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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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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.

Appropriation Bill (No. 1) 2024-2025
Appropriation Bill (No. 2) 2024-2025
Appropriation Bill (No. 5) 2023-2024
Appropriation Bill (No. 6) 2023-2024[1]

Purpose	Appropriation Bill (No. 1) 2024-2025 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government. Appropriation Bill (No. 2) 2024-2025 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure, and for related purposes. Appropriation Bill (No. 5) 2023-2024 seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government, in addition to the appropriations provided for by Appropriation Act (No. 1) 2023-2024 and Appropriation Act (No. 3) 2023-2024. Appropriation Bill (No. 6) 2023-2024 seeks to appropriate additional money out of the Consolidated Revenue Fund for certain expenditure, in addition to the appropriations provided for by Appropriation Act (No. 2) 2023-2024 and Appropriation Act (No. 4) 2023-2024.
Portfolio	Finance
Introduced	House of Representatives on 14 May 2024
Bill status	Passed both Houses on 25 June 2024

[1] This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 1) 2024-2025; Appropriation Bill (No. 2) 2024-2025; Appropriation Bill (No. 5) 2023-2024; Appropriation Bill (No. 6) 2023-2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 108.

Parliamentary scrutiny—ordinary annual services of the government[2]

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

1.3 Appropriation Bill (No. 1) 2024-2025 (Appropriation Bill No. 1) seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.4 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[3]

1.5 The Senate Standing Committee on Appropriations and Staffing[4] has also actively considered the inappropriate classification of items as ordinary annual services of the government.[5] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[6]

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

1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

2) That appropriations for expenditure on:

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2 Various provisions of Appropriation Bill (No. 1) 2024-2025 and Appropriation Bill (No. 5) 2023-2024. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

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

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

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

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

a) the construction of public works and buildings;

b) the acquisition of sites and buildings;

c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);

d) grants to the states under section 96 of the Constitution;

e) new policies not previously authorised by special legislation;

f) items regarded as equity injections and loans; and

g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.[7]

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

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.[8]

1.8 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies, for which money has not been appropriated in previous years, are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[9]

1.9 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than individual assessments as to whether a particular appropriation relates to a new program or project, continues. The committee notes that over a number of years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that

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7 Senate resolution 34. See *Journals of the Senate*, No. 127, 22 June 2010, pp. 3642–3643.

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

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

such expenditure may have been inappropriately classified as 'ordinary annual services'.[10]

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

- Endorsement of the Social Security Agreement between Australia and the Oriental Republic of Uruguay;[11]
- Agriculture and Land Sectors – low emissions future;[12]
- Regional cooperation initiative on carbon sequestration;[13] and
- Supporting Sports Participation.[14]

1.11 While it is not the committee's role to consider the policy merit of these measures, the committee considers that they may have been inappropriately classified as 'ordinary annual services', thereby impacting upon the Senate's ability to subject the measures to an appropriate level of parliamentary scrutiny. The committee considers that Appropriation Bill (No. 5) 2023-2024 (Appropriation Bill (No. 5)) likely raises similar concerns regarding measures inappropriately classified as 'ordinary annual measures'.

1.12 The committee has, on a number of previous occasions, written to the Minister for Finance in relation to the inappropriate classification of items in appropriation bills.[15] However, the Government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

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

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

11 Budget Measures 2024-25—Budget Paper No.2, p. 169.

12 Budget Measures 2024-25—Budget Paper No.2, p. 42.

13 Budget Measures 2024-25—Budget Paper No.2, pp. 59–60.

14 Budget Measures 2024-25—Budget Paper No.2, pp. 131–132.

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

1.14 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects. The committee considers that Appropriation Bill (No. 5) may raise similar issues regarding measures inappropriately classified as 'ordinary annual measures', and therefore repeats its scrutiny concerns in relation to that bill.

1.15 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in bills which should only contain appropriations that are not amendable by the Senate).

Parliamentary scrutiny—appropriations determined by the Finance Minister[16]

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

1.17 Subclause 10(2) of Appropriation Bill No. 1 provides that when the Finance Minister makes such a determination the Appropriation Bill has effect as if it were amended to make provision for the additional expenditure. Subclause 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Bill No. 1 at $400 million. Identical provisions appear in Appropriation Bill (No. 2) 2024-2025 (Appropriation Bill No. 2), with a separate $600 million cap in that bill.[17] The amount available under the AFM provisions in these bills together add up to $1 billion. The explanatory memoranda do not provide any justification as to why this amount is considered appropriate.

1.18 In relation to the exemption from disallowance, the explanatory memoranda to both bills explain that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for

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16 Clause 10 of Appropriation Bill (No. 1) 2024-2025; clause 12 of Appropriation Bill (No. 2) 2024-2025. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

17 Clause 12 of Appropriation Bill (No. 2) 2024-2025.

urgent expenditure'.[18] Nevertheless, the committee considers that, in allowing the Finance Minister to allocate additional funds to entities via non-disallowable delegated legislation, the AFM provisions in Appropriation Bills Nos 1 and 2 delegate significant legislative power to the Executive.

1.19 While this does not amount to a delegation of the power to create a new appropriation, the committee notes that one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[19] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

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

> …would reduce an entity's appropriation to its original level. Yet the urgent expenditure it had already undertaken validly prior to disallowance, in reliance upon the determination, would count towards the newly reduced appropriation…
>
> Accordingly, disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.[20]

1.21 While noting this explanation, the committee is of the view that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless there are exceptional circumstances, and any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.[21]

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18 Explanatory memorandum, p. 10.

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

20 Explanatory memorandum, p. 10.

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

1.22 The committee concurs with the view expressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the disallowance status of AFM determinations. In particular, the committee agrees that if the AFM is used for a genuine emergency situation, the likelihood of it subsequently being disallowed would be virtually non-existent, and therefore insufficient to justify an exemption from disallowance. Instead, the potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgent circumstances, as intended by the Parliament.[22]

1.23 Further, the committee considers alternative drafting approaches could be considered to manage the minimal risk of disallowance on the appropriation available for expenditure, for example by including a provision that ensures that expenditure already made under an AFM does not reduce the already approved appropriation if it is disallowed.

1.24 Finally, following previous correspondence between the committee and the minister during the COVID-19 pandemic which saw exceptionally high AFM caps introduced,[23] the committee welcomes the inclusion of additional information in the explanatory memoranda about transparency measures applying to AFMs.[24] The explanatory memorandum notes that:

> The following strong accountability and transparency arrangements will continue to apply to AFM determinations made during 2024-25, including:
>
> - registration of each AFM determination with an explanatory statement on the Federal Register of Legislation (legislation.gov.au);
> - a media release by the Finance Minister in weeks when AFMs are issued;
> - an annual assurance review by the Australian National Audit Office (ANAO); and
> - an annual report on the AFM allocations tabled in the Parliament, inclusive of the ANAO's assurance review report.[25]

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

23 See, for example, *Appropriation Act (No. 1) 2020-2021*, *Appropriation Act (No. 2) 2020-2021*, *Appropriation Act (No. 1) 2021-2022*, *Appropriation Act (No. 2) 2021-2022*, *Appropriation (Coronavirus Response) Act (No. 1) 2021-2022*, *Appropriation (Coronavirus Response) Act (No. 2) 2021-2022*, Appropriation *Act (No. 1) 2022-2023* and *Appropriation Act (No. 2) 2022-2023* which set Advance to the Finance Minister caps at $4 billion, $6 billion, $2 billion, $3 billion, $2 billion, $3 billion, $2.4 billion and $3.6 billion respectively.

24 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021* (16 June 2021) pp. 8–11 and *Scrutiny Digest 13 of 2021* (25 August 2021) pp. 20-21.

25 Explanatory memorandum to Appropriation Bill (No. 1) 2024-2025, p. 9.

1.25 The committee considers that the provision of this additional information provides the Parliament with important details to assist in scrutiny of the AFM provisions and welcomes its continued inclusion.

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

- **how the combined cap of $1 billion to the additional amounts that may be allocated by the Finance Minister (AFM) in Appropriation Bills (No.1) and (No. 2) 2024-2025 was determined;**
- **whether alternative approaches could be considered in striking the appropriate balance between the necessity of the Parliament authorising and scrutinising expenditure and addressing genuine emergency situations; and**
- **whether explanatory statements to AFMs could include a statement justifying the urgent need for expenditure that is not provided for, or is insufficiently provided for, by the relevant appropriation bills.**

Parliamentary scrutiny—measures marked 'not for publication'[26]

1.1 Clause 4 of both Appropriation Bill (No. 1) and Appropriation Bill (No. 2) provide that portfolio budget statements (PBS) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PBS may be considered in interpreting the provisions of each bill. Moreover, the explanatory memoranda to the bills state that they should be read in conjunction with the PBS.[27]

1.27 Noting the important role of the PBS in interpreting Appropriation Bills Nos 1 and 2, the committee has scrutiny concerns in relation to the inclusion of measures within the PBS that are marked as 'not for publication' (nfp), meaning that the proposed allocation of resources to those budget measures is not published within the PBS. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are commercial-in-confidence or relate to matters of national security.

1.28 Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the full amount of funding allocated to each budget measure. However, where it is necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the portfolio

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[26] Clauses 4 and 6 and Schedule 1 to Appropriation Bill (No. 1) 2024-2025; clauses 4 and 6 and Schedule 2 to Appropriation Bill (No. 2) 2024-2025. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

[27] Explanatory memorandum to Appropriation Bill (No. 1) 2024-2025, p. 2; explanatory memorandum to Appropriation Bill (No. 2) 2024-2025, p. 2.

statements. The committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the portfolio statements that are earmarked as nfp where there is either no, or only a very limited, explanation as to why it is appropriate to mark the measure as nfp.

1.29 In *Scrutiny Digest 16 of 2021*, the committee requested that future Department of Finance guides on preparing portfolio budget statements be updated to include guidance that, where a measure is marked as nfp, at least a high-level explanation should be included within the portfolio budget statements explaining why this is appropriate.[28] As a result, the Department of Finance updated the Guide to Preparing the Portfolio Budget Statements to reflect the committee's scrutiny concerns.[29] The committee notes that the most recent Department of Finance *Guide to Preparing the 2024-25 Portfolio Budget Statements* also includes advice reflecting the committee's scrutiny concerns.[30]

1.30 The committee notes that despite the inclusion of this advice it nevertheless has scrutiny concerns in relation to the lack of detailed explanation provided within the PBS. In *Scrutiny Digest 3 of 2024*, the committee requested the minister's advice as to whether future guides could include guidance that, where a measure is marked as nfp, as much detail should be provided as is necessary to substantiate the decision to not publish the financial details for the measure due to the public interest.[31] The minister responded advising that they had asked the department to 'consider, where possible, enhancing the guidance on information which may be provided…'. [32] The committee notes that this recent commitment has likely not yet been implemented, as the level of explanation provided within the PBS remains high-level. For example, the majority of explanations for measures marked as nfp within the 2024-25 portfolio statements merely state that the funding for a measure is not for publication due to commercial-in-confidence considerations, or due to national security reasons.

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

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

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

30 Department of Finance, *Guide to preparing the 2024-25 Portfolio Budget Statements*, pp. 35-36.

31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 16–17.

