint Committee on Intelligence and Security is currently reviewing the bill but has not yet reported.

than mandating such a review may operate so as to impact the efficacy of parliamentary scrutiny of the exercise of legislative power.

1.27 The committee requests the Attorney-General's advice as to why it is necessary and appropriate for item 3 of Schedule 1 to the bill to repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001* without reinstating the mandate for review specifically of the declared area offences framework by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

1.28 Noting the value to parliamentary scrutiny of the measures that would be provided by a mandated review, the committee's scrutiny of the Attorney-General's response would be assisted if it addressed how the proposed broad discretion for a review into any counter-terrorism or national security legislation by the PJCIS prior to sunsetting is a sufficient and equal safeguard.

1.29 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the proposed amendment to subsection 119.2(6) of the Criminal Code, which extends the operation of the offence in section 119.2 by a further three years.

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024[16]

Purpose	The bill will amend the *Crimes Act 1914*, the *Proceeds of Crime Act 2002*, the *National Anti-Corruption Commission Act 2022*, the *Telecommunications (Interception and Access) Act 1979* and the *Telecommunications Act 1997*.
Portfolio	Attorney-General
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Undue trespass on rights and liberties
Privacy
Broad discretionary powers[17]

1.30 Item 6 of Schedule 1 to the bill seeks to insert proposed section 3FA into the *Crimes Act 1914* (the Crimes Act). Proposed section 3FA would allow an existing search warrant to authorise additional things in relation to the search of digital assets. Proposed subparagraph 3FA(5)(a)(v) would provide for an executing officer to access account-based data in relation to a person who *uses or has used* the computer found in the course of a search authorised under a warrant. This is in order to determine whether the relevant account-based data suggests the existence of a digital asset that may be seized under the warrant. Proposed paragraph 3FA(5)(d) authorises this data to be copied where it appears to be relevant for the purposes of determining whether the data suggests the existence of a digital asset that may be seized under the warrant, or suggests the existence of a digital asset that may be seized under the warrant. In addition, proposed subsection 3FA(3)(b) permits the executing officer to alter or delete data obtained through these processes when using electronic equipment to seize a digital asset.[18]

1.31 In relation to these powers the explanatory memorandum states:

> Subsection 3FA(3) provides that the executing officer or a constable assisting may use a computer or data storage device found in the course of the search authorised by the warrant, a telecommunications facility, other

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16 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 86.

17 Schedule 1, item 6, proposed section 3FA; and Schedule 1, item 30, proposed section 228A. The committee draws senators' attention to these provisions pursuant to Senate standing orders 23(1)(a)(i) and (ii).

18 Similar powers would be provided for in proposed paragraphs 3FA(4)(b) and (5)(b).

> electronic equipment or a data storage device for the purpose of seizing a digital asset under the warrant.
>
> This will allow the executing officer or a constable assisting to use specialist equipment to analyse computers and digital equipment to seize digital assets. The executing officer or constable assisting may add, copy, delete or alter data if necessary to achieve this purpose. If it is reasonable to do so for the purpose of seizing a digital asset, the warrant may authorise the use of any other computer or a communication in transit, and to add, copy, delete or alter other data in the other computer or the communication in transit.
>
> The executing officer or a constable assisting may also do any other thing reasonably incidental to these activities.[19]

1.32 In addition, item 30 seeks to insert proposed section 228A into the *Proceeds of Crime Act 2002* (the Proceeds of Crime Act). Similarly to proposed section 3FA of the Crimes Act, proposed section 228A would expand the authority for executing officers in the exercise of search warrants in relation to digital assets under the Proceeds of Crime Act.

1.33 The proposed framework appears to provide a means of accessing the content of private information and communications held in digital assets, including user information for third parties who have used a digital asset in question at some point in time, and appears to enhance the ability of agencies to utilise information gained under warrant or authorisation regimes that raise significant scrutiny concerns. It is unclear to the committee why, in this instance, it is necessary and appropriate for the authority of existing search warrants to be expanded by the bill to authorise access to account-based data for third parties who may have, at any time, used a computer being considered for seizure under the warrant.

1.34 The committee notes with further concern that such third-party information may be copied and altered in line with the conditions set out in the relevant provisions of the bill. Noting the serious nature of this intrusion into personal privacy the committee considers that the explanatory memorandum should have provided a more robust justification of why these extended coercive powers are necessary, including examples of scenarios in which it is envisaged they may be required. In particular the committee queries why it may be necessary to alter and delete such data and notes that the explanatory memorandum does not provide sufficient clarity about what appear to be highly technical provisions.

1.35 The committee has previously discussed the potential for inappropriately framed warrant regimes to trespass on personal rights and liberties. Relevantly, the committee has expressed concern about warrant regimes that: do not adequately guard against the seizure of material unrelated to an investigation; do not adequately protect third parties; authorise covert access to material and thereby deny individuals

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19 Explanatory memorandum, p. 19.

the opportunity to protect privileged information or to challenge the grounds on which access has been granted; and are not subject to adequate judicial oversight.[20]

1.36 Further, the committee notes that the explanatory memorandum does not specifically consider the privacy implications of these new powers. In general, the statement of compatibility with human rights states:

> Furthermore, the Bill provides that safeguards in the existing legislation which govern the time periods law enforcement can retain things moved or seized under warrant will also apply to the digital asset seizure measure. This intends to balance criminal justice outcomes with the effects depriving a person of their property may have.[21]

1.37 In light of the nature of these powers the committee considers that the explanatory memorandum should contain detailed information in relation to any constraints or privacy safeguards that exist for any personal information seized under warrant, especially that of third parties.

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

- **the privacy protections that apply to account-based data that is accessed as a result of proposed subparagraph 3FA(5)(a)(v) of the *Crimes Act 1914*;**
- **why it is necessary and appropriate for the authority of existing search warrants to be expanded by proposed section 3FA of the *Crimes Act 1914* to capture account-based data, including that of third parties;**
- **why it is necessary and appropriate to be able to obtain the account-based data of *any* person who has ever used the target computer;**
- **why it is necessary and appropriate that digital data accessed as a result of proposed section 3FA of the *Crimes Act 1914* and proposed section 228A of the *Proceeds of Crime Act 2002* can be altered, copied or deleted by executing officers; and**
- **whether any examples can be provided of scenarios in which it is envisaged that the expansive powers provided by the various aspects of these provisions would be necessary.**

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20 Senate Scrutiny of Bills Committee, *Entry, search and seizure provisions in Commonwealth legislation*, 4 December 2006, pp. 308–316; *Scrutiny Digest 12 of 2018* (17 October 2018), p. 21.

21 Statement of compatibility with human rights, p. 7.

Significant penalties[22]

1.39 Item 1 of Schedule 3 to the bill would amend subsection 4AA(1) of the Crimes Act to increase the Commonwealth penalty unit amount from $313 to $330. The amendment would take effect from 1 July 2024. Item 2 would amend subsection 4AA(3) to provide that indexation of the penalty unit amount commences from 1 July 2026.

1.40 Commonwealth pecuniary criminal and civil penalty provisions are generally expressed in terms of penalty units, with the penalty amount calculated by multiplying the value of a penalty unit as prescribed by the Crimes Act by the number of penalty units applicable.[23] The effect of this amendment would therefore be to increase the maximum civil and criminal penalties that apply across the majority of Commonwealth legislation.

1.41 Commonwealth penalty unit amounts typically increase according to an indexation process, which sees amounts automatically increase every three years in line with the consumer price index. However, on 1 January 2023 an amendment to the Crimes Act took effect which raised the amount of a single penalty unit from $222 (as indexed) to $275, alongside indexation.[24]

1.42 The committee expects that any significant penalty will be justified within the explanatory materials for the bill. Scrutiny concerns are heightened in this case given that the amendment introduced by this bill would apply across the majority of Commonwealth civil and criminal penalty provisions. In this instance, the explanatory memorandum merely notes that:

> Maintaining the value of the penalty unit over time ensures that financial penalties for Commonwealth offences reflect community expectations and continue to remain effective in deterring unlawful behaviour.[25]

1.43 The committee is concerned that the Parliament is being asked to approve a wholesale increase to all civil and criminal penalties contained within Commonwealth legislation that are expressed in penalty units with very limited justification as to why this significant increase is necessary or appropriate. For example, the committee notes that the explanatory materials to the bill do not explain how the amount of the increase was determined, or why it is considered necessary to introduce an increase to the Commonwealth penalty unit of approximately 5 per cent in addition to the usual indexation process. The explanatory memorandum also contains no evidence that the

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22 Schedule 3, item 1, section 4AA of the *Crimes Act 1914*. The committee draws senator's attention to the provision pursuant to Senate standing order 23(1)(a)(i).

23 However, it is sometimes appropriate to express a penalty in individual dollar amounts, see Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) pp. 42–43.

24 *Crimes Amendment (Penalty Unit) Act 2022*, section 1.

25 Explanatory memorandum, p. 37.

proposed increase better reflects community expectations or is necessary to ensure that penalties remain an effective deterrence measure.

1.44 The committee recently raised this issue in relation to the Crimes Amendment (Penalty Unit) Bill 2022 which increased the penalty until from $222 to $275.[26] The committee undertook significant engagement with the Attorney-General setting out the above concerns and querying why detailed justification of the amendment had not been provided in the explanatory memorandum.

1.45 In relation to that bill, the committee concluded by stating:

> At a minimum, the committee considers that it would have been appropriate had the increase introduced by the bill been justified with reference to evidence: that the previous amount of the penalty unit was not acting as an effective deterrent; evidence that the new amount constitutes an effective deterrent; and information explaining how the new amount was determined.[27]

1.46 The committee is concerned that the Attorney-General has adopted the same approach as the Crimes Amendment (Penalty Unit) Bill 2022 and notes a similar lack of detail and justification in this bill's explanatory memorandum.

1.47 The committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to increase the amount of a Commonwealth penalty unit by 5 per cent, noting the limited explanation provided in the explanatory materials for the increase and that the increase will apply in addition to the usual indexation process from 2026.

1.48 In particular, the committee's consideration of this issue will be assisted if the Attorney-General's response addresses:

- **how the amount of the increase was determined;**
- **why it was considered necessary to introduce an increase to the Commonwealth penalty unit of approximately 5 per cent in addition to the usual indexation process;**
- **any evidence that the previous amount of the penalty unit was not acting as an effective deterrent;**
- **any evidence that the new amount is likely to constitute an effective deterrent; and**
- **any evidence that the increase better reflects community expectations.**

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26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2022* (30 November 2022), pp. 1–2; *Scrutiny Digest 1 of 2023* (8 February 2023), pp. 87–89; and *Scrutiny Digest 3 of 2023* (22 March 2023) pp. 23–26.

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2023* (22 March 2023) p. 26.

Broad delegation of administrative powers and functions
Significant matters in delegated legislation[28]

1.49 Item 3 of Schedule 4 to the bill seeks to insert proposed section 7A into the *Telecommunications Act 1997* (the Telecommunications Act). Proposed subsection 7A(2) provides that for the purposes of the Telecommunications Act the Home Affairs Minister may, by legislative instrument, specify a person, body or class of such to be a Communications Security Coordinator. Proposed subsection 7A(3) provides that only APS employees (or classes thereof) within the Home Affairs Department may be specified by legislative instrument under proposed subsection 7A(2).

1.50 In addition, item 62 of the same Schedule would substitute proposed section 6R, which provides the same measures in relation to the prescription of a Communications Access Coordinator within the Attorney-General's Department.

1.51 In relation to proposed section 7A the explanatory memorandum states:

> … This will allow the Minister for Home Affairs to specify different persons and bodies to perform certain functions of the Communications Security Coordinator as appropriate. The Minister's instruments will provide clarity as to which functions will be performed by which persons, classes of persons, or bodies. These legislative instruments will be subject to parliamentary scrutiny including possible disallowance.
>
> Subsection 7A(3) provides that the Minister for Home Affairs must only specify a person or class of persons in an instrument made under subsection 7A(2) if the person is an APS employee, or the class consists wholly of APS employees, in the Department of Home Affairs. This ensures that the persons or classes of persons specified and exercising these functions are only comprised of persons in the department administered by the Minister for Home Affairs.

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

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[28] Schedule 4, item 3, proposed section 7A; and Schedule 4, item 62, proposed subsection 6R(2). The committee draws senator's attention to these provisions pursuant to Senate standing orders 23(1)(a)(ii) and (iv)

1.53 The committee acknowledges the explanation provided in the explanatory memorandum that the relevant instruments will be legislative instruments, subject to parliamentary scrutiny. However, the committee reiterates its long-standing scrutiny position that delegated legislation is not subject to the full range of parliamentary scrutiny inherent in the legislative process, including the ability of the Parliament to amend the proposal as to which functions of the Communications Service Coordinator or Communications Access Coordinator will be performed by particular persons, classes of persons, or bodies. The committee emphasises that it is for the Parliament to decide the appropriate persons to whom powers and functions under legislation may be delegated and not the Executive.

1.54 The committee notes that it appears Communications Access Coordinators, for example, have substantial responsibilities under the Telecommunications Act, such as determining requirements for authorisations and notifications (section 183) and approving data retention implementation plans applied for by service providers (section 187E). This indicates to the committee that these are positions which may be more appropriately limited for delegation to SES-level employees and above in the relevant Departments.

1.55 In this instance the committee's view is that the explanatory memorandum does not sufficiently justify why it is necessary and appropriate for proposed subsection 7A(3) or 6R(2A) to permit delegations to any APS employees of the relevant departments.

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

- **why it is necessary and appropriate to allow the roles of Communications Access Coordinator and Communications Security Coordinator to be delegated to any APS employee at any level within either the Home Affairs or Attorney-General's Departments respectively and by delegated legislation;**
- **the scope of powers that might be delegated; and**
- **the categories of people to whom it is envisaged these roles will be delegated to, including whether any specific training, skills or experience will be a pre-requisite and, if so, whether consideration can be given to providing such a requirement on the face of the bill.**

Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024[29]

Purpose	The bill seeks to amend the *Illegal Logging Prohibition Act 2012* to better protect the Australian market from illegally harvested timber and timber products and support legal and sustainable timber trade by improving regulatory tools and action for non-compliance.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Use of negligence as fault element for an offence
Significant matters in delegated legislation[30]

1.57 Item 10 of Schedule 1 to the bill seeks to amend section 9 of the *Illegal Logging Prohibition Act 2012* (the Act) by substituting a standalone fault-based offence for illegally importing logged timber in regulated timber products with a graduated compliance framework which includes a fault-based offence, a strict liability offence and a civil penalty provision. The fault-based offence in subsection 9(1) of the bill remains the same as in subsection 9(1) of the Act.

1.58 Paragraph 9(1)(b) provides one of the elements of the offence, that the thing is, is made from, or includes, illegally logged timber. Although under the *Criminal Code*, the default fault element for this aspect of the offence would ordinarily be recklessness, subsection 9(2) provides that the fault element for paragraph 9(1)(b) is negligence. The penalty for the fault-based offence in subsection 9(1) is 5 years imprisonment or 500 penalty units, or both.

1.59 The committee has long-standing scrutiny concerns relating to whether mere negligence should attract criminal liability for a serious criminal offence. Offences with a fault element of negligence may impose criminal liability on persons who had a state of mind that was something less than knowledge of the facts. In establishing a criminal offence on the basis of what a person ought reasonably to have known, this may be seen to remove the element of *mens rea* in a criminal offence.[31] As such, where a bill provides for a fault element of negligence, the committee is of the view that the

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29 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 87.

30 Schedule 1, item 10, proposed subsections 9(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (iv).

31 See, for instance, Senate Scrutiny of Bills Committee, *Twelfth Report of 1989* (30 August 1989), p. 266.

explanatory memorandum should explain the appropriateness of negligence as a fault element in the particular circumstances of the offence.

1.60 The committee considered section 9 when it was initially introduced, in *Alert Digest 1 of 2012*, and sought advice from the minister as to whether the use of negligence as the standard of fault was consistent with the *Guide to Framing Commonwealth Offences*.[32] The minister provided a detailed response, outlined in its *Sixth Report of 2012*, explaining, amongst other things, that negligence is appropriate as the element relates to the standard of care that a reasonable person would exercise in the circumstances.[33]

1.61 The committee considers that as substituted section 9 seeks to retain negligence as a fault element it would have been appropriate for the explanatory materials to explain and justify this approach. The committee considers that the advice provided in previous correspondence between the committee and the minister could helpfully be included in the explanatory memorandum to provide this explanation.

1.62 Further, paragraph 9(1)(c) provides another element of the offence, that the thing is a regulated timber product. A regulated timber product is defined in proposed section 7 to mean a timber product prescribed by the rules for the purposes of this definition. The committee similarly previously sought advice regarding the use of regulations to define regulated timber products. At the time, the committee noted that important information making up an offence, particularly one subject to a heavy penalty for contravention, is a significant matter which should be included in primary legislation where possible. The committee left the question of whether the proposed approach was appropriate to the consideration of the Senate.[34]

1.63 The proposed amendment in the current bill seeks to leave the definition of a regulated timber product to delegated legislation, and further seeks to move the definition from regulations to rules providing even less oversight. The explanatory memorandum provides no explanation for this approach. However, in previous correspondence, the minister provided an explanation that including the definition in regulations:

> allows for greater flexibility to continually improve the legislative framework for the policy over time, and to allow for adjustments to be made to the products covered, as innovation and technology improves, such as advancements in harvesting and manufacturing techniques.[35]

1.64 The committee generally does not accept arguments for a need for flexibility or responsiveness as a justification for the inclusion of significant matters in delegated legislation. The committee again considers it is more appropriate for the definition of

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32 Senate Scrutiny of Bills Committee, *Alert Digest 1 of 2012* (8 February 2012) pp. 25–26.

33 Senate Scrutiny of Bills Committee, *Sixth Report of 2012* (20 June 2012) pp. 217–218.

34 Senate Scrutiny of Bills Committee, *Sixth Report of 2012* (20 June 2012) p. 217.

35 Senate Scrutiny of Bills Committee, *Sixth Report of 2012* (20 June 2012) p. 218.

regulated timber products to be included on the face of the bill given it is a significant matter that constitutes an offence subject to significant penalties.

1.65 The committee requests that minister's advice as to whether the Government remains of the view that negligence is an appropriate fault element for the offence in proposed subsection 9(1) of the *Illegal Logging Prohibition Act 2013*, in accordance with the views expressed in earlier correspondence to the committee.

1.66 If so, the committee requests that the minister give consideration to tabling an addendum to the explanatory memorandum containing the key information provided by the minister in that correspondence as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

1.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the definition of a regulated timber product to rules in proposed paragraph 9(1)(c) of the *Illegal Logging Prohibition Act 2013*.

Reversal of the evidential burden of proof
Significant matters in delegated legislation[36]

1.68 Item 12 in Schedule 1 to the bill seeks to substitute section 12 of the Act, which provides an offence for importing regulated timber products. The amendment seeks to introduce a strict liability offence and a civil penalty provision in addition to the fault-based offence that already exists in the Act. Proposed subsection 12(4) seeks to provide that the offence does not apply in any circumstances prescribed by the rules. A defendant bears an evidential burden in relation to these matters.

1.69 Similarly, subsections 17(1), 18B(1) and 18C(1) provide, respectively, for offences relating to processing raw logs without complying with due diligence requirements, not providing a notice of regulated timber products to be unloaded in Australia, and not providing a notice of the processing of a raw log into something other than a raw log. Subsections 17(5), 18B(6) and 18C(5) all provide that rules may prescribe exceptions to these offences. Again, a defendant bears an evidential burden in relation to these matters.

1.70 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[37] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a

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[36] Schedule 1, item 12, proposed subsections 12(4), 17(5), 18B(6) and 18C(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

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

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

1.71 Generally, 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.[38]

1.72 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.73 In this case, the explanatory memorandum provides no justification as to why it is proposed to reverse the evidential burden of proof or include exceptions to the offence in the rules, however the statement of compatibility explains that:

> Each of these matters would be peculiarly within the knowledge of the defendant, who would be best placed to know the relevant information or circumstances or whether or not the declaration, notice, document or information is false or misleading in a material particular.[39]

1.74 The committee is concerned that the exceptions to the offences in these provisions are to be specified in rules. As such, it is not possible to comment on whether the matters that are included in the rules would be peculiarly within the knowledge of the defendant. Further, the committee considers that the inclusion of an exception to an offence in delegated legislation is a significant matter which may have an impact on personal rights and liberties, and therefore is better placed in primary legislation to allow for appropriate parliamentary scrutiny.