32 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2024* (20 March 2024) p. 20.

committee why it is appropriate not to publish total amounts in relation to the Australian Universities Accord – tertiary education system reforms[33] or the Capacity Investment Scheme.[34]

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

1.33 Finally, the committee notes that there has been a significant upwards trend in the number of nfp measures being included within Budget Paper No. 2. For example, Budget Paper No. 2 for the 2004-05 budget contained seven references to the term nfp, while Budget Paper No. 2 for the 2023-24 budget contained 240 nfp references. Budget Paper No. 2 for the 2024-25 budget contains 228 nfp references.

1.34 Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself.'[35] Given the Parliament's fundamental scrutiny role over the appropriation of money from the Consolidated Revenue Fund, the committee has scrutiny concerns in relation to the proliferation of measures within the PBS for which the proposed allocation of resources is not published. Any decision not to publish the total amount for a budget measure must be weighed against the significance of abrogating Parliament's fundamental scrutiny role.

1.35 The committee considers that Appropriation Bills (No. 5) and (No. 6) 2023-2024 may raise similar issues regarding the inclusion of measures within the portfolio additional estimate statements that are earmarked as 'not for publication' (nfp) and reiterates its scrutiny concerns in relation to these bills.

1.36 In light of the above, the committee reiterates its significant concerns that the Parliament is being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual budget measure. The committee's concerns in relation to measures marked as 'not for

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33 Attorney-General's Department, *Portfolio Budget Statements 2024-25*, pp. 15 and 317.

34 Department of Climate Change, Energy, the Environment and Water, *Portfolio Budget Statements 2024-5*, p. 39.

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

publication' (nfp) are heightened in light of the upwards trend in the number of measures marked as nfp.

1.37 The committee reiterates its view that, notwithstanding the welcome guidance in the Department of Finance's *Guide to Preparing the 2024-25 Portfolio Budget Statements*, it would be appropriate to include more detailed explanations within the portfolio budget statements explaining why it is appropriate to mark a measure as nfp, where possible.

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

Parliamentary scrutiny—section 96 grants to the states[36]

1.39 Clause 16 of Appropriation Bill No. 2 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.40 Clause 16 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[37] and
- the amounts and timing of those payments.[38]

1.41 Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum states that this is:

> …because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[39]

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36 Clause 16 and Schedules 1 and 2 to Appropriation Bill (No. 2) 2024-2025. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

37 Paragraph 16(2)(a) of Appropriation Bill (No. 2) Bill 2024-2025.

38 Paragraph 16(2)(b) of Appropriation Bill (No. 2) Bill 2024-2025.

39 Explanatory memorandum to Appropriation Bill (No. 2) 2024-2025, p. 13.

1.42 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[40]

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

1.44 The committee notes that important progress has been made to improve the provision of information regarding section 96 grants to the states since the 2017-18 budget, following suggestions originally made by the committee in *Alert Digest 7 of 2016*.[41] These improvements include: the addition of an Appendix E to Budget Paper No. 3,[42] which provides details of the appropriation mechanism for all payments to the states and the terms and conditions applying to them; and a mandatory requirement for the inclusion of further information in portfolio budget statements where departments and agencies are seeking appropriations for payments to the states, territories and local governments.[43]

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

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

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

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

42 Budget Measures 2024-25—Budget Paper No.3, Appendix E.

43 See Department of Finance, *Guide to Preparing the 2024-25 Portfolio Budget Statements*, pp. 26-27.

1.47 The committee leaves to the Senate as a whole the appropriateness of clause 16 of Appropriation Bill (No. 2) 2024-2025, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

Parliamentary scrutiny—debit limits[44]

1.48 Clause 13 of Appropriation Bill (No. 2) 2024-2025 specifies debit limits for both general purpose financial assistance and national partnership payments.

1.49 The *Federal Financial Relations Act 2009* sets up a standing appropriation through which the Commonwealth is able to provide financial assistance for the delivery of services to the states for general purpose financial assistance (funding to the states with no conditions on how they use the funding),[45] and national partnership payments (funding to support the delivery of specified outputs or projects, facilitate reforms, or to reward the states for nationally significant reforms).[46]

1.50 The minister may make a determination under sections 9 or 16 of the *Federal Financial Relations Act 2009* to provide this financial assistance.[47] These ministerial determinations are legislative instruments which are not subject to disallowance.[48]

1.51 Further, the amounts payable under these determinations are subject to the debit limit prescribed in the Appropriation Acts. A debit limit must be set each financial year otherwise grants under these programs cannot be made.[49] The total amount of grants cannot exceed the relevant debit limit set each year.[50]

1.52 The explanatory memorandum explains the purpose of setting debit limits:

> Specifying a debit limit in clause 13 is an effective mechanism to manage expenditure of public money as the official or Minister making a payment of public money cannot do so without this authority. The purpose of doing so

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44 Clause 13 of Appropriation Bill (No. 2) 2024-2025. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

45 *Federal Financial Relations Act 2009*, section 9.

46 *Federal Financial Relations Act 2009*, section 16.

47 If the minister determines an amount under subsections 9(1) and 16(1) of the *Federal Financial Relations Act 2009*, the amount must be credited to the Council of Australian Governments (COAG) Reform Fund. The COAG Reform Fund is automatically debited via the special appropriation mechanism in section 80 of the *Public Governance, Performance and Accountability Act 2013*.

48 *Federal Financial Relations Act 2009*, subsections 9(4) and 16(4).

49 *Federal Financial Relations Act 2009*, subsections 9(5) and 16(5).

50 *Federal Financial Relations Act 2009*, subsections 9(3) and 16(3).

is to provide Parliament with a transparent mechanism by which it may review the rate at which amounts are committed for expenditure.[51]

1.53 This bill proposes the following debit limits for 2024-25:

- general purpose financial assistance to the states—$5 billion;[52] and
- national partnership payments to the states—$37 billion.[53]

1.54 In *Scrutiny Digest 13 of 2021*, the committee welcomed the minister's advice that additional information about the expected level of expenditure against debit limits can be included in the explanatory memoranda to future Appropriation Bills where appropriate.[54]

1.55 In relation to the $5 billion debit limit for general purpose financial assistance to the states, the explanatory memorandum does not state the expected expenditure however Budget Paper No. 3 states that it is expected the payments will be $711.4 million.[55] This means that over $4 billion in general purpose financial assistance can be made without the need to seek further parliamentary approval.

1.56 In relation to the $37 billion debit limit for national partnership payments, the committee notes that the explanatory memorandum states that it is expected that national partnership payments will be $26.7 billion in 2024-25, while the budget papers state that it is expected that national partnership payments will be $24 billion.[56] In either case, it appears that the debit limit proposed in this bill would allow approximately $10-13 billion in national partnership payments to be made without the need to seek further parliamentary approval.

1.57 The committee further notes that a $35 billion debit limit was initially introduced for national partnership payments in *Appropriation Act (No. 4) 2021-2022*,[57] and the explanatory memorandum to that Act explained that this was increased on a one-off basis given the ongoing nature of the COVID-19 pandemic.[58] The explanatory memorandum to this bill does not acknowledge the ongoing large increase in the debit limit, in this case a higher limit than during the COVID-19 pandemic years, and instead it explains that:

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51 Explanatory memorandum to Appropriation Bill (No. 2) 2024-25, p. 11.

52 Subclause 13(1) of Appropriation Bill (No. 2) 2024-2025.

53 Subclause 13(2) of Appropriation Bill (No. 2) 2024-2025.

54 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2021* (25 August 2021) p. 24.

55 *Federal Financial Relations: Budget Paper No. 3 2024-25*, p. 121.

56 Explanatory memorandum to Appropriation Bill (No. 2) 2024-2025, p. 11; *Federal Financial Relations: Budget Paper No. 3 2024-25*, p. 15.

57 Subsection 13(1) of *Appropriation Act (No. 4) 2021-2022*.

58 Explanatory memorandum to *Appropriation Act (No. 4) 2021-2022*, p. 12.

> Since 2014-15, the debit limit has generally been between $10,000 million and $15,000 million above the expected level of spending under section 16 of the FFR [Federal Financial Relations] Act. The debit limit provided in subclause 13(2) would mitigate the risk of reaching the limit in the event that unexpected circumstances arise. The limit is set to ensure the Government has appropriate provision in place to fund existing undertakings to the States, new programs that may be required between Appropriation Acts, and to respond to major unexpected events such as large-scale natural disasters.[59]

1.58 While the committee acknowledges this rationale, it considers that setting a debit limit substantially higher than expected expenditure may undermine the stated intention of the debit limit regime—that is, to provide Parliament with a 'transparent mechanism by which it may review the rate at which amounts are committed for expenditure'.[60] Setting such high limits, alongside the power of the minister to authorise the funding of further grants by non-disallowable determination, means that significant new expenditures can be made without oversight by the Parliament and therefore greatly reduces transparency over expenditure of public money.

1.59 The committee considers it is appropriate for the debit limit to more closely match the expected level of expenditure and for new appropriation bills to be introduced for parliamentary consideration where the debit limit may be exceeded.

1.60 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of setting debit limits for these grant programs well above the expected level of expenditure, noting that this practice appears to undermine the effectiveness of the debit limit regime as a mechanism for ensuring meaningful parliamentary oversight of these grant programs.

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59 Explanatory memorandum to Appropriation Bill (No. 2) 2024-2025, pp. 11–12.

60 Explanatory memorandum to Appropriation Bill (No. 2) 2024-2025, p. 11.

Criminal Code Amendment (Deepfake Sexual Material) Bill 2024[61]

Purpose	The bill seeks to amend the *Criminal Code Act 1995* in relation to offences targeting the creation and non-consensual sharing of sexually explicit material online, including material that has been created or altered using technology such as deepfakes.
Portfolio	Attorney-General
Introduced	House of Representatives on 5 June 2024
Bill status	Before the House of Representatives

Broad scope of offence provisions[62]

1.61 Item 5 of Schedule 1 to the bill introduces proposed section 474.17A into the *Criminal Code Act 1995* (the Criminal Code), which replaces the existing (aggravated) offence of using a carriage service to menace, harass or cause offence by the transmission of private sexual material. In doing so, proposed section 474.17A creates an offence of using a carriage service to transmit material of another person and the material depicts or appears to depict the other person engaging in a sexual pose or sexual activity or depicts a sexual organ or the anal region or the breasts of the other person. The fault element in relation to this offence is provided in proposed paragraph 474.17A(1)(d); that the first person knows or is reckless as to whether the other person did not consent to the transmission. The offence set out in proposed section 474.17A is the underlying offence[63] and carries a maximum penalty of imprisonment for 6 years.

1.62 As part of the amendments to the existing offence made by proposed section 474.17A, there is no longer a requirement that the transmission be regarded as menacing, harassing or offensive.[64] Existing section 473.1 of the *Criminal Code Act 1995* (Criminal Code) sets out a separate test used to determine when material is taken to be offensive. However, the removal of the requirement for the transmitted material to be offensive makes it unclear as to whether existing section 473.1 is applicable to the offence under proposed section 474.17A.

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61 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 109.

62 Schedule 1, item 5, proposed section 474.17A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

63 Proposed subsection 474.17AA(1).

64 *Criminal Code Act 1995*, subsection 474.17(1).