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

- **why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed subsections 12(4), 17(5), 18B(6) and 18C(5) of the *Illegal Logging Prohibition Act 2013*; and**
- **why it is appropriate for an offence-specific defence to include any circumstances prescribed by the rules.**

1.76 The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the advice explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

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

39 Statement of compatibility, p. 73.

Abrogation of privilege against self-incrimination[40]

1.77 Item 52 in Schedule 1 to the bill seeks to substitute section 82 of the Act. Proposed subsection 82(1) provides that an individual is not excused from making a declaration under section 13 (a customs declaration); giving a notice under section 18B or 18C (respectively, a notice of regulated timber products to be unloaded in Australia, and a notice of the processing of a raw log into something other than a raw log); giving information or producing a document under section 18E, 18F or 31 (respectively, a requirement for importers to give information or documents to the Secretary, a requirement for processors to give information or documents to the Secretary, and a requirement to give information or produce documents to an auditor conducting an audit); or answering a question under section 31, on the ground that making the declaration, giving the notice or information, producing the document or answering the question might tend to incrimination the individual in relation to an offence.

1.78 Proposed subsection 82(2) provides for a limited use immunity, providing that the declaration, notice, information or document produced under subsection 82(1) is not admissible in evidence against the individual in criminal proceedings, other than proceedings for an offence against the sections referred to in subsection 82(1) or proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code*.[41]

1.79 The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may incriminate them. This is a key component of the right to be presumed innocent. The committee recognises that there may be certain circumstances in which the privilege against self-incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

1.80 The explanatory memorandum explains that:

> Abrogating the privilege against self-incrimination in relation to these provisions would be necessary to ensure the Department has the necessary information and documents to assess an importer's or processor's compliance with the requirements of the Act and the rules and effectively manage the risks of the importation of illegally logged timber and the processing of illegally logged raw logs. It is considered that the public benefit associated with the ability to effectively enforce the Act and the rules would outweigh the loss of personal liberty associated with abrogating the privilege against self incrimination in this context. Further, the effect of

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40 Schedule 1, item 52, proposed section 82. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

41 Section 137.1 of the *Criminal Code* creates an offence for providing false or misleading information. Section 137.2 creates an offence for providing false or misleading documents.

> proposed new subsection 82(2) would be that the information or document would not be able to be used against the person in any other criminal proceedings.
>
> Abrogation of the privilege against self-incrimination would also be appropriate and justified on the basis that the kind of information contemplated under section 82 – that is, concerning when a regulated timber product is to be imported or when a raw log is to be processed, information about compliance with due diligence requirements and information requested in the context of an audit – is likely to be information that is peculiarly within the knowledge of the importer or processor.[42]

1.81 While acknowledging this explanation, the committee considers that any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'. A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings.

1.82 In this case, the committee notes that subsection 82(2) includes a limited use immunity but no derivative use immunity. The committee considers it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained from a person could not be used in evidence against them. The lack of a derivative use immunity has not been addressed in the explanatory memorandum.

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

- **whether consideration has been given to providing for less coercive avenues to obtain the information prior to compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination; or**
- **in the alternative, what consideration has been given to including derivative use immunity to ensure information or evidence indirectly obtained from a person could not be used in evidence against them.**

Immunity from civil liability[43]

1.84 Item 54 of Schedule 1 to the bill seeks to insert proposed section 85D, which relates to protection from civil proceedings. Proposed subsection 85D(1) provides that no civil proceeding lies against the Commonwealth or a protected person in relation

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42 Explanatory memorandum, pp. 45–46.

43 Schedule 1, item 53, proposed section 85D. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

to anything done, or omitted to be done, in good faith by a protected person in the performance or purported performance of a function, or the exercise or purported exercise of a power, conferred by the Act or the rules. Proposed subsection 85D(2) defines protected person to mean a person who is, or was, the Minister, the Secretary, an APS employee in the Department, an inspector or an auditor.

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

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

1.87 In this case, the explanatory memorandum states that:

> Protection from civil proceedings in this context would be necessary and appropriate to support the performance of functions and the exercise of powers under the Act or rules by the people covered by this provision.[44]

1.88 While acknowledging this explanation, the explanatory memorandum does not provide any information on what recourse, if any, affected persons may have to bring an action to enforce their legal rights.

1.89 The committee considers that it would have been more appropriate had the explanatory materials addressed the limited nature of the 'good faith' safeguard and why providing the immunity is nevertheless justified in light of this limited nature. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.90 The committee's concerns are also heightened in this instance given the broad range of persons upon whom immunity is conferred under proposed subsection 85D(2) and, as such, the committee expects the explanatory materials to address why it is necessary and appropriate for such a broad class of persons to be protected from civil liability for damages.

1.91 The committee requests the minister's advice as to why it is necessary and appropriate to confer immunity from civil proceedings on a potentially broad range of persons, such 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.

1.92 The committee's consideration of this issue will be assisted if the minister's advice addresses what, if any, alternative protections are afforded to an affected individual given that the normal rules of civil liability have been limited by the bill.

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44 Explanatory memorandum, p. 53.

Incorporation of external materials as existing from time to time[45]

1.93 Item 55 of Schedule 1 to the bill seeks to replace existing section 86 of the Act, which provides for a regulation-making power, with a revised section 86, which instead provides for a rule-making power. Proposed subsection 86(2) seeks to provide that, despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

1.94 At a general level, the committee is concerned where provisions in a bill allow the incorporation of legislative provisions by reference to other documents as such an approach:

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.95 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. The committee reiterates its consistent scrutiny view that where material is incorporated by reference into the law, it should be freely and readily available to all those who may be interested in the law.

1.96 In this case, the explanatory memorandum provides a detailed explanation:

> Schedule 2 to the Regulation contains the timber legality framework, the Country specific guidelines and the State specific guidelines. Each of these documents sets out the guidance or information to be taken into account in considering a variety of sources when undertaking due diligence requirements.
>
> Proposed new subsection 82(2) [sic] would provide a contrary intention to subsection 14(2) of the Legislation Act. That is, the incorporation of the timber legality frameworks, the Country specific guidelines and the State

[45] Schedule 1, item 55, proposed subsection 86(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

> specific guidelines and other relevant documents by reference would not be limited to the instrument or other writing as at the date of incorporation.
>
> It is appropriate to enable the incorporation of these documents as they exist from time to time because these documents are of a technical nature that are updated frequently as required.
>
> It is intended that where the rules would incorporate such documents, they would either be freely or publicly available, or would be required in the ordinary course of doing business in the timber industry.
>
> In order to comply with paragraph 15J(2)(c) of the Legislation Act, the explanatory statements for the rules would contain a description of the relevant incorporated documents and indicate how they may be obtained.

1.97 While the committee notes the stated intention that incorporated documents would be either freely or publicly available, or would be required in the ordinary course of business in the timber industry, the committee considers that incorporated documents should be freely available not only to the entities that are directly required to comply with the measures but also to members of the public who have an interest in oversight and understanding the law.

1.98 The committee understands that, in instances where incorporated documents are not otherwise freely available, it is not uncommon for the documents 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.[46]

1.99 In light of the above, the committee requests the minister's advice as to whether documents incorporated by reference under proposed subsection 86(2) of the *Illegal Logging Prohibition Act 2013* will be made freely available to all persons interested in the law.

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[46] 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].

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024[47]

Purpose	The bill seeks to make various amendments to the *National Disability Insurance Scheme Act 2013*, including to: introduce a new definition of 'NDIS supports'; expand National Disability Insurance Scheme (NDIS) rules relating to access requirements; empower the CEO to request information and reports relating to the participant; provide for new framework plans; and allow for the imposition of conditions on approval of quality auditors
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Exemption from sunsetting
Significant matters in delegated legislation[48]

1.100 The *National Disability Insurance Scheme Act 2013* (the NDIS Act) provides the minister with extensive rule-making powers. Existing section 209 of the NDIS Act provides that the minister may, by legislative instrument, make rules called the National Disability Insurance Scheme rules and sets out four categories of rules which require different levels of consultation and agreement with the Commonwealth and host jurisdictions.

1.101 Item 123 of Schedule 1 to the bill seeks to introduce new table item 42AC into section 12 of the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM) to include the National Disability Insurance Scheme rules, within the meaning of the NDIS Act, and any other instrument made under the NDIS Act. The effect of this provision is that the NDIS rules and any other instrument made under the NDIS Act are exempt from sunsetting.

1.102 Sunsetting plays a key role in ensuring legislative instruments are regularly reviewed to determine whether they are still fit for purpose and only in force as long as required. Once they have sunset, instruments must be remade and tabled in the Parliament, which promotes parliamentary oversight and scrutiny.. Where exemptions to sunsetting are created, as in this case through proposed amendments to the LEOM,

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47 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 88.

48 Schedule 1, item 123, proposed table item 42AC in section 12 of the Legislation (Exemptions and Other Matters) Regulation 2015. The committee draws senators' attention to this provision pursuant to Senate standing orders 24(1)(a)(iv) and (v).

the committee expects the explanatory memorandum to outline the circumstances that justify the limit on parliamentary oversight and scrutiny.

1.103 In this case, the explanatory memorandum explains:

> It is appropriate for all legislative instruments made under the Act to be exempt from sunsetting as they form part of an intergovernmental scheme, as provided in the Attorney-General's Department's *Guide to managing sunsetting of legislative instruments*.
>
> The legislative instruments made under the Act operationalise the NDIS, which is an intergovernmental scheme involving the Commonwealth and all States and Territories. As a result, the instruments form an integral part of an intergovernmental scheme.
>
> As outlined above, almost all legislative instruments made under the Act are subject to formal state or territory consultation or agreement requirements. The remainder are subject to consultation under section 17 of the Legislation Act.
>
> This results in a situation where instruments cannot be made, amended or repealed without direct involvement of States and Territories except in the case of sunsetting where the instruments will be automatically repealed by operation of a Commonwealth law. This is inconsistent with the consultation and agreement requirements for NDIS rules specifically, and with the operation of the NDIS and the Act more broadly. A sunsetting exemption will ensure the same consultation and agreement requirements apply to an instrument being repealed as those that apply to the instrument being made, consistent with the intergovernmental nature of the NDIS.[49]

1.104 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 sunsetting process. This is consistent with the position of the Senate Standing Committee for the Scrutiny of Delegated Legislation, which considered, in its inquiry into the exemption of delegated legislation from parliamentary oversight, that any exemption from sunsetting must be exceptional and recommended that the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance and sunsetting.[50]

1.105 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.

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49 Explanatory memorandum, pp. 44–45.

50 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (16 March 2021), recommendation 3.

1.106 The committee notes that the making of rules is an exercise by the Commonwealth Executive of legislative power that has been delegated to it by the Commonwealth Parliament in pursuance of the objectives of a scheme legislated by the Parliament. As such, the committee is of the view that it would be entirely appropriate for the Commonwealth Parliament to maintain oversight of such instruments made and remade through the sunsetting process.

1.107 The committee's concerns are heightened in this instance given the extensive rule-making powers that exist in the NDIS Act and which are proposed to be expanded in the bill.[51] The committee previously commented on section 209 of the NDIS Act when it was first introduced in *Alert Digest 1 of 2013*, commenting that a 'number of the envisaged rules relate to "significant policy matters"'.[52] The committee reiterates these concerns and notes that without the standard accountability framework through the sunsetting regime it is likely more appropriate that these matters be included in primary legislation rather than in rules.

1.108 Notwithstanding, if these matters remain in rules the committee considers that, at a minimum, specific consultation requirements in the development of the NDIS rules with individuals affected should be included in the bill. This reflects the committee's long-standing scrutiny view that where the Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that specific consultation requirements (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

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

- **why it is considered appropriate to provide for a blanket exemption from sunsetting for the NDIS rules and all instruments made under the *National Disability Insurance Scheme Act 2013*, with particular consideration to the implications this will have on parliamentary rather than executive oversight;**
- **why it is appropriate to include such extensive rule-making powers; and**

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51 See, for example, Schedule 1, items 14 (subsections 10(b) and (c)), 25 (section 27), 28 (subsection 29(3)), 31 (subsection 30A(2), 36 (subsections 32B(1) and (3), paragraph 32D(4)(a), subparagraph 32D(6)(b)(ii), paragraph 32D(6)(f), subsection 32D(8), subsection 32E(4), paragraph 32F(7)(c), subsection 32G(4), paragraph 32H(2)(d), section 32J, subsection 32K(2), subsection 32L(8)), 39 (subsection 33(2E)), 59 (subsection 41(3)), 63 (subsection 43(2D)), 72 (subsection 44(3)), 73 (subsections 44(4) and (5)), 74 (subsection 45(6)), 78 (subparagraph 47A(1AB)(j)(iii)), 82 (subsection 47A(1B)), 83 (paragraph 47A(2A)(f)), 96 (paragraph 74(3C)(c)), 99 (subsection 74(6)).

52 Senate Scrutiny of Bills Committee, *Alert Digest 1 of 2013* (6 February 2013) p. 65.

- **whether more specific consultation requirements with people impacted by the NDIS rules can be included in the bill, namely the disability community.**

Broad delegation of administrative powers or functions
Availability of independent merits review[53]

1.110 Various amendments proposed in the bill seek to expand the decisions that the Chief Executive Officer (CEO) can make.[54] For example, item 36 of Schedule 1 seeks to insert subsection 32F(6) to provide that, if the CEO is satisfied that a circumstance mentioned in subsection 32F(7) exists, a restriction may be placed on how the flexible funding is spent in the reasonable and necessary budget under a new framework plan.[55] The circumstances that the CEO must be satisfied of under proposed subsection 32F(7) are that the participant would be likely to suffer physical, mental or financial harm if the flexible funding were not subject to the restriction; section 46 (acquittal of NDIS amounts) has not been complied with in relation to any of the participant's plans; or a circumstance prescribed by the NDIS rules.

1.111 Subsection 202(1) of the NDIS Act provides that the CEO may, in writing, delegate to an Agency officer any or all of their powers or functions under the Act, the regulations or the NDIS rules. The proposed introduction of new decisions that the CEO may or must make can therefore also be delegated to any Agency officer. An Agency officer means a member of staff of the National Disability Insurance Agency or a person assisting the Agency.[56]

1.112 Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service (SES). Where broad delegations are provided for, the committee expects the explanatory memorandum to include an explanation as to the purpose and scope of the delegated power, including why these are considered necessary, and, where a delegation

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53 Schedule 1, item 36, subsection 32F(6), subsections 32F(6), 43(2A), 73(3A) and paragraphs 74(4)(b) and subsection 74(4A). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(ii) and (iii).

54 See, for example, Schedule 1, items 17 (paragraph 19(2)(b)), 22 (paragraph 25(1)(d)), 30 (subsection 30(5)), 31 (subsections 30A(1) and (7)), 36 (subsections 32D(2) and 32F(6)), 54 (paragraph 36(3)(b)), 63 (subsection 43(2A)), 69 (subsection 69(2AA)), 70 (paragraph 44(2A)(c)), 74 (subsection 45(5)), 78 (paragraphs 47A(1AB)(g), (h) and (j)), 83 (subsection 47A(2A)), 96 (subsection 74(3A)), 97 (paragraph 74(4)(b)) and 98 (paragraph 74(4A)(b)).

55 Proposed section 32E provides that a 'reasonable and necessary budget' is made up of flexible funding or stated supports or both under the new framework plan (under the current Act, framework plans provide for 'reasonable and necessary supports').

56 *National Disability Insurance Act 2013*, section 9.

extends beyond members of the SES, an explanation as to why this is appropriate. In addition, the committee expects the explanatory memorandum to explain what safeguards are in place to ensure that any powers are appropriately delegated, and whether these safeguards are contained in law or policy.

1.113 Although the bill does not introduce or amend the power of the CEO to delegate powers and functions, the committee notes that numerous provisions of the bill expand the scope of the CEO to make decisions on various matters. As such, the committee queries whether consideration has been given to whether the breadth of the existing delegation power remains appropriate in these circumstances or whether it would be appropriate for the delegation power to be legislatively constrained with respect to any of the new powers or functions. The committee notes that the explanatory memorandum provides no insight into this matter.

1.114 Further, it is unclear to the committee whether all of these decisions are subject to independent merits review. While the committee notes that items 100 to 102 of Schedule 1 seek to add some decisions to section 99 of the NDIS Act (which lists reviewable decisions and decision-makers), it is unclear to the committee whether all decisions of the CEO proposed to be introduced in the bill are subject to review and, if not, the justification for this. For example, it is unclear whether the following provisions are subject to independent merits review:

- item 36, proposed subsection 32F(6) as discussed above;
- item 63, proposed subsection 43(2A) in relation to funding choices for the participant in relation to plan management; and
- items 96 to 98, respectively subsection 73(3A), paragraph 74(4)(b) subsection 74(4A), in relation to funding for new framework plans for children.

1.115 The committee generally expects that if a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, those decisions should ordinarily be subject to independent merits review. Where a bill empowers a decision-maker to make a decision which has the capacity to affect rights, liberties or obligations, the committee expects that the explanatory memorandum to the bill should address whether independent merits review is available with respect to the decision and, if not, the characteristics of the decision which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*. In this instance, the explanatory memorandum provides no insight into either of these matters.

1.116 The committee's concerns are heightened in this instance given the breadth of the power for the CEO to delegate their administrative powers or functions, including the power to make decisions.

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

- **why it is considered necessary and appropriate to expand the scope of the CEO's powers, noting that these powers may be delegated to any Agency officer under subsection 202(1) of the *National Disability Insurance Scheme Act 2013*;**
- **whether consideration has been given to whether the breadth of the delegation power should be legislatively constrained with respect to any of the new powers or functions and if not, why not;**
- **whether those exercising the delegated powers or functions will possess the appropriate training, qualifications, skills or experience; and**
- **whether independent merits review is available for decisions under proposed subsections 32F(6), 43(2A) and 73(3A), paragraph 74(4)(b) and subsection 74(4A) and, if not, whether an explanation can be provided of the characteristics of the decisions which justify the omission of merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?***

Incorporation of external materials as existing from time to time[57]

1.118 Item 114 of Schedule 1 to the bill seeks to amend subsection 209(2) of the NDIS Act to clarify the reference to the *Legislation Act 2003*. The effect of the provision remains the same, that the NDIS rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force from time to time. Item 36 also seeks to introduce subsections 32K(6) and 32L(11), and item 39 seeks to introduce subsection 33(2F), similarly to provide that determinations made under those sections may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

1.119 At a general level, the committee is concerned where provisions in a bill allow the incorporation of legislative provisions by reference to other documents as such an approach:

- raises the prospect of changes being made to the law in the absence of parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future

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[57] Schedule 1, item 114, subsection 209(2); item 36, subsections 36K(6) and 32L(11) and item 39, subsection 33(2F). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

changes to that document would operate to change the law without any involvement from Parliament);

- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.120 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law, it should be freely and readily available to all those who may be interested in the law.

1.121 The explanatory memorandum provides an explanation only in relation to subsection 33(2F), stating that:

> For example, the determination may adopt a document such as the *NDIS Pricing Arrangements and Price Limits* as in force from time to time. This recognises the fact that pricing arrangements change from year to year to take account of inflation and developments in the market.[58]

1.122 The committee notes that it previously commented on subsection 209(2) of the NDIS Act in *Alert Digest 1 of 2013*.[59] The minister explained that reference material will be available either direct or via links on the Agency website, and where changes directly affect individuals, these individuals will be notified by letter or equivalent.[60] At that time, the committee requested that a general requirement to this effect be included in the bill.

1.123 The committee requests the minister's further advice as to:

- **whether it remains the case that reference material will be available and individuals directly affected by any changes will be notified by letter or equivalent;**
- **if so, whether an addendum to the explanatory memorandum containing this information can be tabled in the Parliament as soon as practicable; and**
- **whether the bill can be amended to include a requirement that any changes to reference material will be widely publicised and affected individuals will be directly notified.**

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58 Explanatory memorandum, p. 27.

59 Senate Scrutiny of Bills Committee, *Alert Digest 1 of 2013* (6 February 2013) pp. 65–66.

60 Senate Scrutiny of Bills Committee, *Fourth Report of 2013* (20 March 2013) pp. 130–131.

Net Zero Economy Authority Bill 2024[61]

Purpose	The bill seeks to establish the Net Zero Economy Authority (Authority) to assist with the economic transformation to a net zero economy. The Authority would do this by helping to facilitate the achievement of Australia's greenhouse gas emissions reduction targets and by ensuring Australia's regions and workers are supported through the associated economic transformation.
Portfolio	Prime Minister and Cabinet
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Exemption from disallowance[62]

1.124 Clause 20 of the bill provides that the minister may, by legislative instrument, give directions to the Board of the Net Zero Economy Authority (the Authority) about the Board's performance of its functions or exercise of its powers, or the performance of the Authority's functions or exercise of its powers. A note to the provision confirms that section 42 of the *Legislation Act 2003* does not apply, which means that instruments made under clause 20 are exempt from disallowance.