1.63 Further, the offence under existing section 474.17A of the Criminal Code requires that the transmission be of private sexual material, which is currently defined as material that depicts a person in a sexual pose or activity or material that depicts a sexual organ or the anal region or the breasts of a person in circumstances that the reasonable person would regard as giving rise to an expectation of privacy.[65] As Item 1 of Schedule 1 repeals the definition of private sexual material, the offence under proposed section 474.17A does not require that the transmission has occurred in circumstances that the reasonable person would regard as giving rise to an expectation of privacy.

1.64 Proposed subsection 474.17A(2) clarifies that for the purposes of the offence under proposed section 474.17A, it is irrelevant whether the material transmitted is in an unaltered form or has been created or altered using technology. A note to this subsection explains this is intended to capture material including 'deepfakes'.

1.65 When offence provisions are drafted in broad terms and without clear definitions in the bill, there may be substantial variation in the way the legislation is interpreted and applied in practice. This lack of clarity may unduly trespass on an individual's rights and liberties, as it is uncertain what an individual is and is not able to do. The committee considers that any offence provisions should be clearly drafted and sufficiently precise to ensure that any person may understand what may constitute an offence and the explanatory memorandum should explain what key terms mean and how they are intended to operate.

1.66 In this instance, the committee notes that there is no definition provided for the term 'sexual pose' in proposed subsection 474.17A(1) in relation to the transmitted material. The explanatory memorandum also does not provide clarity on how this term should be interpreted and it is unclear what is expected to constitute a sexual pose for the purposes of the offence under proposed section 474.17A.

1.67 The committee's concerns are heightened in this instance as there is also a lack of clarity as to how material that depicts a sexual pose of another person is of a nature that will be prosecuted under proposed section 474.17A. In relation to this matter, the explanatory memorandum does not clarify whether existing subsection 473.1(1) will apply to the offence under proposed subsection 474.17A(1). As a result of the amendments, there is no requirement under proposed subsection 474.17A(1) that the transmission be of a nature that is offensive, as the proposed offence rather relies on the content being transmitted without consent.

1.68 The committee further notes the removal of the existing requirement for the material to depict a person in circumstances that a reasonable person would regard gives rise to an expectation of privacy. In relation to this, the explanatory memorandum explains:

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65 *Criminal Code Act 1995*, section 473.1.

> In recent years, the creation and distribution of sexual material created or altered using technology is increasingly more common as AI programs become more accessible and ubiquitous. This type of AI-generated material is commonly referred to as 'deepfakes'. The issue that arises when dealing with such material under the current framework is that because the victim is not involved in the creation of the fictional 'deepfake' version of themselves, an expectation of privacy may not attach to the depiction of the victim. This issue does not arise with the new offences, which do not rely on this definition and instead turn on whether the person depicted in the material consents to its transmission.[66]

1.69 While the committee accepts the explanation that technological advances have led to material being created that does not capture an actual person, but rather uses AI-generated material which may closely resemble an actual person, the committee is concerned that in instances where the transmitted material is in relation to a person, rather than an AI-generated version, the offence provision is now broad enough to capture material that is not intended to be the subject of this offence. This is particularly so as the material need not be of a sexual pose, and it is sufficient for the material to depict genitalia to be captured by proposed paragraph 474.17A(1)(c). The committee queries whether there may be situations in which non-sexual nudity is acceptable, where there is no reasonable expectation of privacy, and seeking consent as to transmitting this material may not always be feasible (particularly as not providing thought to whether or not the person is consenting is sufficient to constitute recklessness as the fault element for this offence).[67]

1.70 The committee therefore queries whether consideration was given to retaining the existing offence in section 474.17A of the Criminal Code for transmission of private sexual material, while creating a new offence targeted at deepfake material, and is seeking advice on the approach taken in the bill to assist the committee in assessing these scrutiny issues.

1.71 In light of the above, the committee requests the Attorney-General's advice as to:

- **whether a definition of the term 'sexual pose' can be provided;**
- **whether clarity can be provided as to whether existing subsection 473.1(1) applies to the offence under proposed subsection 474.17A(1); and**
- **why the offence under existing section 474.17A of the *Criminal Code Act 1995* has been broadened to capture AI-Generated material as opposed to creating of a separate offence to prosecute such material?**

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66 Explanatory memorandum, p. 4.

67 Proposed subsection 474.17A(5).

Reversal of the evidential burden of proof[68]

1.72 Proposed subsection 474.17A(3) provides a number of exceptions to the offence under proposed subsection 474.17A(1). These exceptions include where transmitting the material is necessary for or of assistance in enforcing a law or monitoring compliance with, or investigating a contravention of the law;[69] the transmission is necessary for the purposes of proceedings in a court or tribunal;[70] or a reasonable person would consider transmitting the material to be acceptable, having regard to various circumstances, which includes the age, intellectual capacity or vulnerability of the person being depicted, the degree to which the transmission affects the privacy of the person being depicted, and the relationship between the person transmitting the material and the person depicted.[71] A note to this provision clarifies that a defendant bears the evidential burden of proof in relation to these matters.

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

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[72]

1.75 In relation to these exceptions, the explanatory memorandum provides the following explanation:

> It is reasonable and necessary for the burden of proof to be placed on the defendant in relation to the defences provided for in the Bill. If a person had a particular reason for thinking that they were transmitting the material for legitimate purposes or in circumstances where it would have been

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68 Schedule 1, Item 5, proposed subsection 474.17A(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

69 Proposed paragraph 474.17A(3)(a).

70 Proposed paragraph 474.17A(3)(b).

71 Proposed paragraph 474.17A(3)(d).

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

> considered reasonable and acceptable, it would not be difficult for them to describe how they came to those conclusions. It would be significantly more cost effective for the defendant to assert this matter rather than the prosecution needing to prove, beyond a reasonable doubt, that the transmission of the material without consent was neither necessary, reasonable, or for a genuine purpose, in all the circumstances.[73]

1.76 It is unclear to the committee how evidence that a transmission for the purposes of complying with or enforcing a law, or a transmission that is necessary for the purpose of a court or tribunal proceeding is both peculiarly within the defendant's knowledge and significantly more costly and difficult for the prosecution to obtain. The committee understands that in both instances, a court, tribunal or other authority, such as the police, should be aware of the necessary information or evidence and there are appropriate channels available for prosecution to obtain this information or evidence from these bodies. The committee also notes that it is not sufficient for it to be more 'cost effective' for the defendant to assert a matter, but rather that it must be *significantly* more costly for prosecution to do so, in addition to the relevant information being peculiarly within the defendant's knowledge.

1.77 Further, in relation to the exception under proposed paragraph 474.17A(3)(d), it is unclear to the committee how what a reasonable person would consider in relation to a transmission is a matter that is peculiarly within any person's knowledge. The committee further notes that the circumstances to which a reasonable person would have regard to in this exception, such as the age, intellectual capacity, vulnerability, and violation of privacy of the person being depicted, and the nature of their relationship with the person capturing the material, are not information or evidence in relation to the transmission. Rather, these are perceptions of the transmission itself. The committee considers that this indicates the offence may be drafted in overly broad terms, and that these are matters that are more appropriately disproven by prosecution by including them as elements of the offence under proposed subsection 474.17A(1).

1.78 As the explanatory materials do not adequately address this issue, the committee requests the Attorney-General's detailed justification as to why it is proposed to use offence-specific exceptions (which reverse the evidential burden of proof) in relation to the offence under proposed subsection 474.17A(1), and requests further guidance as to the operation of the exceptions.

1.79 In relation to the exception under proposed paragraph 474.17A(3)(d), the committee seeks the Attorney-General's justification as to why these matters have not been included as elements of the offence under proposed subsection 474.17A(1).

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[73] Explanatory memorandum, p. 7.

Undue trespass on rights and liberties[74]

1.80 Item 5 of Schedule 1 to the bill introduces proposed subsection 474.17AB(5), which provides that if a person has been convicted of the aggravated offence under subsection 474.17AA(1) ('aggravated offence'), and that conviction has been set aside under subsection 474.17AB(4), the setting aside of the conviction does not prevent the prosecution from instituting proceedings against the person for an offence under subsections 474.17A(1) or 474.17AA(5), for the same conduct.[75]

1.81 In order to be convicted of the aggravated offence under proposed subsection 474.17AA(1), an individual has to commit the offence under subsection 474.17A(1), which is the underlying offence.[76] Then, for the aggravated offence, the individual must also have 3 or more civil penalty orders made against them under the *Regulatory Powers (Standard Provisions) Act 2014* prior to conviction of the underlying offence. Proposed section 474.17AB also sets out provisions to prevent double jeopardy, which state that a person who has been convicted or acquitted of the aggravated offence cannot then be convicted of the underlying offence.[77] Similarly, a person who has been acquitted of the underlying offence cannot be convicted of the aggravated offence.[78]

1.82 Under proposed subsection 474.17AB(4), if a person has been convicted of the aggravated offence, but one or more of the civil penalty orders made against the person was set aside or reversed on appeal, and if without those civil penalty orders, the person could not have been convicted of the aggravated offence, then the court must set aside the conviction.

1.83 In this instance, the explanatory memorandum does not provide any explanation for this provision, and only describes it.

1.84 The committee is concerned in this instance that a defendant could possibly be required to stand trial twice for the same factual circumstances, when guilt as to the offence relevant to the second proceeding would already have been established in the first proceeding. The committee notes the impact criminal trials have on individuals therefore considers a strong justification should be provided as to why it is necessary in this instance for an individual to stand trial twice.

1.85 In light of the above, the committee seeks the Attorney-General's justification as to why it is necessary for the prosecution to institute proceedings as a result of proposed subsection 474.17AB(5) for an offence under proposed subsection 474.17A(1) when a conviction is set aside under proposed subsection

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74 Schedule 1, item 5, proposed subsection 474.17AB(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

75 Proposed subsection 474.17AB(5).

76 Proposed paragraph 474.17AB(1)(a).

77 Proposed subsection 474.17AB(1).

78 Proposed subsection 474.17AB(3).

474.17AB(4), noting that this would require a person to stand trial twice for the same factual circumstances when guilt as to the offence under proposed subsection 474.17A(1) would already have been established in a previous proceeding.

Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024[79]

Purpose	The bill seeks to amend the *Defence Act 1903* to establish the Parliamentary Joint Committee on Defence to replace the Joint Standing Committee on Foreign Affairs, Defence and Trade and have general oversight of Australian defence agencies, other than the Australian Geospatial-Intelligence Organisation, the Australian Signals Directorate and the Defence Intelligence Organisation.
Portfolio	Defence
Introduced	House of Representatives on 30 May 2024
Bill status	Before the House of Representatives

Insufficient parliamentary scrutiny[80]

1.86 Schedule 1 to the bill seeks to introduce Part VIIIAB into the *Defence Act 1903*, to establish the Parliamentary Joint Committee on Defence (PJCD). Proposed Division 3 of Part VIIIAB seeks to introduce provisions relating to the procedures that apply to the PJCD, including how it obtains information, takes evidence and publishes or discloses reports. The provisions include measures to consider 'protected information'[81] by providing for circumstances in which a minister can limit or restrict how the PJCD conducts itself. For example:

- proposed section 110ACA—the PJCD can only require the production of some types of 'protected information' if the Minister responsible for the Commonwealth entity from which the information originates authorises its disclosure;

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79 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 110.

80 Schedule 1, item 2, proposed Part VIIIAB. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

81 Proposed subsection 4(1) seeks to define 'protected information' to mean: operationally sensitive information; information that would or might prejudice Australia's national security or foreign relations; information that would or might prejudice the performance by an Australian defence agency or agency in the national intelligence community of its functions; naval nuclear propulsion information; and information relating to an inquiry or investigation by the Inspector-General Australian Defence Force that is being conducted.

- proposed section 110ACE—the minister can give a certificate to the presiding committee member stating that a person should not give evidence or produce documents to the committee in relation to particular matters;
- proposed section 110ACG—limits when the committee may disclose or publish evidence or documents in relation to proceedings conducted in private and evidence that involves protected information;
- proposed section 110ACH—restricts the committee from disclosing protected information in a report to a House of Parliament by requiring the committee to obtain ministerial advice and authorisation; and
- proposed subsection 110AEH(2)—the committee must not conduct proceedings in public without the minister's approval.

1.87 The explanatory memorandum notes that these processes are in addition to processes associated with public interest immunity in parliamentary committees which will continue to apply. In relation to ministerial certificates, the explanatory memorandum explains in section 110ACE:

> It is appropriate that a decision to issue a certificate under this section cannot be questioned in a court and tribunal, noting:
>
> a. Ministers are accountable to the Parliament for a decision to issue a certificate, noting that they must provide a copy of the certificate to the President of the Senate and Speaker of the House of Representatives (subsection 110ACE(7)).
>
> b. It is not appropriate for a court or tribunal to intervene in this way with processes of parliamentary committees.
>
> c. There is a strong public interest in certainty when a certificate is issued, to protect the operationally sensitive and other damaging information from uncontrolled disclosure.[82]

1.88 These provisions are largely modelled off the *Intelligence Services Act 2001* which establishes the Parliamentary Joint Committee on Intelligence and Security.

1.89 The committee considers that these provisions provide for the executive to restrict the ability of this parliamentary committee to operate as it sees fit. By controlling the kinds of information and evidence that the PJCD can receive and restricting what the PJCD may disclose or publish, this limits the ability of the PJCD and the parliament to oversee and scrutinise information that comes before it.

1.90 The committee considers that while there are valid national security reasons for introducing these limitations on the procedures of the committee, it is unclear why these cannot be managed with the existing public interest immunity processes. Nevertheless, the committee notes that this bill seeks to establish these limitations in relation to a particular parliamentary committee and not committees more broadly.

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[82] Explanatory memorandum, p. 12.

The committee also notes that the Senate Foreign Affairs, Defence and Trade committee will continue to have oversight over the defence portfolio and can inquire into matters in the Defence and Foreign Affairs and Trade portfolios in the usual manner.

1.91 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of establishing a parliamentary committee with powers to conduct itself limited by the executive.

Significant penalties[83]

1.92 Division 4 of Part 1 of Schedule 1 to the bill sets out a number of offences that apply in relation to the PJCD, including offences for the disclosure of evidence, documents and information in certain circumstances, failure to attend or produce documents when required, giving false evidence, and threatening or improperly influencing witnesses. These offences can only be prosecuted with the consent of the Attorney-General.[84] Generally, the offences and penalties closely align with the *Intelligence Services Act 2001* in relation to the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

1.93 Subsection 110ADG(1) provides that it is an offence if a current or former committee member, or staff member of the committee or committee member, directly or indirectly makes a record of, or disclosure or communicates to, a person any information acquired because of holding that office or employment, or produces to a person a document provided to the committee for the purposes of enabling the committee to perform its functions, and does so not for the purposes of enabling the committee to perform its functions. The penalty for this offence is five years imprisonment, 300 penalty units, or both.

1.94 The committee considers that, where significant penalties are imposed, the rationale should be fully outlined in the explanatory memorandum, and should be justified by reference to similar offences in Commonwealth legislation or if not, why not. This promotes consistency and guards against the risk that a person's liberty is unduly limited through the application of disproportionate penalties.

1.95 In this case, the explanatory memorandum explains:

> The maximum penalty for this offence is five years imprisonment or 300 penalty units, or both. This penalty reflects the gravity of the responsibility of Committee members and their staff, who are provided with, or may come into the possession of in the course of their work, sensitive information in

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83 Schedule 1, proposed subsection 110ADG(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

84 Proposed section 110ADH.

order to allow close scrutiny by the Committee of defence operations and other matters.[85]

1.96 While acknowledging this explanation, the committee notes that a similar secrecy offence in the *Intelligence Services Act 2001* in relation to the PJCIS is subject to a smaller penalty of two years imprisonment, 120 penalty units, or both.[86] It is therefore unclear to the committee why the proposed penalty amount is considered appropriate. The committee's concerns are further heightened in this instance as the offence appears not to be limited to 'protected information' but 'any information', and this is not explained further in the explanatory memorandum.

1.97 In light of the above, the committee requests the minister's advice as to the appropriateness of the penalty proposed in subsection 110ADG(1).

1.98 The committee's consideration of the appropriateness of this provision would be assisted if the minister's response explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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85 Explanatory memorandum, p. 18.

86 *Intelligence Services Act 2001*, section 12.

Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024[87]

Purpose	The bill seeks to amend the *Education Services for Overseas Students Act 2000* to support the quality, integrity and sustainable growth of the international education sector. The bill seeks to address issues identified in the Rapid Review into the Exploitation of Australia's Visa System (the Nixon Review) and the Government's Migration Strategy.
Portfolio	Education
Introduced	House of Representatives on 16 May 2024
Bill status	Before the House of Representatives

Significant penalties[88]

1.99 Item 13 of Schedule 1 to the bill seeks to insert proposed paragraph 108(c) into existing section 108 of the *Education Services for Overseas Students Act 2000* (the Act). Proposed paragraph 108(c) would list new section 21B to provide that a person commits an offence if they provide false or misleading information in complying or purporting to comply with proposed section 21B. Proposed section 21B would be inserted into the Act by item 10 of Schedule 1 to the bill and empowers the secretary to request specific information from registered providers in relation to education agent commissions.

1.100 Existing section 108 of the Act provides a penalty of 12 months imprisonment.

1.101 The committee considers that, where significant penalties are imposed, the rationale should be fully outlined in the explanatory memorandum, and should be justified by reference to similar offences in Commonwealth legislation. This promotes consistency and guards against the risk that a person's liberty is unduly limited through the application of disproportionate penalties.

1.102 The committee notes that the explanatory memorandum does not justify why it is necessary and appropriate for the existing penalty of 12 months imprisonment to be applied to providers who give false and misleading information to the secretary in relation to a request for information about education agent commissions.

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87 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 111.

88 Schedule 1, item 13, proposed paragraph 108(c). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

1.103 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole to consider the appropriateness of the imposition of 12 months imprisonment without justification.

Privacy[89]

1.104 Items 21 and 22 of Schedule 1 to the bill respectively seek to insert proposed paragraph 175(3)(c) and proposed subsection 175(6) into the Act.

1.105 Proposed paragraph 175(3)(c) provides that information relating to the exercise of functions by education agents can be disclosed to the Secretary or the Education Services for Overseas Students (ESOS) agency for a provider or a registered provider, for the purposes of protecting and enhancing Australia's reputation for quality education and training services for accepted students. Proposed subsection 175(6) provides additional categories of information that may be disclosed, including the number of transfers of accepted students, recruited or otherwise dealt with by an education agent and information about education agent commissions in connection with the recruitment of accepted students.

1.106 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).

1.107 The explanatory memorandum provides:

> The amendments to subsection 175(3) of the ESOS Act aim to achieve transparency of education agent practices and behaviours through strengthening the ability of the Secretary, or relevant ESOS agency, to give information relating to the exercise of functions by education agents to registered providers. The amendments, aimed at assisting providers to make better decisions about which agents to engage (based on a range of agent information), go towards protecting and enhancing Australia's reputation for quality education and training services for accepted students.
>
> […]
>
> The information relating to functions of education agents will be given to registered providers in a controlled, access restricted platform and it is expected that providers will use this information to decide which education agents to engage and work with on agent-based activities, such as the recruitment of students. For example, a provider may choose to work with education agents who have a lower rate of course transfers (an indicator of student satisfaction) or lower commissions, and not choose to use agents

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89 Various provisions of the bill including Schedule 1, item 21, proposed paragraph 175(3)(c) and item 22 proposed subsection 175(6). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

> who have a pattern of high visa refusals and high commission rates. Some of the agent information is given by providers to the department under section 19 of the ESOS Act, specifically, for the purposes of subsection 19(1) of the ESOS Act and as prescribed in the Education Services for Overseas Students Regulations 2019 (ESOS Regulations). Providers will be required to give information about education agent commissions under new section 21B which is being inserted in the ESOS Act by Part 1 of Schedule 1 to this Bill.[90]

1.108 In this instance, it is not clear what type of information will be disclosed under proposed paragraph 175(3)(c) and whether disclosed material can include personal information. Although categories of information that may be disclosed are provided under proposed subsection 175(6), it is not apparent whether information in relation to education agent commissions, for example, may include personal information. Further, if personal information may be disclosed, there is no information provided as to applicable safeguards.

1.109 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the adequacy of the explanatory memorandum to the bill in relation to privacy.

Exemption from disallowance[91]

1.110 Item 33 of Schedule 1 to the bill seeks to insert proposed section 14C into the Act. Proposed subsection 14C(1) empowers the minister to make legislative instruments determining that an ESOS agency for a provider is not required to deal with applications made under section 9 until after a day specified in the instrument. Proposed subsection 14C(3) provides the minister with a similar power to make instruments which provide that an ESOS agency must not deal with such applications until after the specified day. Proposed subsection 14C(8) provides that instruments made under proposed subsections 14C(1) and (3) are not subject to disallowance.

1.111 Proposed sections 14D, 14E and 14F provide similarly in relation to other instrument making powers where the minister can determine respectively that applications are not required to be or must not be dealt with until after a specified day, that no applications may be made after a specified day, and that no applications may be made under section 10H until a specified day.

1.112 In relation to the exemption from disallowance the explanatory memorandum states:

> It is not appropriate for an instrument made under subsections 14C or 14D to be subject to disallowance as it may cause uncertainty for the operations

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90 Explanatory memorandum, pp. 27-28.

91 Schedule 1, item 33, proposed subsections 14C(8), 14D(8), 14E(6) and 14F(6). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

> and functions of ESOS agencies, and for providers, as the instrument is to be relied upon from the date it takes effect. As explained above, the Minister will only exercise this power in limited circumstances, for example, where the Minister has concerns relating to the integrity or sustainability of the international education sector and urgent and decisive action is required. As set out in new section 14G, the Minister is required to consult before making legislative instruments under this Division.
>
> In addition, the department will communicate with providers affected by the making of the instrument to provide them with advance notice. Once the instrument is in effect, an ESOS agency's main resources and focus will likely be diverted to investigating significant concerns in the international education sector rather than processing activities. Providers may also make certain adjustments to their commercial operations and business plans in response to the instrument, to enable them to continue providing domestically-focused education services.
>
> Subjecting the legislative instrument to the disallowance process may result in further uncertainty in this period of change for the international sector, in respect of affording providers with commercial and business certainty once an instrument has been made. The matters covered by an instrument should also be under Executive control, given the primary purpose of the instrument will go to the functioning and operations of ESOS agencies and their role in regulating providers where integrity risks are present. [92]

1.113 Similar explanations are provided in relation to proposed sections 14E and 14F.

1.114 While the committee acknowledges the advice that consultation will be undertaken before an instrument will be made, the committee does not consider the need for certainty a sufficient justification for exempting an instrument from the usual parliamentary disallowance process. The committee is of the view that the importance of a matter set out in an instrument would be appropriately weighed by a house of the Parliament and would inevitably be a subject of debate should a proposal to disallow the instrument be put to that house.