1.125 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 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.

1.126 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*[63], and by the Senate Standing Committee

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61 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Net Zero Economy Authority Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 89.

62 Clause 20. The committee draws senators' attention to this provision pursuant to Senate standing order 23(1)(a)(iv).

63 See Chapter 4 of Senate Scrutiny of Bills Committee, *Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021* (12 May 2021) pp. 33–44; *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 76–86.

for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[64]

1.127 In light of these comments and the resolution of the Senate, the committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. This justification should include an explanation of the exceptional circumstances that are said to justify the exemption and how they apply to the circumstances of the provision in question.

1.128 In relation to this the explanatory memorandum states:

> This provision strikes a balance between empowering the Authority to act independently, while giving the Government of the day the opportunity to set broad policy direction, for example, by issuing a statement of expectations articulating how the work of the Authority intersects with government priorities and initiatives.
>
> A Ministerial direction would have the status of a legislative instrument. This promotes transparency as any direction would be tabled in Parliament, and registered and made publicly available on the Federal Register of Legislation.
>
> The note following subclause 20(1) clarifies that, in line with the usual provisions for Ministerial directions (under subsection 44(2) of the Legislation Act), directions will not be disallowable. It is appropriate for directions under this clause to be exempt from disallowance. The net zero transition is a significant economic shift and it is necessary to minimise barriers to the Authority functioning effectively and efficiently.[65]

1.129 The committee acknowledges that pursuant to table item 2 in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015, ministerial directions are not subject to disallowance. However, the committee notes that this is not a *justification* for the exemption from disallowance for a particular ministerial direction and that it remains open to the Parliament to provide otherwise in a particular case. As such, the committee expects that the explanatory materials to a bill will provide justification for exemption of each ministerial direction from disallowance.

1.130 While noting the advice in the explanatory memorandum, above, it is unclear to the committee how subjecting these instruments to parliamentary disallowance would inhibit the ability of the Authority to function effectively and efficiently.

1.131 The committee notes that disallowance of an instrument is a rare occurrence, but that the disallowance process plays an important role in maintaining

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64 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report* (2 December 2020); and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (16 March 2021).

65 Explanatory memorandum, p. 27.

parliamentary oversight of delegated legislation made by the Executive. The committee notes that any proposal to disallow a legislative instrument is debated, with an appropriate opportunity provided to the Government to explain the consequences of disallowance. The decision for the Parliament to disallow an instrument is carefully considered and the Parliament should be trusted to exercise its powers cautiously and appropriately.

1.132 In this instance, the committee is of the view that the availability of disallowance would enable the Parliament to work in a constructive manner with the minister to ensure that any directions issued are appropriate and in accordance with the Parliament's intention in enacting the legislation setting up the Board. It should be expected that it would only be in an exceptional case that the Parliament would disallow such a direction.

1.133 As such, in this instance it is not clear to the committee that exceptional and rare circumstances exist to justify this exemption from disallowance. The committee is of the view that the fact that the net zero transition is a significant economic shift is more reason for relevant instruments to be subject to parliamentary control through the disallowance process.

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

- **why it is considered necessary and appropriate for directions made under clause 20 not to be subject to disallowance;**
- **how the possibility of disallowance could be seen to be a 'barrier to the Authority functioning effectively and efficiently'; and**
- **whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.**

Documents not required to be tabled in the Parliament[66]

1.135 Subclause 68(3) provides that the CEO of the Authority must conduct, or cause to be conducted, a review into the operation of Part 5 of the bill, including consideration of whether any amendments to that Part are desirable. Subclauses 68(5) and (6) provide for the giving of reports of these reviews to the minister. Similarly, paragraph 72(1)(a) provides that the minister may request that the CEO of the Authority provide to the minster a report or advice on a matter relating to the CEO's or the Authority's functions, powers or duties. There is no requirement that the reports or advice provided under these provisions be subsequently tabled in the Parliament.

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66 Subclauses 68(5), 68(6) and 75(1), and paragraph 72(1)(a). The committee draws senators' attention to these provisions pursuant to Senate standing order 23(1)(a)(v).

1.136 In addition, subclause 75(1) provides that the minister may publish reports, documents or information given to the minister or the Finance Minister under paragraph 19(1)(b) of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Subclause 75(2) provides that the minister must omit from the published report, document or information any information that the Board is satisfied is commercial-in-confidence.[67] Subclause 75(4) provides that the minister must also omit any national security or sensitive financial intelligence information.

1.137 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be some consideration provided for the tabling of documents such as those being published under subclause 75(1) in the Parliament.

1.138 It is unclear to the committee why the CEO of the Authority must provide reports on the desirability of *parliamentary* amendments to an Act of the Parliament, to the minister with no corresponding requirement for the Parliament to be informed. Similarly, it appears to the committee that as the functions, powers and duties of the Authority and the CEO are matters that are to be established by the Parliament through the enactment of legislation, it would be appropriate for the Parliament to be provided with any reports prepared on matters relating to these functions, powers or duties.

1.139 The committee therefore requests the minister's advice as to whether the following provisions of the bill can be amended to require the tabling of the relevant reports in both Houses of the Parliament:

- **clause 68, concerning reports of reviews of Part 5 of the bill;**
- **clause 72, concerning any reports requested by the Minister concerning the functions, powers or duties of the Net Zero Economy Authority or the CEO of the Authority; and**
- **clause 75, concerning reports given to the minister or the Finance Minister under paragraph 19(1)(b) of the *Public Governance, Performance and Accountability Act 2013*.**

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[67] The definition of 'commercial-in-confidence' for the purposes of this subsection is set out in subsection 75(3).

New Vehicle Efficiency Standard Bill 2024[68]

Purpose	The bill seeks to establish a new vehicle efficiency standard to regulate the carbon dioxide emissions of certain road vehicles.
Portfolio	Infrastructure, Transport, Regional Development and Local Government
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation[69]

1.140 Clause 69 of the bill provides that rules may be made for or in relation to the New Vehicle Efficiency Standard Unit Registry, which may include rules that provide for requirements in relation to, and conditions imposed upon, registry accounts. Clause 62 provides that that a person commits an offence and is liable to a civil penalty if the person contravenes a requirement they are subject to under the rules. Similarly, clause 63 provides that a person commits an offence and is liable to a civil penalty if the Secretary has imposed a condition on the person's registry account and the person engages in conduct that contravenes the condition. Both offences are subject to a maximum penalty of 120 penalty units.

1.141 As the content of the offences under clauses 62 and 63 is proposed to be left to the rules, the committee considers this is a significant matter in delegated legislation. Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. 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.

1.142 The explanatory memorandum provides some examples of requirements and conditions that may be imposed upon registry accounts:

> For example, as the rules may provide for the suspension of registry accounts, the rules may also include associated requirements on a registry account holder while their account has been suspended.
>
> …

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68 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, New Vehicle Efficiency Standard Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 90.

69 Clauses 62, 63 and 69. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

> Examples of such conditions include conditions about retaining specified records or providing specified information to the Secretary on request. Such conditions may be necessary to ensure the integrity of the Registry and purported transactions in relation to registry accounts, such as transfers of units.[70]

1.143 The explanatory memorandum further explains that the availability of the criminal penalty is appropriate for the circumstances where higher culpability is present and the fault elements of the offence are made out, and the penalties align with comparable penalties in section 16 and section 28 of the *Road Vehicle Standards Act 2018* (RVSA) respectively.[71]

1.144 While the explanatory memorandum provides some helpful examples of what may be included in the rules and some justification as to why it is subject to a criminal penalty, it does not explain why it is appropriate to leave the content of the offence to the rules. Where content of an offence is left to rules, the scope and effect of the offence is unclear to the Parliament and those subject to the offence, and does not allow for the opportunity for the Parliament to properly scrutinise it. The committee notes that subparts [2.3.4] and [2.3.5] of the *Guide to Framing Commonwealth Offences* state that the content of an offence should only be delegated to an instrument where there is a demonstrated need to do so and appropriate safeguards apply.[72] It further provides some examples where it may be appropriate to delegate offence content to an instrument, for example where: the relevant content involves a level of detail not appropriate for an Act; prescription by legislative instrument is necessary because of the changing nature of the subject matter; the relevant content involves material of such a technical nature that it is not appropriate to deal with it in an Act; or where the elements of the offence are to be determined by reference to treaties or conventions. To this end, the committee does not consider that the explanatory memorandum provides an appropriate justification for the delegation of offence content in rules.

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

- **why it is considered appropriate and necessary to include the content of the offences in clauses 62 and 63 in rules rather than in the bill;**
- **whether there are appropriate legislative safeguards in place; and**
- **whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.**

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70 Explanatory memorandum, pp. 39–40.

71 Explanatory memorandum, p. 40.

72 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) pp. 26–29.

Privacy[73]

1.146 Various provisions in the bill provide for the sharing of information. Clause 78 provides that enforceable undertakings must be published on the Department's website. Clause 83 provides that a relevant court may, on application of the Secretary, make an adverse publicity order in relation to a person who has contravened their duty to ensure that their final emissions value is zero or less, which requires the person to disclose specified information and to publish an advertisement in the terms specified in the order. Clause 84 provides that a relevant court may, on application of the Secretary, make a non-punitive order, which may include an order requiring the person to publish an advertisement in terms specified in the order. Clause 86 also provides that the Secretary must publish specified information on the Department's website, including the name of each person who holds a registry account, their interim emissions value for the year and other information as prescribed by the rules.

1.147 These provisions require the disclosing and publishing of information. 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, what safeguards are in place to protect the personal information, and whether these safeguards are set out in law or policy (including whether the *Privacy Act 1988* applies).

1.148 The statement of compatibility explains that, in relation to the adverse publicity orders and the non-punitive orders:

> These clauses may operate to limit the right to privacy and reputation, as they involve the publishing of information that may include personal information, as well as information that adversely affects a person's reputation (for example, information about a person's wrongdoing). A number of protections are in place to ensure that any interference with the rights to privacy and reputation is lawful and to protect these rights. Publication of information may only be ordered by a court, and the content of the publication is also determined by a court. Further, the court can only order an APO or an NPO if a person has been found by the Court to have breached a provision of the NVES Bill or a relevant provision of the RVSA. An APO or an NPO cannot be made against a member of the general public. The limitation to the right to privacy and reputation therefore only occurs to the extent that it is necessary, reasonable and proportionate to administering the NVES Bill and the RVSA.[74]

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[73] Clauses 78, 83, 84 and 86. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

[74] Statement of compatibility, pp. 11–12.

1.149 In relation to clause 86, the explanatory memorandum explains:

> The publication of information provides transparency in the operation of the Bill. The publication of information about the holding of units also contributes to market transparency and allows people interested in trading units to have access to relevant information to allow for efficient trading. The rules may also provide for the publication of other information. After further development of rules to support the legislation, it might be considered desirable to publish information like: the Final Emissions Value for each person, the total amount of emissions offset through the extinguishment of units, and/or the total amount paid under infringement notices, for example.[75]

1.150 The committee considers that it is likely most of these provisions will apply to corporations rather than individuals, however it is unclear to the committee to what extent they may apply to individuals, what kind of personal information may be disclosed and what safeguards are in place.

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

- **what extent the bill provides for the disclosure or publication of personal information; and**
- **what safeguards are in place to protect this information, including whether the *Privacy Act 1988* applies.**

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[75] Explanatory memorandum, p. 53.

Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024[76]

Purpose	The bill seeks to amend *the Parliamentary Business Resources Act 2017* and *the Independent Parliamentary Expenses Authority Act 2017* to respond to a number of recommendations of the *Independent Review into the Parliamentary Business Resources Act 2017 and the Independent Parliamentary Expenses Authority Act 2017*.
Portfolio	Special Minister of State
Introduced	House of Representatives on 27 March 2024
Bill status	Before the House of Representatives

Exemption from disallowance[77]

1.152 Item 20 of Schedule 1 seeks to insert proposed subsection 12(5) into the *Independent Parliamentary Expenses Authority Act 2017* (the IPEA Act). Proposed subsection 12(5) would provide that section 42 of the *Legislation Act 2003* (the Legislation Act) does not apply to legislative rules or provisions thereof made for the purposes of one of more of the following provisions:

- subparagraph 12(1)(i)(i), in relation to audits of designated MP resources;
- subparagraph 12(1A)(a)(ii) or (v), in relation to the definition of 'authority-administered MP resource';
- subparagraph 12(1B)(a)(ii), in relation to the definition of a 'designated MP resource'; and
- subsection 12(2A), in relation to the authority not to provide certain authority-administered MP resources.

1.153 The disapplication of section 42 of the Legislation Act has the purpose of exempting these instruments from disallowance. 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

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76 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 91.

77 Schedule 1, item 20, proposed subsection 12(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

justify an exemption. In addition, the Senate 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.

1.154 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*,[78] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[79]

1.155 In light of these comments and the resolution of the Senate, the committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. This justification should include an explanation of the exceptional circumstances that are said to justify the exemption and how they apply to the circumstances of the provision in question.

1.156 This matter is addressed in the explanatory memorandum:

> The legislative rules to be made for the purposes of new subparagraphs 12(1)(i)(i), 12(1A)(a)(ii) and (iv), and (1B)(a)(ii) and subsection (2A) of the IPEA Act do not confer on IPEA the responsibility for administering PBR Act resources. Rather, the legislative rules would carve out PBR Act resources administered by other entities from IPEA's functions. If the legislative rules were disallowed, IPEA's role as the default provider and administrator of PBR Act resources (as provided by the Bill) would be engaged in such a way that the resources that the legislative rules would exclude from IPEA's remit would not come into effect, and as a consequence, IPEA would be responsible for providing and administering those resources, including, for example, Commonwealth transport, property management and ICT.
>
> The exemption from disallowance would mean that the Parliament cannot prevent the exclusion. The exemption from disallowance is principally justified on the basis that disallowance of the legislative rules would have significant administrative impact on IPEA and on all entities who currently administer the relevant resources. This would have flow-on impacts for the provision of resources under the PBR Act to members of parliament.

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78 See Chapter 4 of Senate Scrutiny of Bills Committee, *Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021* (12 May 2021) pp. 33–44; *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 76–86.

79 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report* (2 December 2020); and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (16 March 2021).

Furthermore, the following legislative instruments under the PBR Act are already exempt from disallowance:

- a determination made by the Minister under section 6 of the PBR Act, determining the activities that are or are not parliamentary business within the meaning of that Act. This legislative instrument provides the necessary flexibility to account for the changing and future nature and needs of members' roles, and is not subject to disallowance in order to provide members with certainty about what activities are covered as parliamentary business at any particular time. The legislative rules noted above would similarly provide the necessary flexibility to account for changing requirements to the administration, reporting and auditing of PBR Act resources in the future, and their exemption from disallowance would prevent confusion for administering entities and members alike. This would mitigate against the disarray caused by a particular resource being included within IPEA's functions and IPEA commencing performing those functions, but the Parliament subsequently disallowing that change.
- a determination made by the Prime Minister under section 16 of the PBR Act, determining the resources to be provided to former Prime Ministers. This legislative instrument is not subject to disallowance given these decisions are, as a matter of long-standing practice, made through executive power and are not subject to parliamentary processes.
- a determination made by the Remuneration Tribunal under section 47 of the PBR Act, determining the remuneration, and the rates of domestic travel allowances for members, and the allowances and expenses for former members. This legislative instrument is not subject to disallowance to ensure that the Remuneration Tribunal maintains its independence in determining the remuneration of senators and members of the House of Representatives, and in acknowledgement that such matters should not be subject to the political process.

For all of the above reasons, it is not appropriate that the requirements of the Legislation Act in relation to disallowance apply to these legislative rules, noting that there would be significant practical impacts for all administering entities should the legislative rules preventing certain resources from being administered by IPEA be disallowed.[80]

1.157 The committee commented on the original provisions as enacted by the Parliamentary Business Resources Bill 2017 in *Scrutiny Digest 5 of 2017*.[81] In that entry the committee noted that several instrument-making powers were being introduced, with the instruments being exempt from disallowance, and found that the explanatory memorandum failed to adequately justify this exemption. In relation to the current bill

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80 Explanatory memorandum, pp. 27–28.

81 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2017* (10 May 2017), pp. 2–4.

the committee welcomes the substantial consideration of these matters included in the explanatory memorandum.

1.158 The committee notes that the purpose of the instruments being exempted from disallowance is to ensure that the Independent Parliamentary Expenses Authority (the IPEA) is not responsible for the various measures. Nevertheless, the committee remains concerned that central aspects of this legislative scheme will be set out in delegated legislation which is exempt from disallowance. The committee's long-standing scrutiny concerns in relation to instruments which are exempt from disallowance remain. The committee does not consider that consistency with past practice is a convincing justification, in itself, for excluding parliamentary consideration.

1.159 The committee notes that disallowance of an instrument is a rare occurrence, but that the disallowance process plays an important role in maintaining parliamentary oversight of delegated legislation made by the Executive. In this light, the committee notes that pursuant to the amendment made by item 9 of Schedule 1 to the bill, a legislative instrument made for the purposes of subparagraph 12(1)(i)(i) of the IPEA Act could theoretically prescribe *all* designated MP resources as those to which the IPEA could not conduct an audit, effectively relieving IPEA of its audit function. This would clearly frustrate the Parliament's intentions in establishing the IPEA, yet the exemption of such instruments from disallowance would mean that the Parliament's ability to control the power it has delegated would be excluded.

1.160 While acknowledging the purpose of the exemptions from disallowance, the committee notes that, in a practical sense, the exemptions does not appear to be necessary. This is because any proposal to disallow a legislative instrument is subject to parliamentary debate, with an appropriate opportunity afforded to the Government to explain the consequences of disallowance. The decision of a house of the Parliament to disallow an instrument would be carefully considered and the Parliament should be trusted to exercise its disallowance powers cautiously and appropriately.

1.161 In this instance, the committee is of the view that the availability of disallowance would enable the Parliament to work in a constructive manner with the minister to ensure that any instruments made are appropriate and in accordance with the Parliament's intention in enacting the legislation setting up the scope of the IPEA's powers. It should be expected that it would only be in an exceptional case that the Parliament would disallow such an instrument.

1.162 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole proposed subsection 12(5) of the *Independent Parliamentary Expenses Authority Act 2017* which provides that specified legislative instruments made under that Act will be exempt from disallowance.

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

Exemption from disallowance
Instruments not subject to an appropriate level of parliamentary oversight[82]

1.164 Item 32 of Schedule 1 to the bill would substitute existing section 16 of the *Parliamentary Business Resources Act 2017* (PBR Act). Proposed subsection 16(1) would provide that the Prime Minister may, in writing, determine that the Commonwealth must provide specified goods, services, premises, equipment or facilities, or pay specified allowances or expenses to:

- a former Prime Minister (proposed paragraph 16(1)(a)); or
- a spouse or dependent child of a former Prime Minister (proposed subparagraph 16(1)(b)(i)); or
- an employee of a formed Prime Minister employed under the *Members of Parliament (Staff) Act 1984* (proposed subparagraph 16(1)(b)(ii)).[83]

1.165 Currently, existing subsection 16(1) provides that a person who is a former Prime Minister is to be provided with any goods, services, premises, equipment or any other facility determined from time to time by the Prime Minister. Existing subsection 16(3) of the PBR Act provides that determinations made under subsection 16(1) are legislative instruments but are exempt from disallowance.

1.166 The explanatory memorandum states, in relation to proposed new section 16:

> Notwithstanding the amendments made to section 16 by the Bill, it is appropriate that a legislative instrument made under subsection 16(1) of the PBR Act continue to be exempted from the disallowance process under section 42 of the Legislation Act, consistent with the current subsection16 (3) of the PBR Act, noting that the power to provide resources to former Prime Ministers has by long-standing practice been a matter under executive control rather than being subject to parliamentary processes.[84]

1.167 This passage appears to indicate to the committee that a written determination made by the Prime Minister under proposed new subsection 16(1) would be a legislative instrument, but would be exempt from disallowance. However, it appears to the committee that there is some uncertainty as to the status of these

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82 Schedule 1, item 32, proposed section 16. The committee draws senators attention to this provision pursuant to Senate standing orders 24(1)(a)(iv) and (v).

83 Proposed subsection 16(2) would provide that a determination made under proposed subsection 16(1) may impose limits or other conditions including a requirement that the provision of resources be dependent on a decision of a specified person or relate to specified persons or classes of persons within the confines of the provision.

84 Explanatory memorandum, p. 31.

written determinations. This is because item 32 of the bill would repeal existing subsection 16(3), which provides a clear declaration that such determinations are legislative instruments. If it is the case that such written determinations are legislative instruments by reason of subsection 8(4) of the *Legislation Act 2003*, it is unclear to the committee on what basis such instruments would be exempt from disallowance in the absence of an express statutory declaration to the alternative.

1.168 The committee is of the view that if it is intended that such written determinations are not to be legislative instruments, at a minimum, the explanatory memorandum to the bill should make this clear. In this light, the committee further notes that *Drafting Direction No. 3.8*, issued by the Office of Parliamentary Counsel, provides that if a bill makes provision for a written instrument that does not fall within the definition of legislative instrument in the Legislation Act, an express statement should be included in the bill that the written instrument is not a legislative instrument.[85]

1.169 The committee is also of the view that adequate explanation should be provided in the explanatory memorandum justifying the decision for such determinations to not be made by legislative instruments in light of the history of similar determinations. The committee notes that a written determination other than a legislative instrument would not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As such, there would be no avenue for parliamentary scrutiny of such determinations.

1.170 In addition, the committee expects that any exemption of delegated legislation from the disallowance process should be fully justified in the explanatory memorandum. The committee notes that the explanatory memorandum states that it has been long-standing executive practice for these types of instruments to be exempt from disallowance. The committee's view is that the fact that there has been long-standing practice for a type of instrument to be exempt from disallowance is an insufficient justification, in itself, for removing delegated legislation from parliamentary control.

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

- **whether the intention is for determinations made under proposed subsection 16(1) of the *Parliamentary Business Resources Act 2017* to be legislative instruments or non-legislative;**
- **if the determinations are to be non-legislative, why this is the case, in light of the history of such determinations being legislative instruments; and**

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85 Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate* Legislation, 2021, p. 15.

- **if the intention is for the determinations to be legislative instruments exempt from disallowance, the justification and legislative basis for this exemption.**

Henry VIII clauses – modification of primary legislation by delegated legislation[86]

1.172 Item 33 of Schedule 4 to the bill would substitute existing subsection 13(9) of the *Parliamentary Contributory Superannuation Act 1948* (the PCS Act). Proposed subsection 13(9) would provide that regulations made under the PCS Act may modify the Act as required as a result of the amendments made to the PBR Act by Schedule 4 of the bill.

1.173 Similarly, item 48 (of the same Schedule) would insert proposed subsection 8(7) into the *Parliamentary Superannuation Act 2004* (the Parliamentary Superannuation Act) to provide for the same in relation to regulations made under that Act.

1.174 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.175 In relation to proposed subsection 13(9) the explanatory memorandum states:

> Item 33 would repeal existing subsection 13(9) which defines a month for the purposes of section 13. In its place, Item 33 inserts new subsection 13(9) which enables the PCS Act to be amended by regulations made under that Act. The regulations for the purpose of new subsection 13(9) are limited to modifications to the Act that are required as a result of the amendments to the PBR Act made by Schedule 4 to this Bill. New subsection 13(9) is a necessary contingency for addressing any unforeseen matters arising following commencement in order to deal with the changeover of remuneration and superannuation payments from monthly to fortnightly. This would provide for the continued and uninterrupted administration of the PCS Act. Regulations made under subsection 13(9) would be subject to disallowance by the Parliament.[87]

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86 Schedule 4, item 33, proposed subsection 13(9); and Schedule 4, item 48, proposed subsection 8(7). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

87 Explanatory memorandum, p. 58.

1.176 In relation to proposed subsection 8(7) the explanatory memorandum states:

> Item 48 would insert new subsection 8(7) in the PS Act which would enable the PS Act to be amended by regulations made under that Act. The regulations for the purpose of new subsection 8(7) are limited to modifications to the Act that are required as a result of the amendments to the PBR Act made by Schedule 4 to this Bill. New subsection 8(7) is a necessary contingency for addressing any unforeseen matters arising following commencement in order to deal with the changeover of remuneration and superannuation payments from monthly to fortnightly. This would provide for the continued and uninterrupted administration of the PCS Act. Regulations made under subsection 8(7) would be subject to disallowance by the Parliament.[88]

1.177 The committee notes the justifications and welcomes the inclusion of limitations on the face of the bill to provide that amendments to primary law may only be made by regulations where required in the context of the amendments made by the bill. However, the committee maintains its long-standing scrutiny concerns in relation to any modifications of primary law by delegated legislation.

1.178 In this instance, the committee is of the view, from a scrutiny perspective, that a time limit on the duration of time in which such instruments may be made would have been a welcome additional safeguard to these powers, noting that following this period it would be more appropriate for amendments to be made by way of amending legislation.

1.179 The committee draws these concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsection 13(9) of the *Parliamentary Contributory Superannuation Act 1948* and proposed subsection 8(7) of the *Parliamentary Superannuation Act 2004* providing that delegated legislation can modify primary legislation.

Standing appropriations[89]

1.180 Subsection 280(3) of the *National Anti-Corruption Commission Act 2022* (NACC Act) appropriates the Consolidated Revenue Fund for the purpose of making payments of financial assistance to, or for the benefit of, parliamentarians under arrangements prescribed by the National Anti-Corruption Commission Regulations 2023 (NACC Regulations). Item 1 of Schedule 3 seeks to amend subsection 280(3) of the NACC Act to add the words 'former parliamentarians', with the effect that the standing appropriation will extend to all payments that can be made in accordance with the

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88 Explanatory memorandum, p. 60.

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

NACC Regulations, including those made to former parliamentarians. This provision therefore seeks to amend an existing standing appropriation.

1.181 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis, usually for indefinite amounts and duration. Unlike annual appropriations which require the Executive to periodically request the Parliament to appropriate money for a particular purpose, once a standing appropriation is enacted any expenditure under it does not require regular parliamentary approval and therefore escapes direct parliamentary control. The amount of expenditure authorised by a standing appropriation may grow significantly over time, but without any mechanism for review included in the bill alongside the appropriation, for example a sunset clause, it is difficult for the Parliament to assess whether a standing appropriation remains appropriate.

1.182 Given the difficulty of ongoing parliamentary oversight over enacted standing appropriations, the committee expects a robust justification for why a standing appropriation should be established or expanded in the first place. To this end, the committee expects the explanatory memorandum to a bill which establishes or expands a standing appropriation to explain why it is appropriate to include a standing appropriation (rather than providing for the relevant appropriations in the annual appropriation bills) and whether the bill places a limitation on the amount of funds that may be appropriated or duration in which the standing appropriation will exist for. The committee also expects the explanatory memorandum to address whether the standing appropriation is subject to a sunset clause and, if not, why such a clause has not been included in the bill.

1.183 In this case, the explanatory memorandum explains:

> As Part 5 of the NACC Regulations provides a statutory entitlement to financial assistance to both current and former parliamentarians, it is appropriate that the standing appropriation be extended to support all payments that may be made to parliamentarians, consistent with statutory entitlements. This is consistent with the approach in section 59 of the *Parliamentary Business Resources Act 2017*, which appropriates the Consolidated Revenue Fund for, among other things, payments for legal assistance to parliamentarians who are or were Ministers under Division 2 of Part 5 of the PBR Regulations.
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> The inclusion of Item 1 in this Schedule is appropriate as the amendment directly relates to resources provided to parliamentarians in connection with their parliamentary business.[90]

1.184 The committee notes that the explanatory memorandum has provided some explanation as to what the standing appropriation is for and why it is proposed to expand it. However, the committee does not consider that the standing appropriation in the *Parliamentary Business Resources Act 2017* (PBR Act) is analogous to the

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90 Explanatory memorandum, pp. 50–51.

standing appropriation in, or the proposed amendment to, the NACC Act. The standing appropriation in the PBR Act is to provide remuneration and public resources (including work expenses) to members performing their duties as elected representatives,[91] while the standing appropriation in the NACC Act is limited to financial assistance in relation to matters arising under, or in relation to, the NACC Act. It is unclear to the committee, and no explanation has been provided, as to why such an appropriation should not be included in the annual appropriation bills and whether any mechanisms have been considered to provide parliamentary oversight.

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

- **why it is necessary and appropriate to include a standing appropriation (rather than providing for the relevant appropriations in the annual appropriation bills);**
- **whether the bill places a limitation on the amount of funds that may be appropriated or duration in which it will exist for and, if not, whether consideration could be given to the appropriateness of including such constraints;**
- **whether the standing appropriation is subject to a sunset clause and, if not, whether it would be appropriate for such a clause to be included in the bill; and**
- **what mechanisms are in place to report to the Parliament on any expenditure authorised by the standing appropriation.**

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[91] Explanatory memorandum to the Parliamentary Business Resources Bill 2017, p. 47.

Private senators' and members' bills that may raise scrutiny concerns[92]

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
Crimes and Online Safety Legislation Amendment (Combatting Online Notoriety) Bill 2024	Schedule 1, item 1, proposed subsection 474.49(1)	The provision may raise scrutiny concerns under principal (i) in relation to offence provisions that are subject to significant penalties.
	Schedule 1, item 1, proposed subsection 474.49(2)	The provision may raise scrutiny concerns under principal (i) in relation to the reversal of the evidential burden of proof.
Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024 *and* **Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024 (No. 2)**	Schedule 1, item 4, proposed paragraph 307AB(3)(a)	The provision may raise scrutiny concerns under principal (i) in relation to privacy.
	Schedule 1, item 6, proposed subsections 321JA(5) and 321JF(2)	The provisions may raise scrutiny concerns under principal (i) in relation to the reversal of the evidential burden of proof.
	Schedule 3, item 1, proposed subsection 321KB(1)	The provision may raise scrutiny concerns under principal (i) in relation to offence provisions that are subject to significant penalties.

92 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 6 of 2024*; [2024] AUSStaCSBSD 92.

Reducing Supermarket Dominance Bill 2024	Clauses 7, 11, 17 and 19	The provisions may raise scrutiny concerns under principal (i) in relation to offence provisions that are subject to significant penalties.
	Subclauses 7(3), 7(4), 11(4) and 17(2)	The provisions may raise scrutiny concerns under principal (i) in relation to the reversal of the evidential burden of proof.
	Clause 14	The provision may raise scrutiny concerns under principal (v) in relation to instruments not being subject to parliamentary oversight.
	Clause 16	The provision may raise scrutiny concerns under principal (i) in relation to coercive powers.

Bills with no committee comment[93]

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

- Criminal Code Amendment (Protecting Commonwealth Frontline Workers) Bill 2024
- Net Zero Economy Authority (Consequential Amendments) Bill 2024
- New Vehicle Efficiency Standard (Consequential Amendments) Bill 2024
- Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024.

93 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 93.

Commentary on amendments and explanatory materials[94]

Digital ID Bill 2024

1.186 On 27 March 2024, the Senate agreed to 27 Government amendments and 16 Australian Greens amendments to the bill. The Assistant Minister for Education (Senator the Hon Anthony Chisholm) tabled a supplementary explanatory memorandum relating to the Government amendments.

1.187 The Government amendments address, amongst other matters, concerns raised by the committee in *Scrutiny Digest 2 of 2024*[95] and clarified by the minister in a response, commented on in *Scrutiny Digest 3 of 2024*.[96]

1.188 Government amendment no. 18 replaces subclause 84(1) with new subclauses 84(1), (1A) and (1B). The effect of the amendment is to clarify that the protection from liability for accredited entities provided by the section applies only in respect of actions or other proceedings brought by other accredited entities and relying parties participating in the Australian Government Digital ID System (AGDIS) and that the protection from liability is not intended to apply more generally.

1.189 Government amendment no. 25 amends clause 145 which requires the Minister to have periodic review of legislative rules made for the charging of fees by accredited entities participating in the AGDIS. The amendment requires that the report about each review be tabled in each House of Parliament within 15 sitting days of the Minister receiving the report.

1.190 **The committee welcomes these amendments which address the committee's scrutiny concerns relating to immunity from civil liability and to the tabling of documents in the Parliament.**

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94 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 94.

95 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024), pp. 29–31.

96 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024), pp. 72–74.

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024

No-invalidity clause
Availability of judicial review[97]

1.191 On 26 March 2024, the House of Representatives agreed to three Government amendments to the Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024 (the bill) and the Minister for Resources and Minister for Northern Australia, the Honourable Madeleine King MP, tabled a supplementary explanatory memorandum relating to the amendments. The bill as amended is yet to be considered by the Senate at time of writing.

1.192 Amendment no. 2 amended proposed section 790E of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OGPS Act), in item 6 of Schedule 2 to the bill. This section would enable a person whose conduct is in accordance with the OGPS Act or regulations to maintain approval under section 146D of the *Environmental Protection and Biodiversity Conservation Act 1999* (the EPBC Act) even if that conduct is inconsistent with aspects of the endorsed program (which describes the process for environmental management approvals under the OGPS Act and Regulations).

1.193 The effect of agreeing to the amendment was to insert proposed subsection 790E(1A), which requires that the minister do the following prior to the Governor-General making regulations prescribed for the purposes of proposed paragraph 790E(1)(a):

- be satisfied that the designated regulations would not be inconsistent with the principles of ecologically sustainable development set out in section 3A of the EPBC Act (proposed paragraph 790E(1A)(a)); and
- consult with the Environment Minister about the designated regulations; (proposed paragraph 790E(1A)(b)); and
- have received notice from the Environment Minister that:
    - the Environment Minister is satisfied that the designated regulations would not be inconsistent with the principles of ecologically sustainable development set out in section 3A of the EPBC Act (proposed subparagraph 790E(1A)(c)(i)); or
    - the Environment Minister is not satisfied that the designated regulations would not be inconsistent with the principles of ecologically sustainable development set out in section 3A of the EPBC Act (proposed subparagraph 790E(1A)(c)(ii)).

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97 Schedule 2, Part 2, item 6, proposed subsection 790E(1D) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

1.194 However, the effect of agreeing to amendment no. 2 was to also insert proposed subsection (1D) into proposed section 790E. Proposed subsection 790E(1D) provides that a failure to comply with these new requirements as amended does not affect the validity or enforceability of regulations made under the OGPS Act.

1.195 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. The committee therefore expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

1.196 In this instance, the supplementary explanatory memorandum relating to the government amendments states:

> The effect of subsection 790E(1D) is that if the Environment Minister provides notice that they are not satisfied that the designated regulations would not be inconsistent with the ESD principles, or if a notice is not given, this would not affect the validity or enforceability of regulations made under the OPGGS Act. Likewise, the validity or enforceability of regulations made under the OPGGS Act will not be affected if the Resources Minister is not satisfied that the designated regulations would not be inconsistent with the ESD principles, or fails to consult with the Environment Minister as required by paragraphs (1A)(a) and (b).
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> …
>
> Subsection 790E(1D) does not exclude judicial review under section 75(v) of the Constitution or section 39B of the Judiciary Act 1903 where a failure to meet procedural requirements would amount to a jurisdictional error.[98]

1.197 While noting the advice that judicial review remains available where a failure to meet procedural requirements would amount to a jurisdictional error, the committee queries the practical efficacy of judicial review. This is because the conclusion that an instrument is valid irrespective of whether procedural requirements to the making of the instrument were followed means that the instrument-maker had the power (i.e. jurisdiction) to make it. Therefore, review of the instrument on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available.

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98 Supplementary explanatory memorandum, p. 5.

1.198 In addition, the supplementary explanatory memorandum provides the following justification for the inclusion of a no-invalidity clause:

> Subsection 790E(1D) is consistent with section 19 of the Legislation Act. The purpose of this provision is to avoid any risk of subsection 790E(1A) affecting the validity or enforceability of the prescribed regulations. The Environment Regulations are intended to be prescribed for the purposes of paragraph 790E(1)(a). The Environment Regulations provide for the environmental management of offshore petroleum and greenhouse gas storage activities. The object of the Environment Regulations is to ensure that activities are carried out in a manner that is consistent with the ESD principles by which the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable and an acceptable level. As such, it is important that the ongoing validity of the Environment Regulations is maintained.[99]

1.199 The committee acknowledges that section 19 of the *Legislation Act 2003* (the Legislation Act) is a no-invalidity clause relating to the requirement under section 17 of the Legislation Act for rule-makers to consult before making legislative instruments.

1.200 However, the committee is of the view that the specific procedural requirements to be imposed on the minister under proposed subsection 790E(1A) of the OGPS Act are not analogous to the broad consultation requirement applied to all legislative instruments under section 17 of the Legislation Act. This is made clear by the construction of the relevant clauses. For instance, the heading to section 17 is 'Rule-makers *should* consult before making legislative instruments', and the procedural requirement imposed by the section is for the rule-maker to be satisfied that consultation has been undertaken that is 'considered by the rule-maker to be appropriate'. In circumstances where only a weak obligation is imposed on a rule-maker (to be satisfied that such consultation has been undertaken as they consider appropriate), a provision that states that the fact that consultation does not occur does not affect the validity or enforceability of the instrument may be viewed as declaratory and of limited concern.

1.201 On the other hand, the consultation requirements prescribed in proposed subsection 790E(1A) are specifically tailored to the relevant circumstances of legislative instruments to be made for the purposes of proposed paragraph 790E(1)(a) and are aimed at achieving a particular purpose. In this regard, it can be considered that the consultation requirements set out in these amendments are not analogous with the consultation required by section 17 of the Legislation Act.

1.202 Further, the committee notes the uncertainty that the no-invalidity clause creates in instances where an instrument made under these provisions is subject to judicial review, and whether or not an injunction could be issued by the court to restrain reliance on instruments that may be declared unlawful.

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99 Supplementary explanatory memorandum, p. 5

1.203 The committee seeks the minister's advice as to:

- **why the validity of instruments made for the purposes of proposed paragraph 790E(1)(a) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* should not be conditional on compliance with the requirements in proposed subsection 790E(1A), noting the specificity of these requirements and the significance of the statutory purposes underpinning them; and**
- **whether the minister would be obliged to remake the instrument in circumstances where a court declared that the instrument, although valid in consequence of proposed subsection 790(1D), was made in breach of the legal requirements set out in subsection 790(1A).**

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

- Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024
  - On 21 March 2024, the Senate agreed to one Opposition amendment to the bill;
- Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023
  - On 27 March 2024, the Senate agreed to 89 Government amendments (one as amended by an Australian Greens amendment), 2 Pauline Hanson's One Nation amendments and 2 Independent (Senator David Pocock) amendments to the bill. The Assistant Minister for Education, Senator the Honourable Anthony Chisholm, tabled a supplementary explanatory memoranda relating to the Government amendments; and
- Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023
  - On 27 March 2024, the Senate agreed to 6 Opposition amendments to the bill.

Chapter 2
Commentary on ministerial responses

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

Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024[100]

Purpose	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 Senate

Limitation of judicial review[101]

2.2 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).

2.3 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.

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

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100 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 6 of 2024*; [2024] AUSStaCSBSD 95.

101 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).

2.5 In *Scrutiny Digest 3 of 2024* the committee sought the Attorney-General's advice as to why it is necessary and appropriate for decisions made by the Tribunal in its intelligence and security jurisdictional area to be exempted from review under the *Administrative Decisions (Judicial Review) Act 1977* with limited exceptions.[102]

Attorney-General's response[103]

2.6 The Attorney-General advised that the amendments in the bill generally maintain the effect of the existing law with respect to reviews in the Intelligence and Security jurisdictional area. Further, judicial review of decisions made in the intelligence and security jurisdictional area is available under section 39B of the *Judiciary Act 1903* (the Judiciary Act) and under section 75(v) of the Constitution.

2.7 The Attorney-General further advised that intelligence and security decisions will inherently contain sensitive information which may involve matters of national security and therefore should, the Attorney-General stated, be judgements more appropriately left to the Executive.

2.8 The Attorney-General also referred to guidance set out in the Administrative Review Council's 2012 report, *Federal judicial review in Australia*, which indicates circumstances in which administrative decisions may not be appropriate for ADJR Act review, including when national security is a consideration. Further, the Attorney-General noted that in its 2012 report the Administrative Review Council considered that the exemption in paragraph (y) of Schedule 1 to the ADJR Act from the ADJR Act review was appropriate and should be retained, citing national security concerns and the availability of merits review under section 44 of the AAT Act and of judicial review under the Judiciary Act.

2.9 The Attorney-General advised that although the range of decisions that will be made under the intelligence and security jurisdictional area has increased since 2012 'the fundamental considerations' are still applicable.