1.115 In light of the above, the committee requests the minister's advice as to whether the bill could be amended to omit subsections 14C(8), 14D(8), 14E(6) and 14F(6) so that legislative instruments made under subsections 14C(1) and (3), 14D(1) and (3), 14E(1) and 14F(1) are subject to appropriate parliamentary oversight through the usual disallowance process.

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[92] Explanatory memorandum, pp. 30-31.

Broad discretionary power[93]

1.116 Item 47 of Schedule 1 to the bill seeks to insert proposed subsection 26C(1) into the Act, which allows for the Minister to impose total enrolment limits by notice to a registered provider. Under proposed subsection 26C(4), the minister may also exempt by notice a specified course or a course in a specified class of courses from counting towards a registered provider's total enrolment limit.

1.117 Where a bill contains a discretionary power, the committee expects the explanatory memorandum to the bill to address whether there are appropriate criteria or considerations that limit or constrain the exercise of any power, including whether they are contained in law or policy.

1.118 In this instance, the explanatory memorandum provides the following:

> The Minister will only exercise this power where the Minister is satisfied that there is a need for a specific provider to have a different limit than the course enrolment limit that is specified in the instrument under subsection 26E(1). Factors that the Minister may consider include the location of the provider and/or course location, the number of other providers servicing the geographical location of the provider and the availability of student accommodation. The Minister may also give a notice to a provider under subsection 26C(1) if satisfied that the provider has demonstrated that they have developed, or otherwise made available, additional student accommodation to cater for an increase in student enrolments.
>
> Another circumstance in which this power might be exercised is where a provider exits the international education sector and defaults in relation to accepted students. In this case, the Minister may increase the enrolment limits of certain other providers to provide suitable placements for the students affected by the default.[94]

1.119 Although the committee welcomes the inclusion of factors the minister may consider prior to issuing a notice, it does not appear that this decision is subject to merits review. The committee's concerns are heightened in this instance as a result and the committee would prefer to see the listed considerations included on the face of the bill to provide guidance as to how the decision for a notice to limit enrolments can be provided.

1.120 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the broad discretionary powers of the minister under proposed subsection 26C(1) and (4), and the lack of merits review for a notice issued by the minister under proposed subsection 26C(4).

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93 Schedule 1, item 47, proposed section 26C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

94 Explanatory memorandum, p. 61.

Excise and Customs Legislation Amendment (Streamlining Administration) Bill 2024[95]

Purpose	This bill seeks to amend the *Excise Act 1901* to streamline licence application and renewal requirements for excise licences to store or manufacture excisable goods. Additionally, the bill seeks to amend the *Customs Act 1901* to streamline licence application and renewal requirements for customs warehouse licences that authorise the warehousing of excise-equivalent goods. The bill also seeks to establish a public register of entities that hold such licences.
Portfolio	Treasury
Introduced	House of Representatives on 16 May 2024
Bill status	Before the Senate

Availability of merits review[96]

1.121 The bill empowers a range of decisions to be made in relation to excise licenses for the storage and manufacture of excisable goods. For example, item 16 of Schedule 1 to the bill would substitute existing subsection 81B(1) of the *Customs Act 1901* to authorise the Comptroller-General of Customs to vary an excise license.

1.122 The committee expects that explanatory materials to bills which authorise administrative decisions that may affect the interests of a person should clearly set out whether independent merits review is applicable within the existing legislative regimes. If merits review is considered inappropriate the committee's expectation is that a sound justification should be provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

1.123 In this instance, the explanatory memorandum does not set out whether the decisions authorised under the bill are subject to any existing merits review frameworks. The committee's view is that this information should have been provided in the explanatory memorandum to the bill, or, if merits review is not applicable, a sound justification should have been provided.

1.124 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole for consideration the adequacy of the explanatory

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95 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Excise and Customs Legislation Amendment (Streamlining Administration) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 112.

96 Various provisions of the bill. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

memorandum to the bill in relation to merits review of decisions made under the bill.

Significant penalties[97]

1.125 Item 121 of Schedule 1 to the bill inserts proposed subsection 39K(1A) into the *Excise Act 1901* (the Excise Act). Proposed subsection 39K(1A) provides that during a period in which a license is suspended under subsection 39G(1A), the license holder must not, without permission and at premises in relation to which the license is suspended:

- for a manufacturer license—intentionally manufacture goods that are excisable goods knowing, or being reckless as to whether, they are excisable goods (proposed paragraph 39K(1A)(a)); or
- for a manufacturer license or a storage license—intentionally keep or store excisable goods knowing, or being reckless as to whether, they are excisable goods (proposed paragraph 39K(1A)(b)).

1.126 A penalty of up to 2 years imprisonment applies to contravention of this offence.

1.127 Item 139 would insert proposed subsection 39M(2) into the Excise Act. Proposed subsection 39M(2) provides that if a license is varied to no longer cover particular premises, a person must not, without permission, intentionally remove from the premises any excisable goods on which duty has not been paid, knowing, or being reckless as to whether the goods are excisable goods on which duty has not been paid.

1.128 A penalty of up to 2 years imprisonment applies in contravention of this offence.

1.129 The committee's expectation is that the rationale for the imposition of significant penalties will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of similar seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation.'[98]

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97 Schedule 1, item 121, proposed subsection 39K(1A), and item 139, proposed subsection 39M(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

98 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p. 39.

1.130 In this instance, no justification has been provided in the explanatory memorandum for the imposition of custodial penalties in relation to either proposed subsection 39K(1A) or 39M(2).

1.131 The committee therefore seeks the Treasurer's advice as to:

- **the appropriateness of the penalties of two years imprisonment for proposed subsections 39K(1A) and 39M(2); and**
- **whether these penalties are broadly equivalent to similar offences in Commonwealth legislation and if not, why not.**

1.132 The committee's consideration of the appropriateness of these provisions would be assisted if the Treasurer's response explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*

Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024[99]

Purpose	The bill seeks to amend the *Export Control Act 2020* to prohibit the export from Australia of live sheep by sea on and after 1 May 2028.
Portfolio	Agriculture, Forestry and Fisheries
Introduced	House of Representatives on 30 May 2024
Bill status	Before the House of Representatives

Significant penalties[100]

1.133 Item 9 of Schedule 1 to the bill seeks to insert section 23A into the *Export Control Act 2020* (the Act) to prohibit the export of sheep from Australian territory by sea on and after 1 May 2028. Sections 30, 31, 32 and 33 of the Act currently provide for offence and civil liability provisions for both exporting goods that are subject to absolute prohibition on export, and conveying or possessing goods that are subject to absolute prohibition on export and are intended to be exported. Items 10 to 18 of Schedule 1 to the bill seek to include permanently prohibited exports into these existing offence provisions, such that a person commits an offence or is liable to a civil penalty under these sections if the person exports live sheep by sea on or after 1 May 2028.

1.134 Sections 30, 31, 32 and 33 include significant penalties for contravention of the fault-based offences. Subsection 30(2) of the Act provides for a penalty of 8 years imprisonment, 480 penalty units, or both, for exporting goods subject to absolute prohibition on export. Subsections 31(2) and 32(3) of the Act provide for a penalty of 10 years imprisonment, 2,000 penalty units, or both, for exporting goods that are subject to absolute prohibition on export and, respectively, with the intention to obtain a commercial advantage over the person's competitors or potential competitions as a result of exporting the goods, or where the export of the good causes, or has the potential to cause, economic consequences for Australia. Subsections 33(2) and 33(6) of the Act provide for a penalty of 8 years imprisonment, 480 penalty units, or both, for conveying or possessing goods that are subject to absolute prohibition on export and, respectively, the person intends to export the goods or the person knows that the goods are intended to be exported.

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99 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Export Control Amendment (Ending Live Sheep Exports by Sea) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 113.

100 Schedule 1, item 9, proposed section 23A; items 10–18, sections 30–33. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

1.135 The committee considers that, where significant penalties are imposed, the rationale should be fully outlined in the explanatory memorandum, and should be justified by reference to similar offences in Commonwealth legislation. This promotes consistency and guards against the risk that a person's liberty is unduly limited through the application of disproportionate penalties.

1.136 The explanatory memorandum explains, in relation to the basic offence in section 30:

> The penalty provisions under section 30, taking into account proposed amendments to paragraph 30(1)(b), are intended to provide a deterrent to the export of live sheep by sea on and after 1 May 2028. The penalties for the fault-based offence and the civil penalty will also reflect the consequences of exporting live sheep by sea, including consequences for the wellbeing of sheep. They also reflect the significant public interest concerns and the need to protect public morals. Conduct that contravenes the prohibition on the export of live sheep by sea may undermine the integrity of the regulatory framework provided for by the Act. This conduct may also impact on the confidence of the Australian community in the government's regulation of exports.[101]

1.137 In relation to the aggravated offence in section 31:

> The penalties in this section are higher than those outlined in the Guide to Framing Commonwealth Offences. This is in line with the seriousness of the decision to provide for a permanently prohibited export, that is, to permanently prohibit the export of live sheep by sea on and after 1 May 2028. The penalties reflect the potential consequences that the export of live sheep by sea has on animal welfare, the significant public interest concerns, and the need to protect public morals. A person intending to obtain a commercial advantage is an aggravated circumstance that warrants the additional penalty because of the added monetary benefit that may be gained by the person involved in this conduct. Reliance on the basic offence under section 30 may be insufficient to eliminate dishonest trade in circumstances where there may be a high financial reward.[102]

1.138 Similar justifications are provided for the offences in sections 32 and 33.[103]

1.139 While the explanatory memorandum has provided some justification for the penalty amounts for these offences, no reference has been made to other Commonwealth laws or explanation as to why these penalties may differ from other Commonwealth laws. It remains unclear to the committee why these particular

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101 Explanatory memorandum, p. 12.

102 Explanatory memorandum, p. 15.

103 Explanatory memorandum, pp. 18 and 20.

penalty amounts have been considered appropriate in relation to permanently prohibited exports.[104]

1.140 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the offence provisions in sections 30, 31, 32 and 33 of the *Export Control Act 2020*, such that the significant penalties of between eight to ten years imprisonment that attach to these provisions will also apply to the export of sheep by sea.

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[104] The offences in the *Export Control Act 2020* apply to 'permanently prohibited goods' which currently, under section 23, only includes the split vetch due to its 'toxic properties'.

Payment Times Reporting Amendment Bill 2024[105]

Purpose	The bill seeks to amend the *Payment Times Reporting Act 2020* to implement the Government's response to the statutory review of the Act, improve the operation of the scheme and to better achieve its objectives. The amendments seek to influence the behaviour of large businesses with poor small business payment practices and encourage fair and improved payment terms, times and practices for small businesses.
Portfolio	Treasury
Introduced	House of Representatives on 29 May 2024
Bill status	Before the Senate

Immunity from civil liability[106]

1.141 Item 80 of Schedule 1 to the bill seeks to insert proposed paragraph 57(1)(aa) into the *Payment Times Reporting Act 2020* (the Act). This would have the effect of providing that the minister is immune from civil liability in relation to an act or omission done or omitted to be done in good faith in performance of duties, functions or powers under the Act.