2.10 Finally, the Attorney-General noted that the matters are able to be appealed to the Federal Court of Australia through clause 172 of the ART Bill, ensuring that parties can seek judicial review of Tribunal decisions.

Committee comment

2.11 The committee thanks the Attorney-General for providing this further advice as to the avenues of redress available in relation to decisions made under the intelligence and security division, and the additional context of the Administrative Review Council's guidance.

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102 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024), pp. 2–4.

103 The Attorney-General responded to the committee's comments in a letter dated 3 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

2.12 The committee notes that clause 172 of the ART Bill provides for appeals to the Federal Court of Australia on a question of law. The committee is of the view that although a statutory appeal on a question of law is sometimes a functional equivalent of an ADJR Act review, this is not necessarily so. This is because the type of errors that can constitute questions of law (and thus whether the court has jurisdiction to hear an appeal) is a question of statutory interpretation. The courts interpret the meaning of 'question of law' in the context of the particular statute in which it appears. It is therefore not clear that an appeal on a question of law would enable an aggrieved person to raise all of the errors that would give them a ground of review in a judicial review application brought under the ADJR Act.

2.13 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of item 2 of Schedule 2 to the bill which retains an existing exemption from *Administrative Decisions (Judicial Review) Act 1977* review for decisions made in the intelligence and security jurisdictional area of the Administrative Review Tribunal.**

Availability of independent merits review
Limitation of judicial review[104]

2.14 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.

2.15 In *Scrutiny Digest 3 of 2024* the committee sought 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

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

- if an alternative construction is not possible or otherwise appropriate, whether the removal of independent merits review warrants consideration of whether review under the *ADJR Act 1977* should be provided in respect of decisions made under Division 105 of the Criminal Code relating to preventative detention orders.[105]

Attorney-General's response[106]

2.16 The Attorney-General advised that removing an administrative review avenue in relation to PDO decisions will not affect an individual's ability to seek the voiding of a decision or a compensation payment as these remedies are available through, and better determined by, processes of judicial review, noting that compensation is typically a power of the courts and not administrative review bodies. Further, the Attorney-General noted, the courts' expertise reflects the seriousness of these matters relating to the determination of legal rights.

2.17 In addition, the Attorney-General noted that under proposed section 105 of the ART Act the Tribunal would be limited in the remedies that it could provide to remit the decision for reconsideration, substitute the decision or vary the decision. Noting that review of a PDO decision could only occur after the PDO had ceased in fact, the Attorney-General noted that these remedies would not provide relief due to the short-lived nature of PDO orders, and the fact that, arguably, compensation may be the only effective remedy.

2.18 Further, the Attorney-General advised that it is not appropriate for PDO decisions to be subject to review under the ADJR Act, noting that the Administrative Review Council's guidance, *What decisions should be subject to merits review?,* provides that national security is a justifiable exemption.

Committee comment

2.19 While noting the information provided by the Attorney-General, the committee retains its scrutiny concerns.

2.20 The committee notes the Attorney-General's advice that compensation is typically a power of the courts and not administrative review bodies. However, the current Tribunal is empowered to determine compensation payable in relation to a person's PDO under existing paragraph 105.51(7)(b), which indicates that the Parliament has been willing to provide such a power to administrative review bodies in the past. Considering this, the committee's view is that a more robust justification is required to remove this existing merits review right of these significant and rights affecting-decisions. The committee notes that, although requested by the committee,

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105 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024), pp. 4–6.

106 The Attorney-General responded to the committee's comments in a letter dated 3 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

no advice was 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, which is set out in the explanatory memorandum as a reason justifying the repeal of the subsections.

2.21 The committee reiterates its concerns set out in *Scrutiny Digest 3 of 2024*, where the committee noted 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. While an administrative review body may set aside a decision based on the facts and issues at consideration, a court may only do so if they find that the relevant 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.

2.22 In relation to the exclusion of merits review of decisions that involve high political content including national security, the Administrative Review Council's (ARC) guidance, *What decisions should be subject to merits review?* cautions:

> Even where the high political content exception applies, in some areas it will only apply to a few of the total number of decisions made under a particular decision-making power. If review of all decisions under the power is excluded on this basis, then many decisions not exhibiting a high political content would be inappropriately made ineligible for merits review.
>
> The Council therefore considers it preferable for decisions made under such a power to be made subject to merits review, with a mechanism being established to provide for the exclusion from review of those decisions that fall within the exception.[107]

2.23 In light of this advice from the Administrative Review Council the committee is of the view that any exemptions from merits review on the basis of national security concerns should be considered on a case-by-case basis without the imposition of a blanket exemption. This is particularly relevant in matters such as PDO orders where personal rights and liberties may be trespassed upon without the standard protections of the criminal justice system.

2.24 The committee further notes that the ARC in its 2012 report, *Federal judicial review in Australia*, assessed the continuing appropriateness of excluding ADJR Act review of PDO decisions and recommended that the exemption in paragraph (dac) of Schedule 1 to the ADJR Act should be removed. Noting that this report was cited as a

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[107] Administrative Review Council's guidance, What decisions should be subject to merits review? (1 January 1999) [4.27] – [4.28].

rationale to maintain exclusion of ADJR Act review in relation to decisions in the intelligence and security jurisdictional area of the ART (see above), it is unclear to the committee why the ARC's recommendation in respect of PDO decisions should not also be considered.

2.25 The committee again draws to the attention of senators 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.[108] As the bill proposes to repeal this independent merits review, it appears to the committee that it would be appropriate for consideration to be given to the ongoing appropriateness of the ADJR Act review exemption.

2.26 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the removal of the Tribunal's ability to review preventative detention orders, and the ongoing appropriateness of the exemption from ADJR Act review of PDO decisions.

Limitation of merits review – application timeframes[109]

2.27 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.

2.28 In *Scrutiny Digest 3 of 2024* the committee sought 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.[110]

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108 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.

109 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*. The committee draws senators' attention to these provision pursuant to Senate standing order 24(1)(a)(iii).

110 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024), pp. 6–7.

Attorney-General's response[111]

2.29 The Attorney-General advised that these amendments would continue the status quo for review of decisions made under Part VIB of the Wine Act. This, the Attorney-General advised, would provide certainty in relation to the determinations of geographical indications as made under this Part of the Wine Act. The Attorney-General noted that due to the nature of the business activities involved in wine production including the length of time needed to grow grapes and produce the wine, it is important that stakeholders have certainty as to whether their grapes are being grown within the determined geographical area. Extension of the review timeframe would impinge on this certainty.

2.30 Further, the Attorney-General noted that retaining the Tribunal's standard discretion to extend application timelines would undermine the purpose and aims of the geographical framework established under the Wine Act.

Committee comment

2.31 The committee thanks the Attorney-General for this clarificatory advice and notes the justification provided.

2.32 In light of the above the committee makes no further comment on this matter.

111 The Attorney-General responded to the committee's comments in a letter dated 3 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Agriculture (Biosecurity Protection) Charges Bill 2024
Agriculture (Biosecurity Protection) Levies Bill 2024[112]

Purpose	The bills seek to provide for the imposition of a new biosecurity protection levy and charge to be payable by certain producers of agricultural, forestry and fisheries products within Australia.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 28 February 2024
Bill status	Before the Senate

Charges and levies in delegated legislation[113]

2.34 Subclause 7(1) of each of the Agriculture (Biosecurity Protection) Charges Bill 2024 and the Agriculture (Biosecurity Protection) Levies Bill 2024 (together, the Imposition Bills) seek to provide for the imposition, via regulation, of a biosecurity protection charge and levy (BPL) on a product that is exported from Australia, or on the export of a product from Australia.[114] Subclause 11(1) of each of the Imposition Bills seek to provide that the rate of the BPL is the rate specified in or worked out in accordance with the regulations.

2.35 In *Scrutiny Digest 4 of 2024*, the committee drew its scrutiny concerns relating to the setting of the rate of charges and levies in delegated legislation to the attention of senators and left to the senate as a whole the appropriateness of allowing the rates of charges in each of the bills to be specified in, or worked out in accordance with, the regulations.[115]

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112 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Agriculture (Biosecurity Protection) Charges Bill 2024 and Agriculture (Biosecurity Protection) Levies Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 96.

113 Subclauses 7(1) and 11(1) of each of the bills. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

114 Subclause 8(1) further seeks to provide that the regulations may impose a BPL in relation to one or more specified products in the circumstances prescribed by the regulations and clause 9 provides that the regulations may provide for exemptions from a charge.

115 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 2–4.

Minister for Agriculture Fisheries and Forestry's response[116]

2.36 The minister provided further information to the committee advising that the minister believes it is appropriate for the rates to be specified in the regulations, as they would be disallowable legislative instruments under the *Legislation Act 2003.* As such, this would ensure appropriate parliamentary oversight.

2.37 The minister further advised that the regulations would not be exempt from sunsetting under the Impositions Acts.[117]

Committee comment

2.38 The committee thanks the minister for this response.

2.39 While acknowledging the minister's advice that any regulations that set the rate of BPL would be legislative instruments and, as such, subject to parliamentary control through the disallowance process, the committee reiterates its consistent scrutiny view that it is for the Parliament, rather than the Executive to set the rates of a tax.

2.40 The committee further notes that delegated legislation, including regulations, is not subject to the full range of parliamentary scrutiny inherent in proposing the rate of a tax through primary legislation.

2.41 Noting that the committee, in *Scrutiny Digest 4 of 2024*, ultimately left the matter to the Senate for its consideration, the committee makes no further comment on this matter.

Incorporation of external materials as existing from time to time[118]

2.42 Subclause 18(1) of each of the Imposition Bills seek to provide that the Governor-General may make regulations prescribing matters required or permitted by the Act or by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subclause 18(3) seeks to provide that, despite subsection 14(2) of the Legislation Act 2003, the regulations may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

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116 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

117 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

118 Subclause 18(3) of each of the bills. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

2.43 In *Scrutiny Digest 4 of 2024*, the committee requested the minister's advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law, including individuals not in the industries concerned.[119]

Minister for Agriculture, Fisheries and Forestry's response[120]

2.44 The minister advised that the material incorporated from time to time will be made freely and readily available to all persons interested in the law, including individuals not in the industries concerned.

2.45 The minister further advised that explanatory statements to such instruments would include website details on where the documents could be obtained; specify the Australian public libraries where the material is available; or include relevant extracts, in full, from the incorporated documents.

Committee comment

2.46 The committee thanks the minister for this response.

2.47 **In light of the above, the committee makes no further comment on this matter.**

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119 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 3–4.

120 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Agriculture (Biosecurity Protection) Levies and Charges Collection Bill 2024[121]

Purpose	The bill seeks to provide for the collection of levies and charges imposed by, or under, the Agriculture (Biosecurity Protection) Levies Bill 2024 and the Agriculture (Biosecurity Protection) Charges Bill 2024.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 28 February 2024
Bill status	Before the Senate

Broad delegation of administrative powers
Coercive powers
Infringement notices[122]

2.48 Clause 20 of the bill seeks to empower a compliance officer to exercise a range of monitoring powers under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) in relation to the provisions of the bill or the rules; or an offence against the *Crimes Act 1914* (Crimes Act) or the *Criminal Code 1995* (Criminal Code) that relates to the bill or its rules.

2.49 Subclause 20(10) seeks to provide that a compliance officer can be assisted by other persons in carrying out their duties or functions under the Regulatory Powers Act in relation to the bill. Subclause 20(11) seeks to provide that, in executing a monitoring warrant, both an authorised person and a person assisting can use such force against things as is necessary and reasonable in the circumstances.

2.50 Clause 21 of the bill seeks to provide a mirroring provision enabling the investigatory powers in Part 3 of the Regulatory Powers Act to apply in relation to the bill's offence and civil offence provisions, and offences against the Crimes Act or the Criminal Code that relate to this bill or its rules.

2.51 Clause 23 of the bill seeks to provide that the following provisions of the bill are subject to an infringement notice under Part 5 of the Regulatory Powers Act:

- subclauses 17(1), (2), (3) or (4) (penalties for failure to give return or notice under the rules);

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121 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Agriculture (Biosecurity Protection) Levies and Charges Collection Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 97.

122 Clauses 20, 21, and 23. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

- subclauses (18)(1) or (2) (penalties for failure to make or keep records under the rules);
- subclauses 26(4) or (5) (Secretary may require information or documents); and
- subclauses 42(1), (3), (5) or (8) (civil penalty provisions for false or misleading information or documents).

2.52 Further, subclause 23(2) seeks to provide that for the purposes of Part 5 of the Regulatory Powers Act a compliance officer is an infringement officer.

2.53 Clause 4 of the bill seeks to define a compliance officer as either the Secretary or an Australian Public Service (APS) employee in the department appointed by the Secretary under clause 47 of the bill.

2.54 In *Scrutiny Digest 4 of 2024*, the committee noted that the explanatory memorandum contained a detailed explanation of how the provisions will operate, including that compliance officers are provided with appropriate training in relation to investigation and monitoring powers, and that officers assisting will be supervised and directed by experienced compliance officers.

2.55 While noting the committee's preference that such matters be expressly provided for in primary legislation, the committee ultimately left the appropriateness of the provisions to the Senate as a whole.[123]

Minister for Agriculture, Fisheries and Forestry's response[124]

2.56 The minister provided further information concerning the provisions, consistent with the information provided in the explanatory memorandum to the bill.

Committee comment

2.57 The committee thanks the minister for the information provided.

2.58 Noting that the committee, in *Scrutiny Digest 4 of 2024*, ultimately left this matter to the Senate for its consideration, the committee makes no further comment.

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123 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 5–8.

124 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Reversal of the evidential burden of proof[125]

2.59 Subclause 40(1) of the bills seeks to provide an offence if:

- a person is, or has been an entrusted person;[126]
- the person has obtained or generated information in the course of, or for the purposes of:
- administering, or assisting a person to administer, the bill or rules; or
- monitoring compliance with, or assisting a person to monitor compliance with, the bill or the rules;
- the information is protected information;[127] and
- the person uses or discloses the information.

2.60 Subclause 40(4) seeks to provide an offence-specific defence to the above offence if the use of the information is required or authorised by the bill or another law of the Commonwealth, or law of a State or Territory prescribed by the rules. A note to the subsection clarifies that the evidential burden of proof is reversed in relation to the defence.[128]

2.61 In *Scrutiny Digest 4 of 2024*, the committee requested the minister's advice as to:

- whether consideration could be given to moving an amendment to clause 40 to include the matters in subclause 40(4) as an element of the offence in subclause 40(1);
- otherwise, why it is considered appropriate to use an offence-specific defence for the criminal offence in subclause 40(1);
- whether it could be better articulated as to how the matters in subclause 40(4) are *peculiarly* within the knowledge of the defendant and such knowledge not available to the prosecution; and

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125 Subclause 40(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

126 Clause 4 defines 'entrusted person' to mean the Minister, the Secretary, an APS employee in the Department, any other person who is employed or engaged by the Commonwealth to provide services to the Commonwealth in connection with the Department, and any other person who is employed or engaged by the Commonwealth or a body corporate that is established by a law of the Commonwealth and in a class of persons prescribed by rules.

127 Subclause 40(3) provides that protected information is information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence.

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

- if the relevant matter was instead included as part of the offence, the nature of any difficulties that it is anticipated the prosecution would have in proving that matter.[129]

Minister for Agriculture, Fisheries and Forestry's response[130]

2.62 The minister advised that, consistent with the *Guide to Framing Commonwealth Offences*, the provisions only impose an evidential (rather than legal) burden of proof. The minister stated that an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (it only defers that burden).

2.63 The minister noted that an entrusted person will be peculiarly aware of the reasons for the use or disclosure of protected information. Further, where it may not be clear to other people why certain information was used and if the use or disclosure was authorised, the entrusted person should easily be able to point to records indicating why it was appropriate for them to use and/or disclose that information. This explanation could be readily provided by the entrusted person.

2.64 The minister further advised that if the prosecution had to prove beyond a reasonable doubt that the use or disclosure was not authorised, it would undermine the ability to prosecute the offence as the prosecution may have to go to significant lengths to identify the reasons for the use or disclosure of information.

2.65 The minister stated that if the provisions were amended to include the relevant matter as an element of the offence, the Commonwealth would have to prove that there is no Commonwealth law, or prescribed State or Territory law, in existence that could have required or authorised the use or disclosure. This would, in practice, limit the effectiveness of the provisions in protecting individuals from the unauthorised disclosure of protected information by making it impractical to prosecute the offence.

2.66 Finally, the minister advised that the provision is consistent with offence-specific defences in other portfolio bills and legislation.

Committee comment

2.67 The committee thanks the minister for this response.

2.68 While the committee notes the minister's advice that an entrusted person will be peculiarly aware of the reasons for the use or disclosure of protected information, the committee considers that the proper test is whether the matter that establishes an exception to the offence is peculiarly within the knowledge of the defendant. In this

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129 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 8–11.

130 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

case, an exception is made out in subclause 40(4) where the use or disclosure of the information is required or authorised by the Act, a law of the Commonwealth or a law of a state or territory, and not whether the defendant believed their conduct was authorised or required by such a law. The committee remains of the view that this is not peculiarly within the knowledge of the defendant as this is something knowable by the prosecution.

2.69 The committee notes the minister's advice in relation to the significant difficulty of proving that there is no relevant Commonwealth, state or territory law that requires or authorises a particular disclosure, however it remains unclear to the committee in practice how laws regulating this particular regime would not already be knowable to, or readily ascertained by, the prosecution.

2.70 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that appear not to be peculiarly within the knowledge of the defendant.

Automated decision-making[131]

2.71 Subclause 48(1) seeks to provide that the Secretary may arrange for the use, under the Secretary's control, of computer programs for any purpose for which the Secretary may, under the bill or the rules, make a decision of a kind specified in the rules. Subclause 48(2) would require the Secretary to take all reasonable steps to ensure that each decision made by a computer program is a decision the Secretary could validly make under the bill or rules. Subclause 48(4) also seeks to provide that the Secretary may substitute a computer-made decision if they are satisfied that the decision is not the correct or preferable decision.

2.72 In *Scrutiny Digest 4 of 2024*, the committee requested the minister's detailed advice as to:

- what kinds of decisions are likely to be considered appropriate for automated decision-making;
- how much discretion will be involved in automated decisions;
- whether consideration has been given to prohibiting the decisions listed in proposed clauses 43 and 44 from being prescribed by the rules as being decisions to which automated decision-making apply;
- whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example,

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131 Subclause 48. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

the requirement to consider relevant matters and the rule against fettering of discretionary power); and

- whether consideration has been given to:
- the Commonwealth Ombudsman's report, *Automated decision-making: Better practice guide*; and
- whether the principles outlined in recommendation 17.1 of the Royal Commission into the Robodebt Scheme will be applied in relation to the automation of decisions under the bill.[132]

Minister for Agriculture, Fisheries and Forestry's response[133]

2.73 The minister advised that at this stage there is no intention to specify in the legislation the kinds of decisions that may be considered for automated decision-making. However, the kinds of decisions that may be considered appropriate for automated decision-making are those where no discretion is involved (for example, those that involve an objective calculation set out in legislation).

2.74 The minister indicated that they do not propose to prohibit particular decisions from being prescribed in the rules for the purposes of automated decision-making.

2.75 The minister advised that the bill contains appropriate safeguards concerning automated decision-making, including that:

- any such decision would be specified in a legislative instrument that would be subject to the consultation requirements under the *Legislation Act 2003*;
- the instruments would not be exempt from disallowance and could be closely examined by the Senate Standing Committee for the Scrutiny of Delegated Legislation;
- the power to specify decisions could only be exercised by the Secretary personally, and as such would be exercised with the level of accountability that comes with that role;
- decisions made by the Secretary personally are reviewable by the Administrative Appeals Tribunal;
- the Secretary may make a decision in substitution for an automated decision where the Secretary considers the automated is not the correct or preferable decision;

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132 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 11–14.

133 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

- the bill does not oblige the Secretary to automate decisions, they would retain the discretion not to automate decisions they considered more appropriate to be made by a decision-maker.

2.76 The minister further advised that, if decisions are automated in the future, in line with recommendation 17.1 of the Royal Commission into the Robodebt Scheme:

- the department would ensure that there is a clear path for those affected by decisions to seek review;
- departmental websites would contain information advising that automated decision-making is used and would explain in plain language how the process works; and
- the Department would make available business rules and algorithms to enable independent expert scrutiny.

Committee comment

2.77 The committee thanks the minister for this detailed response.

2.78 While the committee welcomes the minister's advice that automated decisions are intended to only be used for non-discretionary decisions, the committee considers it would be a stronger safeguard to include this legislative intention within the bill itself. As such, the committee considers it would be appropriate to amend the bill to constrain the power to make automated decisions to non-discretionary decisions under subclause 48(1).