1.142 This provision therefore removes any common law right to bring a civil action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.143 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.

1.144 In this case, the explanatory memorandum explains:

> The amendments provide for the Minister to have certain protection against civil liability, for an act done or omitted to be done in good faith in the performance or purported performance of functions or exercise or purported exercise of powers under the Act. Specifically, no action for

105 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Payment Times Reporting Amendment Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 114.

106 Schedule 1, item 80, proposed paragraph 57(1)(aa). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

> defamation, breach of confidence or infringement of copyright applies against the Minister for such acts or omissions. This is consistent with the protection afforded to the Commonwealth, the Regulator, delegates of the Regulator and Australian Public Service employees in the Department who have been made available to assist the Regulator.[107]

1.145 While noting this explanation, the committee expects that this immunity from civil liability should be justified with reference to the specific context in which it operates. While the explanatory memorandum explains the operation of the provision it does not justify why the immunity from civil liability is necessary, and nor does it provide any information on what recourse, if any, affected persons may have to bring an action to enforce their legal rights.

1.146 The committee's concerns are heightened in this instance given the operation of proposed subsection 22H(2) of Schedule 1 to the bill. This provision provides that slow payer information published on the Payment Times Reports Register[108] may remain there even after a slow small business payer direction ceases, meaning that outdated information which may impact individuals may remain publicly available.

1.147 The committee draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed paragraph 57(1)(aa) of the *Payment Times Reporting Act 2020* providing the minister with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

Fees in delegated legislation[109]

1.148 Item 46 of Schedule 1 seeks to insert proposed section 27B into the Act to provide that the Regulator may prescribe application fees for application types specified in proposed subsection 27B(1) in delegated legislation. Proposed subsection 27B(2) provides that such a fee cannot amount to taxation.

1.149 The explanatory memorandum states:

> The fees that may be charged in relation to any of these applications may be determined by the Regulator by legislative instrument and must not exceed the reasonable costs of the Regulator to process an application, so as not to amount to taxation. Allowing fee determinations to be made by legislative instrument, rather than in the Act itself, ensures the fees that may be charged can be easily amended to align with changes in the

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107 Explanatory memorandum, p. 50.

108 The Regulator may direct a reporting entity that is a slow small business payer to publish on their website that it is a small slow business payer. This direction must be recorded on the Register.

109 Schedule 1, item 46, proposed section 27B. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

> reasonable costs of processing the applications. In accordance with the *Legislation Act 2003*, the determination will be subject to parliamentary scrutiny and disallowance. The determinations will be published on the Federal Register of Legislation.[110]

1.150 The committee welcomes the inclusion of proposed subsection 27B(2) which provides that the fee cannot amount to a tax, and notes the advice in the explanatory memorandum that the fee cannot exceed the reasonable costs to the Regulator for processing the application. The committee considers that the latter protection would be a more appropriate safeguard if it was included on the face of the bill.

1.151 Further, there is no guidance in the legislation as to how the fee amount might be determined. The committee considers it may be appropriate to explicitly state on the face of the bill that the amount of the fee be limited to cost recovery, set a maximum limit on the fee that may be imposed, prescribe a formula by which the fee amount is calculated or, in the case of indexation, to include the method of calculating indexation on the face of the bill.

1.152 The committee draws its concerns to the attention of senators and leaves to the Senate as a whole proposed section 27B of the bill which provides for the setting of fees in delegated legislation without any guidance or maximum fee set out on the face of the bill.

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

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110 Explanatory memorandum, p. 55.

Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024[111]

Purpose	The bill seeks to amend the *Corporations Act 2001* and other Acts to implement recommendations by the Council of Financial Regulators in relation to Australia's financial market infrastructure by: introducing a crisis management and resolution regime for domestic clearing and settlement (CS) facilities; expanding the licensing, supervisory and enforcement powers of the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA); and transferring certain powers relating to the licensing and supervision of CS facilities and financial markets to ASIC and the RBA.
Portfolio	Treasury
Introduced	House of Representatives on 27 March 2024
Bill status	Before the Senate

Standing appropriation
Instruments not subject to parliamentary oversight[112]

1.154 Item 14 of Schedule 1 to the bill seeks to amend the *Corporations Act 2001* (Corporations Act) by inserting proposed section 846B, which appropriates the Consolidated Revenue Fund for the purposes of making a payment under an arrangement authorised under proposed section 846A, which is for the purposes of crisis resolution.[113] The authorisation will be provided by legislative instrument[114] and the total maximum amount specified in an authorisation must not exceed $5,000,000,000.

1.155 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis, usually for an indefinite 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

111 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 115.

112 Schedule 1, item 14, proposed section 846B. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

113 Proposed sections 846A and 846B.

114 Proposed subsection 846A(1)

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.

1.156 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.

1.157 In this instance, the explanatory memorandum explains:

> Funds designated for use in a CS facility resolution can only be used for the purposes of protecting the stability of the financial system in Australia or ensuring the service continuity of an Australian CS facility, critical to the functioning of Australia's financial system. Public funds for CS facility resolution are intended to be limited to situations where a CS facility's resources and recovery tools are insufficient to address losses, or the RBA considers the use of some recovery tools poses a threat to financial stability or otherwise compromises resolution objectives. It is expected that funds will be recovered after the crisis is resolved. Recovery mechanisms may be outlined in funding agreements. The provision of public funds is intended to be a last resort option, as preliminary tools available to regulators (such as the powers explained in Chapter 2) are expected to assist in crisis prevention.[115]

1.158 The committee notes that the explanatory memorandum has provided some explanation as to what the standing appropriation is for and safeguards as to how the funds may be used. However, no explanation has been provided as to why such an appropriation should not be included in the annual appropriation bills.

1.159 In this instance, the committee's concerns are heightened as the instrument is not subject to disallowance,[116] cannot be revoked by the minister,[117] and can commence prior to its registration on the Federal Register of Legislation,[118] which limit

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115 Explanatory memorandum, p. 23.

116 Proposed subsection 846A(6).

117 Proposed subsection 846A(5).

118 Proposed subsection 846A(8).

the extent of parliamentary oversight. The committee notes the justification provided in the explanatory memorandum that this is necessary to ensure funding arrangements are made with maximum certainty in order to facilitate effective resolution.[119] However, the committee remains concerned that there currently do not appear to be any mechanisms to provide parliamentary oversight, such as providing that proposed sections 846A and 846B are subject to a sunset clause to ensure parliamentary review of the expenditure of public funds.

1.160 In light of the above, the committee requests the Treasurer'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 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.**

Reversal of the evidential burden of proof[120]

1.161 Item 14 and Item 28 of Schedule 1 to the bill seek to insert new offences and offence-specific defences into the Corporations Act.

1.162 Proposed subsection 837E(6) introduces a defence that a body corporate does not commit an offence against the Corporations Act if the body merely complies with a condition imposed under proposed subsection 837E(1).

1.163 Proposed subsection 834A(2) creates an offence where a person who is a director of a body corporate that is under statutory management purports to perform or exercise a function or a power of a director. Proposed subsection 834A(3) provides an exception to 834A(2) whereby a director of a body corporate is acting with the written approval of the statutory manager of the body corporate or the Reserve Bank.

1.164 Proposed subsection 848C(3) introduces a defence to the offence of disclosing information[121]covered by a determination subject to secrecy provisions, where the

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119 Explanatory memorandum, p. 23.

120 Schedule 1, items 14 and 28, proposed subsections 837E(6), 834A(3), 848C(3) and 821H(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

121 The offence is set out in proposed section 848C(1).

disclosure is done in accordance with proposed sections 848D, 848E, 848F 848G, 848H, 848J or 848K.[122]

1.165 Finally, proposed subsection 821H(1) creates a requirement for a body corporate that is a CS facility licensee or is a body corporate related to one to give written notice to the Reserve Bank immediately after forming an intention to enter into a transaction to recapitalise or if the board of the body corporate agrees to a plan to restructure the body corporate. The failure to do so is an offence under subsection 1311(1) of the Corporations Act. Proposed subsection 821H(2) provides the requirement to provide written notice is not applicable if the transaction or restructure is minor.

1.166 A note to each of these exceptions confirms that the evidential burden of proof is reversed in relation to those matters.

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

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[123]

1.169 The Statement of Compatibility with Human Rights provides the following:

> Placing an evidential burden in relation to those defences is appropriate, proportionate and reasonable. Principally, this is because in the vast majority of cases it will be peculiarly within the knowledge of the defendant how the information may have been publicly accessed, or the means by which the conduct was authorised by another law of the Commonwealth. This in turn is due to the wide range of publicly available information and circumstances in which other laws could authorise or require disclosure. Evidence establishing that disclosure was to a legal representative for the purpose of seeking legal advice or to another person as permitted by the

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122 Proposed subsection 848C(3).

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

other exceptions is also peculiarly within the defendant's knowledge and control.[124]

1.170 It is unclear to the committee how, in relation to each of these exceptions or defences, the requisite information is peculiarly within the defendant's knowledge. The committee notes that for example, the defence under proposed subsection 848C(3) is applicable where disclosure has been made in accordance with the *Reserve Bank Act 1959*[125] or the *Australian Securities and Investment Commission Act 2001.*[126] It is not clear to the committee how any provision of any law can be peculiarly within any person's knowledge, and that disclosure being authorised by a certain law is significantly more difficult or costly for prosecution to disprove.

1.171 Similarly, where disclosure has been authorised by the Reserve Bank[127] or is under circumstances determined by the minister,[128] it is the committee's understanding that there is a written document authorising the disclosure in those circumstances that could be obtained by the prosecution and it is not clear how this information can be peculiarly within the defendant's knowledge. The committee also notes this in relation to a determination made under proposed subsection 837E(1) and the defence under proposed subsection 837E(6).

1.172 Finally, in relation to proposed subsection 821H(1), the committee's concerns are heightened as the defence does not clearly define the meaning of the terms 'minor' or 'insignificant' in the context of a transaction or restructure. The explanatory memorandum does not provide any further information on how these terms should be understood. The committee is concerned that this may cause uncertainty as to when a notification to the Reserve Bank is not required.

1.173 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole to consider the appropriateness of reversing the evidential burden of proof in relation to the defences and exceptions in the provisions detailed above.

Henry VIII clause[129]

1.174 Items 53 and 56 of Schedule 2 to the bill amend existing sections 791C and 820C of the Corporations Act to broaden ASIC's existing power to grant exemptions from all or specified provisions of Parts 7.2 and 7.3 of the Corporations Act. The

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124 Explanatory memorandum, p. 182.