2.79 The committee further welcomes the safeguards specified in the minister's response, including the commitment to align with the recommendations of the Royal Commission into the Robodebt Scheme.

2.80 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to automated decision-making, in particular the information regarding its consideration of automated decision-making in line with recommendations of the Royal Commission into the Robodebt Scheme, be tabled in the Parliament as soon as practicable. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.81 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for the power to automate decision-making, particularly where it is not restricted to non-discretionary decisions.

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

Incorporation of external materials as existing from time to time[134]

2.83 Subclause 55(1) of the bill seeks to provide that, for better securing the payment of levy or charge imposed in relation to products or goods, the Secretary may, by legislative instrument, make rules prescribing matters required or permitted by this Act or by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to this Act. Subclause 55(5) seeks to provide that, despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

2.84 In *Scrutiny Digest 4 of 2024*, the committee requested the minister's advice as to whether material incorporated from time to time would be made freely and readily available to all persons interested in the law, including individuals not in the industries concerned.[135]

Minister for Agriculture Fisheries and Forestry's response[136]

2.85 The minister advised that the material incorporated from time to time will be made freely and readily available to all persons interested in the law, including individuals not in the industries concerned.

2.86 The minister further advised that explanatory statements to such instruments would include website details about where the documents could be obtained; specify the Australian public libraries where the material is available; or include relevant extracts, in full, from the incorporated documents.

Committee comment

2.87 The committee thanks the minister for this response.

2.88 In light of the above, the committee makes no further comment on this matter.

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134 Subclause 55(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

135 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2024* (20 March 2024) pp. 24–15.

136 The minister responded to the committee's comments in a letter dated 15 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Australian Research Council Amendment (Review Response) Bill 2023[137]

Purpose	The bill amended the *Australian Research Council Act 2001* to enhance the Australian Research Council's role to better support Australia's research landscape. The amendments in the bill were proposed 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	Received the Royal Assent on 28 March 2024

Tabling of documents in Parliament[138]

2.89 This entry relates to the amendments to the bill agreed to by the Senate on 21 March 2024 and in particular the Australian Greens amendment on sheet 2469, which inserted section 11A into the *Australian Research Council Act 2001*. Section 11A will require the minister to cause an independent review to be conducted of the functions, size and membership of the board. A report of this review must be given to the minister, but there is no requirement for that report to be tabled in the Parliament.

2.90 In *Scrutiny Digest 5 of 2024*, the committee requested the minister's advice as to whether section 11A of the *Australian Research Council Act 2001* could be amended at a future date to provide that the review be tabled in each House of the Parliament.[139]

Minister for Education's response[140]

2.91 The minister advised that the recent amendments to the Act were the result of rigorous scrutiny and debate through both Houses of Parliament and as such, the minister is disinclined to facilitate this further amendment to the Act.

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137 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Research Council Amendment (Review Response) Bill 2023, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 98.

138 Section 11A of the *Australian Research Council Act 2001*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

139 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp. 21–22.

140 The minister responded to the committee's comments in a letter dated 11 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Committee comment

2.92 The committee thanks the minister for this response.

2.93 While noting the minister's advice that the amendments were the result of negotiations and debate in the Parliament, the committee reiterates its long standing scrutiny position that failure to provide for the tabling of reports of statutory reviews reduces the scope for parliamentary scrutiny.

2.94 Noting that the bill has passed both Houses of Parliament the committee makes no further comment on this matter.

Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024[141]

Purpose	The bill seeks to amend 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 particular recommendations 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 Senate

Procedural fairness[142]

2.95 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.[143]

2.96 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.

2.97 In *Scrutiny Digest 3 of 2024*, the committee requested 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

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141 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 6 of 2024*; [2024] AUSStaCSBSD 99.

142 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).

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

- if the operation of proposed subsection 15YDF(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.[144]

Attorney-General's response[145]

2.98 The Attorney-General advised that the intention of section 15YDG is to prevent vulnerable persons from being required to provide evidence further to that provided in an evidence recording hearing, unless specific circumstances are met. The defendant's fair hearing rights are preserved through appropriate criminal procedure safeguards.

2.99 The Attorney-General further provided that section 15YDG only applies in narrow circumstances.

2.100 First, the new provisions only apply in relation to vulnerable adults, children, and select special witnesses in relation to certain offences. These offences and persons have been identified as those which have the greatest potential for re-traumatisation during the criminal trial process given the nature of the alleged offending.

2.101 Secondly, section 15YDB requires that the court may only order an evidence recording hearing if it is satisfied that it is in the interests of the justice to do so.

2.102 Third, section 15YDG does not prohibit a vulnerable person from being required to give evidence in addition to evidence in an evidence recording hearing but instead necessitates that the court is satisfied that there is probative value in the vulnerable person being required to give further evidence. As such, it is open to the court to allow the admission of additional evidence in circumstances where it is necessary to clarify the vulnerable person's evidence; give proper consideration to information or material that has since come to light; or if it is in the interests of justice to do so. The 'interests of justice' is not prescriptive, but is intended to ensure that the court, and if applicable, jury, have available to it all relevant information in order to make an informed assessment of the evidence.

Committee comment

2.103 The committee thanks the Attorney-General for this advice.

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144 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 28–29.

145 The Attorney-General responded to the committee's comments in a letter dated 25 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

2.104 The committee notes the Attorney-General's advice that proposed sections 15YDB and 15YDG are intended to apply to vulnerable adults, children and select special witnesses, who are identified as having the greatest potential for re-traumatisation and that only where there is probative value in these witnesses providing further evidence, they may be required to do so.

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

Reversal of the evidential burden of proof[146]

2.106 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 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.

2.107 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 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)).

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

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146 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).

2.109 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).

2.110 In *Scrutiny Digest 3 of 2024*, the committee requested the Attorney-General's advice in relation to proposed paragraph 15YR(2)(a) to (e) as to:

- whether the reversed evidential burden defences are justified with 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.[147]

Attorney-General's response[148]

2.111 The Attorney-General advised that the offence-specific defences have been deliberately framed to ensure that lawful publication requires consideration by the publisher of the information whether an exemption to the general prohibition applies. This is the appropriate mechanism to protect vulnerable people from unauthorised publication of identifying material, while ensuring that there are limited carve-outs for legitimate publication.

2.112 The Attorney-General further advised that each defence in subsection 15YR(2) falls within circumstances that the *Guide to Framing Commonwealth Offences* considers may be appropriate for an offence-specific defence to apply.

2.113 Paragraphs 15YR(2)(d) and 15YR(2)(e) each require the publishing person to obtain the consent of the vulnerable person, and the publication must be in accordance with the consent provided. This defence recognises that there is a strong public interest in allowing third parties (such as media outlets) to publish identifying information about vulnerable persons, however this should only occur with that person's consent. It is appropriate for this to be an offence-specific defence as obtaining the consent is an active action of the defendant and is something of which they would have a particular knowledge.

2.114 Paragraph 15YR(2)(c), being the other new defence introduced by the bill, provides a defence where the vulnerable person is identified is deceased. This defence recognises that publishing identifying material of a person who is deceased does not

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147 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 29–32.

148 The Attorney-General responded to the committee's comments in a letter dated 25 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

raise the same issues of re-traumatisation of the vulnerable person, and there are legitimate public interest reasons why persons may wish to publish this information. This defence is offence-specific as there is an expectation that this would be a central consideration in a decision to publish identifying information by the publishing person, and that that material fact is something that the defendant could easily adduce.

2.115 The defences in paragraphs 15YR(2)(a) and 15YR(2)(b) are existing defences to the offence in subsection 15YR(1) and recognise that a vulnerable person may need to be identified in documents either in that legal proceeding, or in other legal proceedings. Demonstrating that these documents were prepared for an authorised purpose is something that a defendant would have particular knowledge of and would be in a position superior to the prosecution to prove. This is further bolstered in that in the preparation of documents in relation to legal proceedings, legal professional privilege would likely present a significant barrier to the prosecution's ability to satisfy the element beyond reasonable doubt. By contrast, a defendant would be well placed to discharge an evidential burden without infringing privilege.

Committee comment

2.116 The committee thanks the Attorney-General for this advice.

2.117 The committee notes the Attorney-General's advice in relation to proposed paragraphs 15YR(2)(d) and 15YR(2)(e) that obtaining the consent of a child or a vulnerable person is an active act of the defendant. While it is not clear to the committee that the knowledge of this consent would be peculiarly within the defendant's knowledge, the committee notes the strong public interest factors present in requiring the defendant to obtain this consent and being able to provide evidence of it.

2.118 In relation to proposed paragraph 15YR(2)(c), while the committee acknowledges that publishing information in relation to a deceased individual does not carry the same potential for re-traumatisation as the publication of a living person's information, it is not apparent to the committee that the justification provided for this defence accords with the requirements of the *Guide to Framing Commonwealth Offences*.[149] The committee understands that knowledge of whether a person is alive or deceased would not be peculiarly within the defendant's knowledge in this instance. The committee acknowledges the policy intention of requiring a publisher to have active knowledge of a vulnerable person's death prior to publishing any identifying information, and in this light it could be said that it should be the case that providing evidence of a vulnerable person's death may be easier for the defendant to adduce.

2.119 Finally, in relation to proposed paragraphs 15YR(2)(a) and 15YR(2)(b), it remains unclear to the committee how the provisions would operate in practice and,

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

as such, it is difficult for the committee to reach a conclusion as to whether they unduly trespass on personal rights and liberties. In this light, the committee would be assisted if examples could be provided as to situations where these defences may be relied on, how they are intended to operate and how these examples illustrate the appropriateness of the matters being constructed as offence-specific defences, with reference to the *Guide to Framing Commonwealth Offences*. Although the committee notes it may be necessary for a vulnerable person to be identified in documents in legal proceedings, it is unclear to the committee how the cause for such identification could be peculiarly within one person's knowledge. The committee currently understands that the use of a document identifying a vulnerable person in a legal proceeding alone would indicate the nature of its purpose.

2.120 The committee requests the Attorney-General's further advice as to examples of when the defences provided by proposed paragraphs 15YR(2)(a) and 15YR(2)(b) of the *Crimes Act 1914* may be used, how they are intended to operate and how these examples illustrate the appropriateness of the matters being constructed as offence-specific defences, with reference to the *Guide to Framing Commonwealth Offences*.

2.121 In relation to proposed paragraph 15YR(2)(c), 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 proposed subsection 15YR(1).

2.122 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the offence-specific defences under proposed paragraphs 15YR(2)(c), (d) and (e) of the bill be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Defence Trade Controls Amendment Bill 2024[150][151]

Purpose	The bill seeks to amend the *Defence Trade Controls Act 2012* to regulate the supply of certain Defence and Strategic Goods List military or dual-use goods and technology.
Portfolio	Defence
Introduced	House of Representatives on 30 November 2023
Bill status	Received the Royal Assent on 8 April 2024

Broad delegation of administrative powers or functions[152]

2.123 Proposed subsection 73(2A) in item 44 of Schedule 1 to the bill provided for the delegation of functions or powers under sections 11 and 12 of the DTC Act to the Secretary, a Senior Executive Service (SES) or acting SES employee in the Department of Defence, or an Australian Public Service employee who holds, or is acting in, an Executive Level 1 or 2, or equivalent position, in the Department of Defence.

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

- why it is considered necessary and appropriate to provide the power to delegate the minister's functions or powers under proposed subsection 73(2A) to an Executive Level 1 or 2 employee in the Department of Defence; and
- whether those exercising the delegated powers or functions will possess the appropriate training, qualifications, skills or experience.[153]

2.125 The Minister for Defence responded to the committee's comments in a letter dated 14 March 2024.[154] A summary of the minister's response is contained in *Scrutiny Digest 4 of 2024*. The minister also undertook to address the delegation to Executive Level 1 (EL1) employees for low risk and low complexity applications in the parliamentary debate on the bill.

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150 This previous title of this bill was Defence Trade Controls Amendment Bill 2023. Previous entries relating to this bill appear under that title.

151 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Trade Controls Amendment Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 100.

152 Schedule 1, item 44, proposed subsection 73(2A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

153 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 16–17.

154 A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Additional correspondence from Minister for Defence[155]

2.126 The minister drew the committee's attention to the second reading speech by the Minister for Finance, Senator the Hon Katy Gallagher, on the Senate's receipt of the bill from the House of Representatives, and attached the relevant *Hansard* extract.

2.127 In that speech, Minister Gallagher explained that Defence will ensure that EL1 officers exercising the relevant delegation will have the appropriate training and experience to make delegated decisions.

Committee comment

2.128 The committee thanks the minister for the additional advice given in accordance with their earlier undertaking.

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155 The minister provided further advice to the committee in a letter dated 14 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Financial Framework (Supplementary Powers) Amendment Bill 2024[156]

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 House of Representatives

Retrospective validation
Parliamentary scrutiny[157]

2.129 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 validation of past action taken pursuant to section 32B to ensure that past spending which may have been authorised under the Financial Framework (Supplementary Powers) Regulations 1997 is legally valid.

2.130 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*.

2.131 In *Scrutiny Digest 3 of 2024,* the committee requested 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

156 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Financial Framework (Supplementary Powers) Amendment Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 101.

157 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).

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.[158]

2.132 In *Scrutiny Digest 4 of 2024,* the Minister for Finance's (the minister) response is outlined.[159] Amongst other matters, the minister advised that the necessity of the amendments was identified by the Department as part of its ongoing review. The committee did not consider that this response fully addressed the question of when and how the need for amendments and the retrospective validation of past actions became apparent.

2.133 As such, the committee requested the minister's further advice in relation to when and how the need for the amendments proposed by the bill and the retrospective validation of past uses of the power under section 32B became apparent during the Department's review of the operation of the *Financial Framework (Supplementary Powers) Act 1997*, referred to in the minister's correspondence.

Minister for Finance's response[160]

2.134 The minister advised that the *Financial Framework (Supplementary Powers)* (FFSP) framework, comprising of the FFSP Act and the FFSP Regulations, is the subject of regular and ongoing review by the Department as part of core business to ensure it remains fit for purpose. The minister advised that over the course of 2023, as part of ongoing and regular engagement with Commonwealth entities, the Department was made aware of a potential risk in relying on sections 32B and 39B for legislative authority.

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158 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) p. 39.

159 The minister responded to the committee's comments in a letter dated 6 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024).*

160 The minister responded to the committee's comments in a letter dated 25 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

Committee comment

2.135 The committee thanks the minister for the response.

2.136 The committee remains of the view that it is unclear what matter was identified that led to these amendments and therefore it is difficult for the committee to assess the extent to which the retrospective validation could impact on personal rights and liberties and whether the necessity for the amendments outweighs any such impact.

2.137 In light of the fact that the bill has already passed the Senate, the committee makes no further comment on this matter.

Migration Amendment (Removal and Other Measures) Bill 2024[161]

Purpose	The bill amends the *Migration Act 1958* (the Migration Act) to set out clear legislative expectations in relation to the behaviour of non-citizens who are on a removal pathway. As amended, the Migration Act will make clear that a non-citizen who is on a removal pathway is expected to voluntarily leave Australia, and will cooperate with steps taken under the Migration Act for the purposes of arranging the non-citizen's lawful removal from Australia. The bill also empowers the minister to designate a country as a 'removal concern country' by legislative instrument, with the effect of invalidating visa applications from citizens of that country located outside of Australia.
Portfolio	Home Affairs
Introduced	House of Representatives on 26 March 2024
Bill status	Before the Senate

Significant matters in delegated legislation – Persons considered to be 'removal pathway non-citizens'[162]

2.138 Item 3 of Schedule 1 to the bill would insert proposed section 199B into the *Migration Act 1958* (the Migration Act), which determines the categories of persons considered 'removal pathway non-citizens'. Paragraph 199B(1)(d) specifies that this includes lawful non-citizens who hold visas prescribed by legislative instrument for the purposes of paragraph 199B(1)(d).

2.139 In *Scrutiny Digest 5 of 2024*, the committee expressed its view that the ability to expand the scope of people that may be subject to removal pathway directions is a significant matter that would more appropriately be dealt with by way of primary rather than delegated legislation.[163]

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161 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Removal and Other Measures) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 102.

162 Schedule 1, item 3, proposed paragraph 199B(1)(d). The committee draws senators' attention to this provisions pursuant to Senate standing order 24(1)(a)(iv).

163 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp. 1–2.

Minister for Immigration, Citizenship and Multicultural Affairs' response[164]

2.140 The minister noted that the bill does not alter or expand the duty in section 198 of the Migration Act to remove certain unlawful non-citizens from Australia or those who may hold a visa on the basis of their pending removal or departure from Australia. Nor does the bill expand the cohort of unlawful non-citizens who are liable to be removed from Australia under section 198 or those holding bridging visas on departure grounds. As section 198 only applies in relation to unlawful non-citizens, prescribing a visa under proposed paragraph 198(1)(d) would not, of itself, make the holder of that visa liable for removal from Australia.

2.141 The minister further stated that the intention of the provision is to provide flexibility to accommodate any new visa arrangements that might be in place in the future should another type of visa be determined in future to be the most appropriate visa for non-citizens to maintain lawful status in the community while making arrangements to depart or be removed from Australia, in the same way the BVR is currently used for this purpose.

Committee comment

2.142 The committee notes the minister's advice that the intention behind proposed paragraph 198B(1)(d) is to provide flexibility to accommodate any new visa arrangements that might be in place in the future, and that new visa types are not currently being subjected to removal. However, the committee reiterates its concerns that given the significant penalties associated with the offence of failing to comply with a removal pathway direction under proposed subsection 199C(1), a robust justification balancing the need for flexibility against the impact that removal pathway non-citizens (affected persons) will experience as a result of this legislative scheme should have been provided in the explanatory memorandum, noting that, in this instance, these changes may be applicable to lawful non-citizens. It remains unclear to the committee what urgency is present that necessitates the use of delegated legislation.

2.143 Further, the committee notes there is a level of parliamentary oversight applicable, as the instruments made under proposed paragraph 199B(1)(d) will be subject to disallowance. However, given the potential impact of prescription of visa types, the committee's preferred position is that these instruments should not commence until the disallowance period for the instrument expires. The committee considers that affected persons should not be subject to the consequences of their visas being prescribed for the purposes of removal pathway non-citizens until there has been an opportunity for proper parliamentary consideration of the relevant instrument.

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

2.144 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of enabling the regulations to prescribe additional visas holders for the purposes of removal pathways, pursuant to proposed paragraph 199B(1)(d) of the *Migration Act 1958*. The committee considers that, at a minimum, it would be appropriate to provide for instruments made under this paragraph to not commence until after the disallowance period has passed.

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

Undue trespass on rights and liberties – Power to issue written directions to removal pathway non-citizens[165]

2.146 Proposed subsection 199C(1) provides the minister with the power to issue written directions to the removal pathway non-citizen cohort, with the directions set out in the subsection as an exhaustive list. Proposed subsection 199C(2) further empowers the minister to issue directions to do or not do a thing if satisfied the measure is reasonably necessary to determine whether there is a real prospect of removal under section 198 becoming practicable in the reasonably foreseeable future, or to facilitate removal under section 198. Proposed subsection 199C(4) provides that the direction must specify the period of time in which the person either must do the directed thing, or during which they must not do the directed thing.

2.147 In *Scrutiny Digest 5 of 2024*, the committee expressed its view that the legislation should set out an appropriate minimum time period, for example 60 days, in which to allow the persons to take steps to comply and to seek legal advice.[166]

Minister for Immigration, Citizenship and Multicultural Affairs' response[167]

2.148 The minister highlighted that the context of the directions is that they are given to people who have already come to the end of any visa application processes, who are on a removal pathway and who have not cooperated with efforts to remove them from Australia.

2.149 The minister advised that minimum timeframes will differ case by case such that a default 60 days would not be appropriate in every scenario. Applying a minimum timeframe would also add to the time involved to bring these matters to a conclusion, and in some cases would add to periods of detention of unlawful non-citizens.

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165 Schedule 1, item 3, proposed section 199C. The committee draws senators' attention to this provisions pursuant to Senate standing order 24(1)(a)(i).

166 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 2.

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

2.150 The minister stated that in practice, directions given to a removal pathway non-citizen would provide a rational and reasonable time for compliance. Examples were provided of providing a signature on a passport application, as opposed to the making of an appointment and attending an interview at a foreign country's embassy or consulate. The Minister or delegate would consider the circumstances of the non-citizen and what was proposed to be required of them and set the timing for compliance accordingly.

2.151 The minister explained that clear information on the obligation would be provided to the non-citizen, including the potential consequences of non-compliance. The timeframes will always be reasonable as the intention is to gain cooperation of the person to effect their removal from Australia, not to seek their punishment.

Committee comment

2.152 The committee notes the minister's advice that the policy intention is to prevent individuals on removal pathways from being able to frustrate the process through time delays, and that this can be achieved through ensuring directions are complied with within a reasonable timeframe.

2.153 The committee retains its position that the significance of these measures on individual rights and liberties necessitates legislative protections to ensure that individuals are provided with an appropriate minimum period in which to allow the person to take steps to comply and to seek legal advice. The committee's preferred position is that such a timeframe be included on the face of the bill and for a specified minimum limit to apply.

2.154 As it currently stands, the advice provided by the minister that a reasonable timeframe will be provided and will differ on a case-by-case basis is not set out in the legislation and therefore is not a guaranteed safeguard for affected individuals.

2.155 In relation to the concern expressed in the response that a specified minimum period may add to the detention for non-citizens, the committee notes that the period would be a minimum period, and a non-citizen could comply with the direction at an earlier time if they wished to. With this in mind, as well as the context in which a direction would be made, the committee is of the view that a minimum period would act as a legislative minimum safeguard for the rights of those subject to a direction.

2.156 The committee considers that, at a minimum, this outcome could be achieved through amendments to the bill to provide that the period for compliance specified in a removal pathway direction must be reasonable having regard to the circumstances. The committee notes that provisions of this nature are not uncommon, particularly where an offence applies for non-compliance with a direction. This would afford the minister the flexibility required while ensuring that there is a legislative safeguard to ensure that individuals are given adequate time to comply with the directions, including by seeking any relevant assistance and legal advice.

2.157 The committee considers that it would be appropriate for the bill to provide that individuals are ensured a reasonable amount of time to comply with directions, in recognition of the potentially significant trespass on rights and liberties involved. The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the consideration of this matter.

Undue trespass on rights and liberties – Penalty for offence relating to non-compliance with removal pathway directions[168]

2.158 Item 3 of Schedule 1 to the bill would also insert proposed subsection 199E(1), which creates an offence where a person who is a removal pathway non-citizen and has been given a removal pathway direction refuses or fails to comply with that direction. This offence carries a maximum penalty of 5 years imprisonment or 300 penalty units. Subsection 199E(2) also requires that the court impose a mandatory minimum sentence of 12 months imprisonment on an individual who is convicted of an offence under subsection 199E(1).

2.159 In *Scrutiny Digest 5 of 2024*, the committee questioned the appropriateness of the penalty for the offence, including in relation to the inclusion of a mandatory minimum sentence.[169]

Minister for Immigration, Citizenship and Multicultural Affairs' response[170]

2.160 The minister advised that the objective of a mandatory minimum sentence is to provide a strong deterrent to non-cooperation by non-citizens with a direction given by the minister under proposed section 199C. The maximum penalty of 5 years imprisonment is intended to provide an effective deterrent and reflects the seriousness of the offence in the context of the integrity of the migration system.

2.161 The minister further advised that the penalty provisions are equivalent to those associated with offences recently agreed to by the Parliament in the *Migration Amendment (Bridging Visa Conditions) Act 2023* and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*.

2.162 The minister explained that the Government considers that the offence set out in the bill is of similar gravity.

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168 Schedule 1, item 3, proposed subsections 199E(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i).

169 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 4.

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

Committee comment

2.163 The committee notes the minister's advice that the penalty provisions are intended to reflect the seriousness of the offence and act as a deterrent to non-cooperation by affected persons. The committee also notes the minister's advice that the maximum available penalty of 5 years' imprisonment under proposed section 199E is equivalent to those associated with other offences under the *Migration Amendment (Bridging Visa Conditions) Act 2023* and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*.

2.164 The committee reiterates its concerns in relation to the significant penalties that relate to the offence in proposed subsection 199E(1), which were noted in *Scrutiny Digest 5 of 2024*.[171] This includes that the penalty provision is subject to a mandatory minimum sentence of 1 year imprisonment. The committee reiterates its long-standing scrutiny view that mandatory minimum sentences impede judicial discretion to impose an appropriate penalty based on the unique circumstances of each offence and offender, and may result in highly disproportionate sentencing outcomes.[172] The committee concerns are consistent with Commonwealth law policy, as specified in the *Guide to Framing Commonwealth Offences*.[173]

2.165 Further, it is unclear to the committee whether the penalties provided in the bill are consistent with other principles set out in the *Guide to Framing Commonwealth Offences*. For instance, the high maximum penalty in this case is not justified by reference to the consequences of the commission of the offence being particularly dangerous or damaging.[174] The committee also notes the view of the Law Council of Australia that ancillary offences, which protect the integrity of a legislative scheme, are rarely subject to mandatory minimum sentences offences (including post-sentence orders in respect of convicted high-risk terrorism offences).[175]

2.166 Finally, the committee reiterates its long-standing scrutiny view that where significant penalties are imposed, they should be justified by reference to similar offences in Commonwealth legislation. Although the response makes reference to the penalty provision being equivalent to the offences under the *Migration Amendment (Bridging Visa Conditions) Act 2023* and the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023*, the committee notes that it raised scrutiny concerns in relation to the penalties in both of

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171 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 4.

172 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 4.

173 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) p. 38.

174 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) p. 38.

175 Law Council of Australia, *Submission 71*, pp. 16–17, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the bill.

the bills proposing these Acts, noting the disproportionate nature of the penalties and the use of mandatory minimum sentences in both instances.[176] The committee has yet to receive a response to these concerns which were raised in November and February respectively, which prevents the committee from sufficiently assessing the justifications for these comparable penalties.

2.167 The committee further notes that other offences in the *Criminal Code* which carry the same maximum penalty do not appear to be analogous to the offence provided by proposed subsection 199E(1).[177]

2.168 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the consideration of the appropriateness of the penalties under proposed section 199E of the *Migration Act 1958*.

Undue trespass on rights and liberties – Reasonable excuse defence[178]

2.169 Proposed subsection 199E(3) provides that the offence in subsection 199E(1) does not apply where a person has a reasonable excuse for refusing or failing to comply with the removal pathway direction. Proposed subsection 199E(4) provides examples of what may not constitute reasonable excuses, which included a genuine fear of suffering persecution or significant harm if a person is removed to a particular country[179] and being or claiming to be a person in respect of whom Australia has non-refoulement obligations.[180]

2.170 In *Scrutiny Digest 5 of 2024*, the committee questioned the appropriateness of the use of a reasonable excuse defence, and expressed a view that many of the matters that could be taken to be reasonable excuses would have been more appropriately dealt with by better delimitation of the directions which can be lawfully given by the minister.[181]

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176 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 13–15; *Scrutiny Digest 3 of 2024* (28 February 2024) p. 56.

177 Law Council of Australia, *Submission 71*, p. 15, Senate Legal and Constitutional Affairs Legislation Committee inquiry into the bill.

178 Schedule 1, item 3, proposed subsection 199E(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

179 Proposed paragraph 199E(4)(a).

180 Proposed paragraph 199E(4)(b).

181 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 4.

Minister for Immigration, Citizenship and Multicultural Affairs' response[182]

2.171 The minister advised that the availability of the reasonable excuse defence reflects the Government's intention that there should be no criminal liability where the removal pathway non-citizen has a reasonable excuse for not complying with the direction. Where it is not possible for a person to comply with a removal pathway direction, there would be no purpose in charging the person with the offence set out in section 199E, as the elements of the offence could not successfully be proven. In circumstances where it is possible for a person to comply with the direction, but they do not comply because they have a reasonable excuse, they will be entitled to raise that defence.

2.172 The minister advised that the Government does not accept that the lawfulness of the direction should be determined by whether, in the particular factual circumstances, the person turns out to be unable to comply with the direction or has a reasonable excuse for not doing so.

Committee comment

2.173 While the committee notes the Government's intention that there should be no criminal liability where the affected person has a reasonable excuse for not complying with a direction, the committee retains its position that the use of a 'reasonable excuse' defence could have a chilling effect on individuals. With no guidance as to how the term 'reasonable excuse' is intended to apply, there is a risk that affected persons may lack clarity as to what actions would be considered reasonable in a particular circumstance and may comply with a direction even when it is lawful for them to not do so.

2.174 The committee understands that defences outside of the general defences at common law are intended to be specific to the elements of an offence. In this instance, the committee reiterates its view that the reasonable excuse defence is unclear in scope, lacks guidance and may indicate that the elements of the offence are framed too broadly. The committee considers that it would have been appropriate for examples to be provided in the explanatory memorandum or other guidance as to what may be a 'reasonable excuse'.

2.175 The committee also notes that Commonwealth law policy, reflected in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, is that, generally a reasonable excuse defence should not be applied unless it is not possible to rely on general defences or to design more specific defences. This is on the grounds that a defence of reasonable

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

excuse is too open-ended and difficult to rely on because it is unclear what needs to be established.[183]

2.176 Further, the committee notes that in an instance where an affected person has a reasonable excuse to not comply with a direction, that person is entitled to rely on this defence. However, this requires the affected person to be charged with the offence and subjected to the criminal justice system in order to be able to raise the defence. The committee's preferred position on this matter is that affected persons should not be subjected to the criminal justice system where possible.

2.177 The committee reiterates its scrutiny view that it may be appropriate to constrain the directions that may be lawfully given by the minister so as to appropriately constrain the circumstances in which a person will be subject to a criminal offence.

2.178 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the reasonable excuse defence provided in proposed subsection 199E(3) of the bill.**

Undue trespass on rights and liberties – Power to revisit protection findings[184]

2.179 Item 5 of Schedule 1 to the bill provides that paragraphs 199B(1)(b) and (c) apply in relation to a non-citizen who holds a visa, whether the visa was granted before, on or after the commencement of these measures.

2.180 In addition, item 4 of Schedule 2 to the bill would repeal and replace subsection 197D(1) of the Migration Act. Section 197D of the Migration Act provides that a protection finding can be revisited in certain circumstances, when the circumstances of the country of origin or the affected person have changed. Item 3 also amends existing section 197C to make consequential and machinery changes to give effect to the expansion of the minister's power to revisit protection visa decisions.

2.181 The effect of these amendments is to empower the minister to revisit the circumstances of an existing protection decision for removal pathway non-citizens and determine whether that person is no longer a person owed protection.

2.182 In *Scrutiny Digest 5 of 2024*, the committee noted that:

- the amendments made to sections 197C and 197D would expand the classes of persons for whom the minister is empowered to overturn a protection decision;

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

184 Schedule 2, item 4, proposed subsection 197D(1). The committee draws senators' attention to this provision pursuant to Senate standing orders 24(1)(a)(i).

- it was unclear to the committee why such a power was necessary; and
- it was unclear to the committee whether any procedural fairness protections apply in relation to any decisions made by the minister to overturn an existing protection decision.[185]

Minister for Immigration, Citizenship and Multicultural Affairs' response[186]

2.183 The minister advised that current section 197D of the Migration Act already provides the minister with power to revisit protection findings of certain unlawful non-citizens, and the proposed amendments will extend this to non-citizens who hold a specified bridging visa, or a visa prescribed by the minister, as removal pathway non-citizens.

2.184 The minister further advised that in cases where a person has already been refused a substantive visa or their substantive visa has been cancelled on other grounds, such as on character grounds, it may be necessary to revisit a person's protection finding. This would be where the circumstances of the person or the country in relation to which a protection finding has been made have changed and it is unlikely they do not hold a substantive visa.

2.185 The minister advised that the Government's view is that there should be no difference in approach to non-citizens unlawfully in Australia in immigration detention, and those who may hold a visa on the basis of their pending removal from Australia.

2.186 The minister advised that the bill does not change current procedural fairness requirements and that the minister has an obligation under common law to afford persons procedural fairness. Further, any decision made under the provision by the minister will be subject to merits review and a non-citizen the subject of a decision under section 197D is not subject to removal until the decision is complete within the meaning of subsection 197D(6).

Committee comment

2.187 The committee notes the minister's advice that the purpose of item 4 of Schedule 2 to the bill, which replaces subsection 197D(1) of the Migration Act, is to facilitate the reconsideration of protection findings (and not protection visas), in relation to removal pathway-non citizens.

2.188 The committee notes that this power already existed in section 179D of the Migration Act and acknowledges that the primary scrutiny concerns are in relation to the existing power. However, the committee considers any expansion of a power

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185 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp. 4–5.

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

which trespasses on individual rights and liberties should be closely examined to ensure the appropriateness and necessity of the measures.

2.189 The committee welcomes the advice from the minister in relation to the common law procedural fairness safeguards that will be applicable to protection finding re-considerations such as the opportunity to comment on any adverse information and the availability of merits review. This information would have been useful for the committee's scrutiny if it had been included in the explanatory memorandum.

2.190 While these safeguards are welcomed the committee retains significant scrutiny concerns about any legislative provisions which allow the Government to re-open an affected persons' protection finding for the purposes of attempting to remove them to a country from which they have sought protection.

2.191 The committee notes that the Australian Human Rights Commission (the AHRC), in its *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, recommended that section 197D of the Migration Act should be repealed.[187] In raising concerns about this provision, the AHRC noted that the provision effectively empowers a departmental officer to overturn the decision of a member of the Administrative Appeals Tribunal.[188] The AHRC also advised that, in the event the section is not repealed, it would support amendments to the provision to narrow its scope to identify specific grounds which give rise to review.[189]

2.192 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the expansion of section 179D of the *Migration Act 1958* to facilitate the re-opening of protection decisions.

Significant matters in delegated legislation
Exemption from disallowance
Broad discretionary powers[190]

2.193 Item 3 of Schedule 1 to the bill would insert proposed section 199F into the Migration Act, to empower the minister to designate a country as a 'removal concern country' by legislative instrument. Proposed subsection 199F(1) provides that the

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187 Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (20 June 2023), recommendations 2 and 3, pp. 15–18.

188 Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (20 June 2023) p. 15.

189 Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (20 June 2023) p. 16-17.

190 Schedule 1, item 3, proposed sections 199F and 199G. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(ii) and (iv).

minister can make such a determination if they consider it in the national interest to do so. Proposed subsection 199F(2) provides that the minister must first consult with the Prime Minister and the Minister for Foreign Affairs.

2.194 Proposed subsection 199G(1) would provide that an application for a visa by a non-citizen is not a valid application if the applicant is a citizen of a designated removal concern country and is outside Australia at the time of application. Proposed subsection 199G(3) provide that the minister can designate a class of persons or visa applicants for the purposes of proposed paragraphs 199G(2)(e) and (f), which means that the minister can declare further exceptions to the visa ban by legislative instrument, and with no criteria for consideration set out in the primary legislation.

2.195 In *Scrutiny Digest 5 of 2024*, the committee questioned the appropriateness of designating a country as a removal concern country by means of delegated rather than primary legislation and the broad and unfettered discretion of the minister in doing so. The committee further queried whether the minister may designate multiple countries as removal concern countries within a single instrument.[191]

Minister for Immigration, Citizenship and Multicultural Affairs' response[192]

2.196 The minister advised that instruments made under proposed section 199F would set out matters related to the national interest and that determination of the national interest is properly a matter for the Executive, not the Legislature. The minister pointed out that the aim of the proposed section is to ensure that countries are aware that the Government thinks they should be facilitating the removal of their own citizens, and that the provision is a lever to do so.

2.197 Further, the minister noted that taking into account all the considerations that may be in play such as consultations with the Prime Minister and the Minister for Foreign Affairs and whether the national interest is at stake, making a determination is not amenable to parliamentary debate. The minister further stated that the power is consistent with other 'national interest' powers in the Migration Act and other Commonwealth legislation.

2.198 The minister also referred to the significant diplomatic and foreign engagement that would be undertaken prior to making such a determination as a supporting factor, and noted that the power has been framed in this way to allow the minister the flexibility to impose the designation in the most impactful way while minimising impact on Australian citizens and residents. This would also allow for exemptions in the interests of Australian citizens such as family members, and also for diplomatic purposes and to meet international obligations. The minister advised this

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191 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp. 7–8.

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

flexibility would also allow a tailored response when designating a country as a removal concern taken into account advice from government agencies.

2.199 Finally, the minister advised that, should the power be exercised, the intention of the Government is that countries would be individually designated in single instruments.

Committee comment

2.200 The committee notes the advice that determinations made under proposed section 199F are in the national interest and are therefore a matter for the Executive. The committee also notes that the policy intention is for relevant countries to be aware that Australia's position is that they should facilitate removal of affected persons and is willing to take steps in response to a failure to do so.

2.201 However, the committee's position is that the designation of countries as removal concern countries is a significant matter which should be subject to full parliamentary approval and would be most appropriate for primary legislation. In this light, the committee notes that the Parliament is capable of appropriately assessing whether a legislative proposal is in the national interest, noting that the Government would have the opportunity to put its position during parliamentary debate.

2.202 Further, the committee notes the advice that the decision to designate a country as a removal concern country follows on from 'significant diplomatic efforts and government-to-government engagement'. However, including these matters in primary law would not prevent the Government from undertaking these diplomatic efforts. Including these matters in primary legislation would indicate to the relevant countries Australia's serious commitment to the measures in a way that inclusion in delegated legislation, which is liable to frequent change, may not.

2.203 The committee understands that instruments made under proposed section 199F of the Migration Act would be exempt from disallowance as a result of item 20 in the table in section 10 of the Legislation (Exemptions and Other Measures) Regulation 2015.[193] However, this information was not provided with sufficient clarity in the explanatory memorandum to the bill, nor was it identified or justified in the minister's response to this committee.

2.204 The committee's position is that any bills which empower the making of non-disallowable instruments should clearly set out the legislative authority for the exemption from disallowance in the explanatory memorandum so that this information may be properly scrutinised and considered by the Parliament. This is particularly salient in situations such as the current bill where the measures to be included in non-disallowable instruments are matters of high policy impact and which trespass on individual rights and liberties.

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193 This item provides that legislative instrument, except for regulations, which are made under Part 2 of the Migration Act are exempt from disallowance.

2.205 Further, in this instance the committee has not been furnished with any justification as to why it is necessary and appropriate for instruments made under proposed section 199F to be exempt from disallowance. The committee's expectation in all instances is for explanatory memoranda to indicate not only the legislative authority for the exemption but to also justify why the exemption is necessary and appropriate in the context of each individual instrument. Noting the significant consequences of the designation of a country as a removal concern country, which would inevitably affect a significant number of people, the committee is of the view that any such designation should be subject to parliamentary control through the disallowance process. However, the committee is of the view that, at a minimum, a full justification for this exemption should have been set out in the explanatory memorandum to the bill.

2.206 The committee also notes the advice that it is the intention of the Government that should the power to designate a country as a removal concern country be exercised, countries would be individually designated. While welcoming this statement of the Government's intentions, the committee notes that this is not *required* by the provision as drafted. Noting the committee's view that designations should be disallowable legislative instruments, it appears to the committee that consideration should be given to whether the efficacy of the disallowance process would be best advanced by the bill requiring each designation to be included in a separate legislative instrument.

2.207 The committee draws these matters to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed section 199F of the *Migration Act 1958* providing for the designation of removal concern countries in non-disallowable legislative instruments.

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

Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023[194]

Purpose	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 Senate

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)[195]

2.209 Various provision in the bill propose amendments to the *Telecommunications Act 1997* (the Tel Act) that would enable delegated legislation to modify the operation of primary legislation:

- proposed subsections 360HB(4) and 360HB(5), which would enable the minister, by legislative instrument, to exempt a project from subsection

194 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 6 of 2024*; [2024] AUSStaCSBSD 104.

195 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).

360HB(2)[196] and to specify circumstances where the obligations do not apply;

- proposed subsections 360J(3) and 360J(4), which would enable the minister, by legislative instrument, to make a declaration which would have the effect of revoking or varying a 'nominated service area'[197];
- proposed subsection 360K(1B), which would enable the minister, by legislative instrument, to declare that subsection 360K(1A)[198] does not apply to a specified nominated service area and that another specified CSP is the SIP for the nominated area; and
- proposed subsections 360KB(2) and 360KB(4), which would enable the minister, by legislative instrument, to declare that subsection 360K(1A)[199] does not apply and that a specified carrier is the SIP for the area.

2.210 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 these provisions to modify the operation of the *Telecommunications Act 1997*.[200]

2.211 The minister responded to the committee's comments in a letter, dated 8 February 2024[201], noting that the 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.