125 Proposed subsection 848G(1).

126 Proposed subsection 848H(1).

127 Proposed subsection 848E(1).

128 Proposed subsection 848J(1).

129 Schedule 2, items 53 and 57, proposed sections 791C and 820C. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

amendment would allow ASIC to grant exemptions from Parts 7.2 and 7.3 to specified persons, CS facilities or financial markets, or to a class thereof. Where an exemption is granted to a specified person, CS facility or financial market, the exemption is not a legislative instrument.[130] Where the exemption is granted to a class of persons, CS facilities or financial markets, the exemption is a legislative instrument that is subject to disallowance.[131]

1.175 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.176 In relation to exemptions from the operation of primary legislation, the committee is also of the view that from a parliamentary scrutiny perspective, these exemptions should be subject to a time limit and should be periodically reviewed to ensure the exemptions from the operation of primary legislation continue to be appropriate. The committee is concerned in this instance as it is possible for ASIC to issue exemptions that may apply indefinitely.[132]

1.177 In this instance, the explanatory memorandum merely explains the extent of the broadening of the exemptions power and does not provide a justification for the need to exempt classes of persons, CS facilities and financial markets from Parts 7.2 and 7.3 of the Corporations Act. The explanatory memorandum also does not provide a justification as to why exemptions may be granted on an ongoing basis.

1.178 The committee requests the Treasurer's advice as to why it is necessary and appropriate for proposed sections 791C and 820C of the bill to empower delegated legislation to create exemptions from Parts 7.2 and 7.3 of the *Corporations Act 2001*.

1.179 The committee also requests the Treasurer's advice as to why it is necessary and appropriate for ASIC to be able to grant exemptions from the application of Parts 7.2 and 7.3 of the *Corporations Act 2001* on an ongoing basis.

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130 Proposed subsections 791C(5) and 820C(5).

131 Proposed subsections 791C(7) and 820C(7).

132 Proposed paragraphs 791C(8)(b) and 820C(8)(b).

Limitation of judicial review[133]

1.180 Item 65 of Schedule 2 to the bill introduces proposed section 826M, which imposes a requirement on ASIC to consult with various affected parties prior to making the Clearing and Settlement Facility Rules (CS facility rules). Proposed paragraph 826M(1)(a) clarifies that requirement extends to consultation with the public. However, under proposed subsection 826M(3), a failure to consult as required by proposed subsection 826M(1) does not invalidate a CS facility rule. 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.

1.181 In this instance, where there has been a failure to meet the procedural requirement of consultation with the public or other listed parties, the appropriate avenue for recourse would be through judicial review as a result of jurisdictional error. In relation this, to the explanatory memorandum provides:

> However, if ASIC fails to consult with the public, the RBA or any other person or body it does not invalidate the rule. This is because the CS facilities rules relate to regulating the entities that support the Australian financial system and affected entities require certainty to ensure that stability continues. Where a failure to meet procedural requirements would amount to jurisdictional error, the no invalidity provision do not prevent an entity from seeking judicial review under section 75(v) of the Constitution and section 39B of the Judiciary Act 1903.[134]

1.182 Even if a party is able to seek judicial review, due to the operation of the no-invalidity clause in proposed subsection 826M(3), it is unclear what the practical efficacy of judicial review to provide a remedy for a legal error would be. For example, the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, which may mean that review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available.

1.183 The committee is concerned that although judicial review is available where there has been a failure to meet procedural requirements resulting in jurisdictional error, it is not apparent that seeking judicial review will result in an effective remedy for an affected party.

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

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133 Schedule 2, item 65, proposed subsection 826M(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

134 Explanatory memorandum, p. 98.

- **how judicial review is intended to operate in this circumstance to provide an effective remedy to an affected person when there has been a failure to meet procedural requirements on ASIC's part; and**
- **whether any other remedies are available to affected persons in this instance.**

Significant penalties

Significant matters in delegated legislation[135]

1.185 A number of provisions in Schedules 1, 2 and 4 of the bill impose significant penalties for a number of offences, including maximum penalties of periods of imprisonment up to 5 years. Item 65 of Schedule 2 to the bill also seeks to introduce proposed section 826L to the Corporations Act which allows for the regulations to provide for alternatives to civil proceedings for a contravention of the Clearing and Settlement Facility Rules (CS Facility Rules), including civil penalties that are payable to the Commonwealth that may be up to 3000 penalty units for an individual and 15,000 penalty units for a body corporate.

1.186 The committee considers that, where significant penalties are imposed, the rationale should be fully outlined in the explanatory memorandum, and should be justified by reference to similar offences in Commonwealth legislation or if not, why not. This promotes consistency and guards against the risk that a person's liberty is unduly limited through the application of disproportionate penalties.

1.187 In this instance, the explanatory memorandum provides the following justification for the offence under proposed subsection 841A(3), in Schedule 1 to the bill, which relates to a refusal or failure to give specified information or documents to the Reserve Bank when directed to do so:

> These penalties reflect the severity of the contravention which would likely have detrimental effects on the stability of the Australian financial system. It is imperative that directions issued during resolution are complied with in order to resolve distressed CS facilities. In addition, the penalty for contravention of a direction issued by the RBA is consistent with contravention of ASIC directions in non-crisis times.[136]

1.188 Comparatively, the offence provisions under Schedules 2 and 4 of the bill have not been accompanied by similarly robust justifications, even where the offence provisions include custodial penalties. For example, in relation to a similar offence under proposed subsection 823G(3) in Schedule 2 to the bill, which relates to the failure to comply with a direction given by the Reserve Bank and carries a maximum

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135 Schedules 1, 2 and 4. The committee draws senators' attention to these Schedules pursuant to Senate standing order 24(1)(a)(i) and (iv).

136 Explanatory memorandum, p. 46.

penalty of 2 years imprisonment, the explanatory memorandum merely restates the provision.[137]

1.189 Further, there are offences which carry higher penalties, such as the breach of a banning order under proposed subsection 853P(2) in Schedule 2 to the bill, carrying a maximum penalty of 5 years imprisonment. Although the context of addressing financial stability risks is noted, the committee still considers that where significant penalties are imposed, particularly where custodial penalties are imposed, the explanatory memorandum should include justifications for all of these penalties with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*[138] and with reference to comparable offences.

1.190 In relation to proposed subsection 826L(2), which allows for regulations to set significant civil penalties, the explanatory memorandum provides:

> The alternative to civil proceedings for noncompliance with CS facility rules by including regulation making power that enables a penalty to be set that may be a maximum of 3,000 for an individual or 15,000 penalty units for a body corporate. The explicit mention of the maximum penalty the regulations can prescribe is consistent with the Guide to Framing Commonwealth Offences.
>
> The Guide to Framing Commonwealth Offences recommends maintaining consistency in the legislative framework with regards to penalties as much as is appropriate. Consistent with this principle, this compliance provision largely mirrors existing section 798K of the Act which applies to the enforcement of market integrity rules, section 901F of the Act which applies to enforcement of derivative transaction rules and section 903E of the Act which applies to enforcement of derivative trade repository rules. The significance of noncompliance with any of these rules and CS facility rules has the potential to adversely impact the financial system stability in Australia, which justifies the requirement for alternative compliance mechanisms in the Regulations.
>
> The Attorney-General was consulted in relation to the inclusion of custodial penalties. Including the penalties in regulations are considered by the Federal Executive Council and are subject to disallowance by Parliament. This provides an additional layer of scrutiny and accountability. Therefore, the delegated offence in the Regulations is necessary and proportionate to the objective of ensuring compliance with the CS facility rules.[139]

1.191 While the committee welcomes the justification provided for the penalties themselves with reference to similar compliance provisions, and the consultation with

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137 Explanatory memorandum, p. 80.

138 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p. 39.

139 Explanatory memorandum, pp. 100-101.

the Attorney-General, the explanatory memorandum does not justify why these measures are appropriate for inclusion in delegated legislation, rather than be included on the face of the bill. Although the relevant regulations may be subject to disallowance, the committee does not consider that this is sufficient justification for the inclusion of penalties in delegated legislation, as delegated legislation is not subject to the same level of parliamentary scrutiny as primary legislation. In this instance, the committee's concerns are heightened as the regulations may provide for up to 3000 penalty units for an individual.

1.192 The committee requests the Treasurer's advice as to whether justifications can be provided for the appropriateness of the criminal penalties in Schedules 2 and 4 of the bill, whether these offences are broadly equivalent to similar offences in Commonwealth legislation, and if not, why not. The committee's consideration of the appropriateness of these provisions would be assisted if the Treasurer's response explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

1.193 The committee also requests the Treasurer's detailed justification as to why it is necessary and appropriate for proposed subsection 826L(2) to allow for the regulations to set civil penalties of up to 3,000 penalty units for an individual and 15,000 penalty units for a body corporate, rather than including these penalties on the face of the bill.

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024[140]

Purpose	Schedule 1 seeks to increase the supply of rental housing by improving incentives for institutional investors to support the construction of new 'build to rent' developments. Schedule 2 seeks to extend the application of the Credit Code to 'Buy Now, Pay Later' contracts and establishes Low Cost Credit Contracts as a new category of regulated credit. Scheule 3 seeks to amend the *Medicare Levy Act 1986* to make changes to how certain eligible lump sum payments in arrears are assessed for the purposes of the Medicare levy. Schedule 4 seeks to require certain large multinational enterprises to publish selected tax information on a Country-by-Country basis for specified jurisdictions. Schedule 5 adds various deductible gift recipients to the *Income Tax Assessment Act 1997.* Schedule 6 amends the *Federal Financial Relations Act 2009* to support Commonwealth payments to the states in accordance with the National Skills Agreement. Schedule 7 seeks to extend the $20,000 instant asset write-off by 12 months until 30 June 2025.
Portfolio	Treasury
Introduced	House of Representatives on 5 June 2024
Bill status	Before the House of Representatives

Privacy[141]

1.194 Item 14 of Schedule 2 to the bill seeks to insert Part 3—2BA into the *National Consumer Credit Protection Act 2009* to provide for additional voluntary rules for licensees that are credit providers relating to low cost credit contracts (LCCCs). Amongst other matters this includes, in proposed new sections 133BXB and 133BXC, additional obligations for licensees to inquire into the suitability of entering into a LCCC

140 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 116.

141 Schedule 2, item 14, proposed Part 3—2BA; item 64, proposed section 331. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

or increasing the credit limit of a LCCC with a consumer who will be the debtor under the contract. This involves an obligation on licensees to make reasonable inquiries about a consumer's requirements and objectives and financial situation,[142] including whether the consumer is financially vulnerable and any additional matters prescribed by the regulations.[143]

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

1.196 The explanatory materials explain:

> Additionally, in making reasonable inquiries into, and taking reasonable steps to verify, the consumer's requirements, objectives and financial situation, any matters prescribed by the regulations must be taken into account. These may include the types of information the LCCC provider must use in the assessment of unsuitability; the content and level of detail of the information to be used; whether the information in the LCCC provider's possession is sufficient; and whether and to what extent an LCCC provider may obtain additional information from the consumer.[144]
>
> …
>
> Any personal information of consumers may only be collected and used for particular purposes, that is, to facilitate assessments of unsuitability to enter into LCCCs. Existing privacy safeguards continue to apply, that is, the *Privacy Act 1988* applies to the handling of personal information and information relating to credit reporting.[145]

1.197 While the explanatory materials explain that the *Privacy Act 1988* is intended to apply, the committee understands that the *Privacy Act 1988* and Australian Privacy Principles apply to government agencies and private organisations with an annual turnover of at least $3 million.[146] It is unclear to the committee whether a LCCC provider may be a private organisation with a turnover less than $3 million and if this is the case, whether the *Privacy Act 1988* continues to apply.