2.212 In *Scrutiny Digest 3 of 2024*, the committee sought the minister's further advice on whether an addendum to the explanatory memorandum could be prepared to include the justifications for the proposed provisions.

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196 This subsection 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.

197 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.

198 This subsection 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.

199 This subsection 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.

200 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 21–23.

201 A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

2.213 The committee further sought advice on whether the bill could be amended to provide for the sunsetting of the relevant instruments after a period of five years.[202]

Minister for Communications' response[203]

2.214 The minister confirmed that an addendum to the explanatory memorandum relating to the bill will be issued, as requested by the committee.

2.215 In relation to the committee's view that the relevant legislative instruments should be limited to five years duration, the minister stated that they are concerned that this may reduce certainty for industry about the operation of the powers and that, in practice, there may be circumstances in which a timeframe longer than five years may be preferable.

2.216 Accordingly, the minister proposed that the instruments sunset in accordance with the requirements of the *Legislation Act 2003* (a maximum period of 10 years), with an earlier self-repeal to be provided for where this is appropriate.

Committee comment

2.217 The committee thanks the minister for this response and acknowledges the minister's concerns that providing for a five year sunset period for the relevant legislative instruments may reduce certainty for industry.

2.218 However, the committee notes that a shorter sunset period would not impact the ability of the minister to address genuinely transient market conditions through the making of legislative instruments. The committee is of the view that a sunset period of five years would not undermine certainty for industry.

2.219 The committee notes that a shorter sunset period than the maximum period provided under the *Legislation Act 2003* would not prevent the remaking of similar legislative instruments, but would enable increased parliamentary oversight over delegated legislation that modifies legislation that the Parliament has enacted. The committee further notes that remaking of the instruments would also enhance engagement with industry through additional, earlier consultation through the making of fresh instruments.

2.220 The committee acknowledges the minister's advice that they will provide for an earlier sunset date where appropriate and expresses its view that the determination of such a date should appropriately balance the need for parliamentary oversight.

2.221 **The committee welcomes the minister's commitment to prepare an addendum to the explanatory memorandum relating to the bill.**

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202 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 84–86.

203 The minister responded to the committee's comments in a letter dated 23 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

2.222 **The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of empowering the minister to modify the operation of the *Telecommunications Act 1997* through the making of legislative instruments under proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360K(1B), 360KB(2) and 360KB(4).**

Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024[204]

Purpose	The bill amends the *Therapeutic Goods Act 1989* (the TG Act) to prohibit the importation, domestic manufacture, supply, commercial possession and advertisement of non-therapeutic and disposable vaping goods. Therapeutic vaping goods will continue to be available and subject to regulation under the TG Act in line with other medicines and therapeutic goods.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 21 March 2024
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof
Strict liability offences
Significant matters in delegated legislation[205]

2.223 Schedule 1 to the bill inserts many new offence provisions into the *Therapeutic Goods Act 1989* (the TG Act).

2.224 Item 6 of Schedule 1 to the bill amends the definitions in subsection 3(1) of the TG Act to provide that the quantity of a kind of vaping goods that will be a 'commercial quantity' will be the amount set out in regulations. The definition of the commercial quantity is a central component to the offence provisions, with different penalties applying depending on the amount of the units above the commercial quantity in contravention. In addition, item 10 of Schedule 1 to the bill amends the definitions in subsection 3(1) of the TG Act to provide that the meaning of a 'unit' of vaping goods will have the meaning to be prescribed by the regulations.

2.225 For example, item 11 would insert proposed section 41Q into the TG Act which would create a new criminal offence, an additional offence of strict liability, and a new civil offence, in relation to the importation of vaping goods into Australia. Proposed subsection 41Q(4) would provide that a person who contravenes the civil offence provision in proposed subsection 41Q(3) would commit a separate contravention in respect of each *unit* of vaping goods imported by the person into Australia.

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204 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024, *Scrutiny Digest 6 of 2024*; [2024] AUSStaCSBSD 103.

205 A range of clauses in Schedule 1 to the bill. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

2.226 In addition, proposed section 41QC provides for a range of offences of possession where the person possesses differing amounts exceeding the commercial quantity of vaping products, with higher penalties for the larger amounts. As noted above, the prescription of the quantity of a kind of vaping goods that would amount to a 'commercial quantity' will be left to regulations, meaning that a significant component of the offences will be left to delegated legislation.

2.227 Further, most if not all the new offences are being introduced alongside offence-specific defences which reverse the evidential burden of proof. The other new offence clauses in the bill, which deal with matters such as manufacturing and possession of vaping goods, broadly follow the same framework as outlined for proposed section 41Q.

2.228 In *Scrutiny Digest 5 of 2024* the committee requested the minister's advice as to why it is necessary and appropriate for the definition of a 'unit' of vaping goods (in item 10 of Schedule 1) or the quantity of a kind of vaping goods that would amount to a commercial quantity (item 6 of Schedule 1) to be left to delegated legislation, noting the importance of these definitions to the offence provisions proposed to be inserted by the bill.[206]

Minister for Health and Aged Care's response[207]

2.229 The Minister for Health and Aged Care (the minister) provided an extensive response to the committee's concerns.

2.230 The minister advised that the definition of a 'unit' of vaping goods only has application in relation to the civil penalty provisions of the bill, and that the definition needs to be 'flexible and adaptable' to meet the changing public health, scientific, technological and market circumstances.

2.231 The minister further advised that it is a complex process to determine what a 'unit' is in relation to each variation of vaping goods and such a determination necessarily requires scientific and medical knowledge of vaping goods as they develop and change.

2.232 The minister advised that it is necessary for the definition of commercial quantity of a kind of vaping good to be determined by delegated legislation to:

- ensure flexibility to change the quantity in light of the prescription practices of health professionals;
- allow the definition to adapt to new product designs and specifications which may affect the type, delivery, volume and concentration of vaping substances;

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206 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp.12–15.

207 The minister responded to the committee's comments in a letter dated 9 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

- target illicit vape trades by allowing efficient amendments; and
- ensure that the commercial quantity flexibly adapts to acceptable or legitimate quantities.

2.233 Further, the minister advised that the medical advice in relation to appropriate quantities of vaping goods for personal use will vary depending on patient circumstances and is evolving. The reasoning behind the amount determined in any instruments made will be set out in the accompanying explanatory statement.

2.234 The minister also provided examples of analogous approaches in comparable legislation.

2.235 Noting that the committee drew scrutiny concerns in relation to strict liability offences and reversals of the evidential burdens of proof to the attention of the Senate in *Scrutiny Digest 5 of 2024*, the minister provided detailed further context for these offences which is available in the relevant correspondence on the committee's website.

Committee comment

2.236 The committee thanks the minister for the detailed information as to why it is considered necessary and appropriate for the definitions of a 'unit' of vaping goods and a 'commercial quantity' of vaping goods to be left to delegated legislation. The committee notes that these definitions relate to areas in which the health and technology advice and requirements are liable to change.

2.237 The committee has generally not accepted a desire for administrative flexibility, or consistency with previous arrangements to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. However, the committee may accept a need for flexibility in circumstances where it is expected that there may be significant technological or other unforeseen developments that require immediate or prompt changes to legislation. This information should be comprehensively included in the explanatory memorandum.

2.238 The committee therefore requests that an addendum to the explanatory memorandum to the bill containing the key information provided by the minister in relation to the prescription of the definition of a 'unit' or 'commercial quantity' of vaping goods in delegated legislation be tabled in the Parliament as soon as is practicable.

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

2.240 In relation to the committee's scrutiny concerns relating to strict liability offences and provisions that reverse the evidential burden of proof the committee draws the attention of senators to the additional information provided by the minister and, noting that the committee previously left these matters to the Senate as a whole, makes no further comment on this occasion.

Broad discretionary powers[208]

2.241 Item 11 of Schedule 1 to the bill would insert proposed section 41RC into the TG Act. Proposed subsection 41RC(1) would empower the secretary to give consent to applications to manufacture, supply or possess vaping goods. Proposed subsection 41RC(2) empowers the secretary to grant an application subject to conditions.

2.242 However, there is no guidance on the face of the bill, nor in the explanatory memorandum, as to what criteria may be considered by the secretary when deciding whether to grant or refuse such an application, or in deciding which conditions to impose, if any. These concerns are heightened noting the relevance of consent granted under proposed subsection 41RC(1) to the offence provisions of the bill.

2.243 In *Scrutiny Digest 5 of 2024* the committee requested the minister's advice as to:

- why it is necessary and appropriate to provide the secretary with a broad power to consent to the manufacture, supply or possession of vaping goods, or to refuse such an application, or grant it subject to conditions; and
- what criteria may be considered by the secretary in making a decision under proposed subsection 41RC(1).[209]

Minister Health and Aged Care's response[210]

2.244 The minister advised that the broad discretionary power provided to the minister in the consent scheme is necessary and appropriate to ensure all legitimate participants in the scheme along the supply chain have clear lawful authority including in cases where relevant actors do not have 'a pre-existing license, approval, authority or permit under the *Customs Act 1901*, TG Act or a state or territory law'.

2.245 The minister further advised that the bill identifies multiple situations where persons involved in the importation, manufacture, supply and commercial possession of vaping goods will have clear lawful authority to do so. The consent scheme is designed to cover other situations, and the broad discretionary power is necessary to deal with such gaps. The minister stated that without a broad discretionary power, a cohort of potential legitimate actors may be inadvertently left without a mechanism

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208 Schedule 1, item 11, proposed section 41RC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

209 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp. 16–17.

210 The minister responded to the committee's comments in a letter dated 9 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

to legitimise their relationship with the vaping scheme, and would otherwise expose such persons to regulatory action.

2.246 The minister explained that where a decision not to grant a person consent is made, or a person disagrees with conditions imposed, internal and external merits review and judicial review will be available.

2.247 In relation to the criteria for granting approval the minister advised that these will be set out in a policy document and would be consistent with the objects of the TG Act. The minister provided further detail in relation to the criteria including:

- for manufacture, storage and transport applications, applicants may need to show technical skills, appropriate facilities and resources and that they can meet minimum safety and quality requirements under the TG Act and other laws; and
- applicants may be expected to show their good character to indicate that vaping goods would not be diverted to criminal elements.

Committee comment

2.248 The committee acknowledges the minister's advice that the consent scheme is intended to deal with gaps in the overall regulatory scheme proposed by the bill and that this is designed to ensure that legitimate actors are not inadvertently exposed to regulatory action. However, it remains unclear to the committee why the power to grant consent could not be subject to appropriate legislative guidance.

2.249 In this light, the committee welcomes the further detail provided in the minister's response in relation to the criteria that it is envisaged will be imposed for applications made under proposed subsection 41RC(1). The committee notes that as per the minister's response there appears to exist a well-developed understanding as to how these applications will be determined. Noting this, it remains unclear to the committee why this important detail is being left to policy guidance as opposed to being set out on the face of the bill. At a minimum, the committee's view is that basic criteria in relation to resourcing, technical skills, ability to meet safety requirements, and good character tests could be set out on the face of the bill while preserving the ability for further criteria to be set out in delegated legislation.

2.250 The committee therefore requests the minister's advice as to whether consideration could be given to moving amendments to the bill to provide for appropriate legislative guidance in relation to the granting of consent under proposed subsection 41RC(1), including criteria on resourcing, technical skills, ability to meet safety requirements, and character requirements.

2.251 Alternatively, the committee seeks the minister's advice as to whether consideration could be given to any other mechanisms by which additional parliamentary scrutiny could be provided in relation to the consent scheme, for instance by providing for relevant factors to be considered in the exercise of the discretion to be set out in delegated legislation.

Enforcement notices

Availability of independent merits review[211]

2.252 Item 51 of Schedule 1 to the bill would insert proposed section 42YT into the TG Act, which would enable the secretary to issue enforceable directions under the TG Act or an instrument made under the TG Act. Proposed subsection 42YT(1) provides that the section applies if the secretary believes, on reasonable grounds, that a person is not complying with the TG Act or TG Act instrument in relation to particular goods, and it is necessary to exercise powers under this section to protect the health and safety of humans. Proposed subsection 42YT(2) provides that the secretary can issue directions to the person requiring the person to take a specified measure, within a specified period and at the person's own cost, including, for example, to relabel, or label, the goods in compliance with the TG Act or TG Act instrument (paragraph (a)), or repackage the goods in compliance with the TG Act or TG Act instrument (paragraph (b)).

2.253 Proposed subsection 42YT(4) would provide that it is an offence to fail to comply with a notice given under proposed subsection 42YT(2), with a penalty of up to 12 months imprisonment or 1000 penalty units, or both.

2.254 In *Scrutiny Digest 5 of 2024* the committee requested the minister's advice as to:

- the criteria that will be considered by the secretary when determining whether they believe on reasonable grounds that a person is not complying with the *Therapeutic Goods Act 1989* or its instruments; and
- whether proposed independent merits review is available for directions issued under proposed subsection 42YT(2) of the bill, and if not, why not.[212]

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211 Schedule 1, item 51, proposed section 42YT. The committee draws senators' attention to this provision pursuant to Senate standing orders 24(1)(a)(i) and (iii).

212 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) pp. 16–17.

Minister for Health and Aged Care's response[213]

2.255 In response, the minister pointed to the common law definition of 'reasonable grounds' to advise that 'a decision maker will need to point to facts (such as information or documents) which are sufficient to induce in the mind of a reasonable person that the person is in contravention of the elements of the relevant provision'. Next, the decision-maker will turn their mind to whether the exercise of powers under proposed subsection 42YT(2) is necessary to protect human health and safety, which the minister advises requires a proportionality assessment of the alternative measures available. The minister also referred to the existing powers to issue infringement notices under section 42YT of the TG Act which have no legislated criteria for consideration.

2.256 In relation to merits review, the minister advised that independent merits review is not available of the decision to issue an enforceable notice to ensure that timely enforcement action can be taken to deal with alleged unlawful goods. The minister notes that this approach is appropriate to ensure there is a balance between the protection of health and safety and a right to review of administrative decisions.

2.257 The minister further advised that procedural fairness requirements will apply and provide for a check on the use of this power including an opportunity for the directed person to make submissions, comment on any adverse information provided for, and propose alternative methods to ameliorate the concerns.

2.258 The minister also noted that judicial review is available to a person affected by a decision.

Committee comment

2.259 The committee's view is that the application of the criteria for making a decision in relation to proposed subsection 42YT(2) is necessarily discretionary. The committee's preferred position is that independent merits review is provided for any rights-affecting decision of a discretionary nature.

2.260 The committee acknowledges the minister's explanation of the counterbalancing need for the protections of health and safety and the procedural fairness requirements that will be afforded to affected persons. The committee further acknowledges the constraints upon the secretary in the making of an enforceable direction.

2.261 However, the committee notes that, unlike the decision to impose other administrative penalties, such as an infringement notice, the decision to make an enforceable direction involves a final or operative determination of substantive rights.

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213 The minister responded to the committee's comments in a letter dated 9 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to).

As such, the committee is of the view that a decision of this nature would ordinarily be subject to independent merits review.

2.262 The committee further notes that, as stated in the Administrative Review Council's guidelines, *What decisions should be subject to merit review?*, the availability of judicial review is not ordinarily a reason to exclude merits review, noting that judicial review is complementary to, but distinct from, merits review'.

2.263 **The committee therefore requests the minister's further advice as to the justification for exclusion from merits review of decisions made under proposed subsection 42YT(2) of the *Therapeutic Goods Act 1989* with reference to the principles set out in the Administrative Review Council's guidelines, *What decisions should be subject to merit review?***

Seizure of assets[214]

2.264 Item 54 of Schedule 1 to the bill would insert proposed section 52AAA into the TG Act, to empower the forfeiture of things seized by an authorised person under a search warrant. Proposed paragraph 52AAA(1)(b) provides that if the secretary believes, on reasonable grounds, that any of the following criteria have been met, then the thing is forfeited to the Commonwealth:

- the thing has been imported, manufactured or supplied in contravention of the TG Act or its instruments; or
- the thing has been in the possession, custody or control of a person in contravention of the TG Act or its instruments; or
- a requirement under the TG Act or its instruments has not been complied with in relation to the thing.

2.265 In *Scrutiny Digest 5 of 2024* the committee requested the minister's advice as to whether it is intended that use and derivative use immunities apply to materials incidentally seized and retained under proposed section 52AAA of the bill.[215]

Minister for Health and Aged Care's response[216]

2.266 The minister advised that only evidential material may be seized under a section 50 warrant due to section 47 of the TG Act, and the TG Act does not authorise sharing of seized materials between other state and Commonwealth agencies other

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214 Schedule 1, item 54, proposed section 52AAA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

215 Senate Scrutiny of Bill Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 17–18.

216 The minister responded to the committee's comments in a letter dated 9 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

than for the warrant purpose. As a result, the minister advised that use and derivative use is not applicable to proposed section 52AAA.

Committee comment

2.267 The committee thanks the minister for this response.

2.268 In light of the above the committee makes no further comment in relation to this matter.

Delegation of administrative powers and functions[217]

2.269 Item 86 of Schedule 1 to the bill seeks to insert proposed subsection 57(1A) into the TG Act. Proposed subsection 57(1A) would empower the secretary to delegate all or any of their powers and functions under Chapter 5A (enforcement), section 52AAA (forfeiture of things seized under search warrant) or section 52AAB (return of retention of thing declared not to be forfeited). The delegation may be to an officer of a Department of State of a State (paragraph (a)), a Department or administrative unit of the Public Service of a Territory (paragraph (b)), or an authority of a State or of a Territory (paragraph (c)).

2.270 However, in relation to proposed subsection 57(1A), the explanatory memorandum states that the delegation is intended to be to the head of the relevant departments and administrative units, as opposed to any officer of these bodies as set out in the subclause itself.

2.271 In *Scrutiny Digest 5 of 2024*, the committee requested the minister's advice as to the intended formulation of the delegation in proposed 57(1A) of the *Therapeutic Goods Act 1989*, with the committee noting its preference for the delegation to be limited to the head of the relevant departments and administrative units.[218]

Minister for Health and Aged Care's response[219]

2.272 The minister advised that the correct formulation of the provision is as per the bill, being that the delegation is to any officer a Department of State of a State, a department or administrative unit of the Public Service of a Territory, or an authority of a State or of a Territory. The minister advised that the explanatory memorandum will be updated accordingly.

2.273 The minister advised that it is necessary for the delegation to be to this level due to the significant volume of enforcement activities that are undertaken by the TGA

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217 Schedule 1, item 86, proposed subsection 57(1A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

218 Senate Scrutiny of Bill Committee, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 18.

219 The minister responded to the committee's comments in a letter dated 9 April 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 6 of 2024*).

in the vaping context, and the need for people with varying technical skills to execute enforcement activities. The minister elaborated that:

> Such powers are appropriately delegated to experienced and skilled persons who undertake investigations and related regulatory functions. It is anticipated that there may be a number of persons with different technical skills, including forensic data analysts, health officials and police officers, who will have jurisdiction to exercise powers under the applied laws.

2.274 The minister also noted that this delegation framework is consistent with existing regulatory framework in the TG Act, and that delegates would be subject to binding directions as to the exercises of their powers and functions.

Committee comment

2.275 The committee thanks the minister for clarifying the operation of the provision and committing to updating the explanatory memorandum to remove the ambiguity.

2.276 The committee also considers that the explanatory memorandum would benefit from further key information in the minister's response in relation to why it is necessary and appropriate for the broad delegation to be imposed.

2.277 The committee therefore requests that, in updating the explanatory memorandum to the bill to clarify the operation of the provision, the minister also include the key information contained in the minster's response in relation to the delegation provided for in proposed subsection 57(1A) of the *Therapeutic Goods Act 1989*.

Chapter 3
Scrutiny of standing appropriations[220]

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.[221] 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.[222]

3.4 The committee draws certain provisions of the Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024 to the attention of senators.[223]

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220 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations [2023] AUSStaCSBSD 105.

221 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*.

222 For further detail, see Senate Scrutiny of Bills Committee, *Fourteenth Report of 2005*.

223 Items 6 and 7 of Schedule 2 to the bill seek to amend the standing appropriation in section 59 of the *Parliamentary Business Resources Act 2017* but not so as to expand the scope of the standing appropriation.

Senator Dean Smith

Chair

Item 1 in Schedule 3 to the bill seeks to amend subsection 280(3) of the *National Anti-Corruption Commission Act 2022*, which contains a standing appropriation for the purposes of making payments of financial assistance to parliamentarians under arrangements prescribed in the regulations so as to expand the scope of the standing appropriation so that it includes payments of financial assistance to former parliamentarians. For further commentary on this item see the entry for the bill in this Scrutiny Digest.