1.198 The committee notes that licensees may elect for Part 3—2BA to apply to them in relation to some or all low cost credit contracts and are therefore electing to have additional requirements placed on them. Nevertheless, the committee considers it would have been useful for the explanatory memorandum to address whether there

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142 Subsection 133BXC(2).

143 Paragraphs 133BXC(3)(c) and (f).

144 Explanatory memorandum, p. 61.

145 Statement of compatibility, p. 123.

146 *Privacy Act 1988*, sections 6C and 6D.

are any privacy or data handling terms and conditions imposed as part of the agreements or what, if any, other privacy safeguards may operate to protect an individual's personal information.

1.199 In light of the above, the committee requests the Treasurer's detailed advice as to what safeguards are in place to protect personal financial information, including whether the *Privacy Act 1988* applies to all licensees entering into low cost credit contracts.

Incorporation of external materials as existing from time to time[147]

1.200 Item 1 of Schedule 4 to the bill seeks to insert section 3DA into the *Taxation Administration Act 1953* to provide for the kinds of information that must be published by certain county by country (CBC) reporting entities. Proposed subsection 3DA(7) is an interpretation provision, which provides that certain documents must be considered to determine the effect of other provisions in section 3DA and this can include, in subparagraph 3DA(7)(b)(iii), a document, or part of a document, prescribed by the regulations.

1.201 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.

1.202 The explanatory memorandum explains:

> The regulation-making power will allow the Government the ability to ensure the requirements are kept up to date and reflect changes in the tax landscape. For example, if an additional requirement was added to the GRI 207, the Government may include this in the regulations if it was determined that the publication of this information was important in improving tax transparency. This update would provide certainty to taxpayers on their reporting obligations in a timely manner. The regulations would be subject to disallowance and therefore would be subject to appropriate parliamentary scrutiny.
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> Pursuant to section 17 of the *Legislation Act 2003*, additional information that is included through regulations would be subject to appropriate consultation.[148]

1.203 The committee notes that the incorporation of a document or part of a document for the purposes of subparagraph 3DA(7)(b)(iii) is to aid in identifying the information to be provided in other provisions and will therefore only impact reporting

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147 Schedule 4, item 1, proposed subparagraph 3DA(7)(b)(iii). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

148 Explanatory memorandum, p. 92.

entities. Nevertheless, the committee's preference is that incorporated documents are freely and publicly 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. It is unclear from the explanation in the explanatory memorandum whether any and all documents prescribed in subparagraph 3DA(7)(b)(iii) will be freely or publicly available.

1.204 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.[149]

1.205 In light of the above, the committee requests the Treasurer's advice as to whether documents incorporated by reference under proposed subparagraph 3DA(7)(b)(iii) of the *Taxation Administration Act 1953* will be made freely available to all persons interested in the law.

Exemption from disallowance
Section 96 grants to the states
Standing appropriation[150]

1.206 Item 4 of Schedule 6 to the bill seeks to repeal section 12 of the *Federal Financial Relations Act 2009* (FFR Act) which provides for lump sum national skills and workforce development payments to the states as indexed each financial year. In its place, item 3 seeks to insert Part 2A into the FFR Act to provide for a flexible funding model with financial assistance to the states payable in accordance with the skills and workforce development agreement,[151] currently the National Skills Agreement that took effect on 1 January 2024 and as amended from time to time.[152]

1.207 Proposed subsection 12A(2) provides that the minister may determine an amount to be paid to a state for the purpose of making a grant of financial assistance for the financial year in accordance with the skills and workforce development agreement. Subsection 12A(3) provides that this determination is not subject to disallowance. Subsections 12A(4) and (5) further provide that the financial assistance payable to a state is on condition that it be spent in accordance with the skills and

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149 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].

150 Schedule 6, item 3, proposed subsection 12A(2); item 7, proposed section 22. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

151 Item 3, proposed subsections 12A(4) and (5).

152 Item 2, proposed section 4.

workforce development agreement and subject to any other terms and conditions set out in the agreement.

1.208 Further, item 7 of Schedule 6 to the bill seeks to amend the appropriation provision in section 22 of the FFR Act to insert Part 2A, with the effect that payments made under Part 2A (national skills and workforce development payments) are to be made out of the Consolidated Revenue Fund which is appropriated accordingly.

1.209 The effect of these proposed amendments is to reduce parliamentary oversight and scrutiny by moving the amounts payable to the states from the FFR Act and the terms and conditions which attach to them to the skills and workforce development agreement. The bill further seeks to amend the standing appropriation in the FFR Act to accommodate any changes to the amounts payable in the skills and workforce development agreement over time, reducing parliamentary oversight over the amounts that may be appropriated.

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

1.211 Further, 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.[153] The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum.

1.212 The explanatory memorandum explains:

> In accordance with subsection 44(1) of the *Legislation Act 2003*, the Minister's determination is a legislative instrument but is not subject to disallowance. This is because the determinations facilitate the operation of an intergovernmental scheme involving the Commonwealth and a State and are made for the purpose of that scheme. In this instance, the scheme is the skills and workforce development agreement, and payments made by the Commonwealth are for the purpose of that scheme.

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

> The exemption from disallowance is consistent with other funding arrangements provided for under the FFR Act, such as national health reform payments, where there is an obligation on the Commonwealth to make payments in a prescribed manner as part of an intergovernmental body or scheme involving the Commonwealth and the States.[154]

1.213 The committee does not consider the fact that an instrument is made to facilitate the operation of an intergovernmental scheme is reason, in itself, for exempting an instrument from the usual parliamentary disallowance process. Moreover, the committee does not consider the fact that a number of executive governments have reached agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such agreement.

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

1.215 In relation to the amendment of the standing appropriation in section 22 of the FFR Act, the committee notes that 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.

1.216 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. For example, a sunset clause could be included such that the appropriation clause could be reviewed for each new skills and workforce development agreement entered into between the Commonwealth and one or more states, providing a regular opportunity for Parliament to reconsider the appropriation.

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154 Explanatory memorandum, p. 106.

1.217 In this case, the explanatory memorandum does not mention the amendment to the standing appropriation.

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

- **whether proposed subsection 12A(3) can be removed to allow for appropriate parliamentary oversight of ministerial determinations through the usual disallowance process;**
- **whether the bill could place a limitation on the amount of funds that may be appropriated or duration in which it will exist for;**
- **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.**

Private senators' and members' bills that may raise scrutiny concerns[155]

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
Keeping Cash Transactions in Australia Bill 2024	Paragraph 8(a)(ii)	The provision may raise scrutiny concerns under principle (iv) inappropriate delegation of legislative powers in relation to significant matters in delegated legislation.
Commission of Inquiry into Antisemitism at Australian Universities Bill 2024	Subclause 7(3) and Section 8	The provisions may raise scrutiny concerns under principle (iii) in relation to procedural fairness.
	Subclause 11(5)	The provision may raise scrutiny concerns under principle (i) in relation to significant penalties.
	Clause 10	The provision may raise scrutiny concerns under principle (i) in relation to privacy.

155 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, [2024] AUSStaCSBSD 117.

Bills with no committee comment[156]

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

- Appropriation (Parliamentary Departments) Bill (No. 1) 2024-2025
- Capital Works (Build to Rent Misuse Tax) Bill 2024
- Creative Australia Amendment (Implementation of Revive) Bill 2024
- Health Insurance Legislation Amendment (Assignment of Medicare Benefits) Bill 2024
- National Health Amendment (Supporting Patient Access to Cheaper Medicines and Other Measures) Bill 2024
- Social Services and Other Legislation Amendment (More Support in the Safety Net) Bill 2024
- Treasury Laws Amendment (Extending the FBT Exemption for Plug-In Hybrid Electric Vehicles) Bill 2024

156 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, [2024] AUSStaCSBSD 118.

Commentary on amendments and explanatory materials[157]

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

1.219 On 5 June 2024, the House of Representatives agreed to 29 government amendments and 1 crossbench amendment to the bill.

1.220 Item 5 to sheet SK113 seeks to insert a substituted section 10 into the *National Disability Insurance Scheme Act 2013* to include a new definition of 'NDIS support' which provides for the definition to be entirely left to the National Disability Insurance Scheme (NDIS) rules. Item 8 to sheet SK113 seeks to insert proposed subsection 32L(7A) to provide that the NDIS rules can make provision for how the CEO decides whether a replacement needs assessment should be undertaken.

1.221 The committee commented on the inclusion of extensive rule-making powers that include significant matters and are exempt from sunsetting in *Scrutiny Digest 6 of 2024*. The committee is concerned that these amendments seek to introduce further significant matters in rules, in particular the definition of NDIS supports which is a key definition in determining what NDIS participants may be funded for.

1.222 The committee has scrutiny concerns with the inclusion of signification matters in delegated legislation as 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. The committee holds further concerns in relation to delegated legislation exempt from sunsetting, as 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.

1.223 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of further expanding the rule-making powers in the *National Disability Insurance Scheme Act 2013* to include significant matters and which are exempt from sunsetting.

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[157] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, [2024] AUSStaCSBSD 119.

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

1.224 On 16 May 2024, the Senate agreed to 3 Government amendments to the bill. The Minister for Finance, Senator the Honourable Katy Gallagher, tabled a supplementary explanatory memorandum relating to the amendments.

1.225 Amendments nos. 1 and 3 remove Part 2 of Schedule 2 of the bill. The committee raised scrutiny concerns in relation to a no invalidity clause included in this Part in Scrutiny Digest 6 of 2024.[158]

1.226 While the committee welcomes the amendments, which have the effect of addressing the committee's scrutiny concerns in the short term, the committee notes that the supplementary explanatory memorandum explains that the removal of the Part from the bill is to 'ensure that the important safety and other measures in the bill can be considered and progressed by Parliament separate to the environment measure'.[159]

1.227 As this suggests the possibility that the environment measure will be reintroduced into the Parliament in the future, the committee notes that it will closely scrutinise the measure at such a time. As such, it is the expectation of the committee that should a no-invalidity clause be included at that time, the explanatory materials should address the concerns previously raised by the committee.

1.228 Noting that the amendments to the bill remove the no invalidity clause to which the committee previously raised scrutiny concerns, the committee makes no further comment on this matter.

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

1.229 On 15 May 2024, the House of Representatives agreed to 19 government amendments to the bill. The bill has now passed both houses of the Parliament, and received the Royal Assent on 30 May 2024.

1.230 Item 4 of Schedule 2 to sheet AW106 of the amendments inserted subsection 12(1A) into the *Independent Parliamentary Expenses Authority Act 2017* (IPEA Act), which allows for the legislative rules to provide that the functions of the Independent Parliamentary Expenses Authority (the Authority) are limited to not extend to specified travel and work resources. Subsection 12(1) of the IPEA Act establishes the functions of the Authority. Further, item 20 inserted subsection 37(1A) into the IPEA Act, which also limits the operation of subsection 12(1) of the IPEA Act by providing

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158 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 6 of 2024 (15 May 2024) pp. 55–58.

159 Supplementary explanatory memorandum, p. 7.

that the Authority cannot give a ruling in relation to expenses or allowances that are specified by the minister by legislative instrument.

1.231 The committee notes that provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive.

1.232 In light of the fact that the bill has passed both Houses of the Parliament, the committee makes no further comment.

Public Service Amendment Bill 2023

1.233 On 16 May 2024, the Senate agreed to 10 Government amendments to the bill. The Minister for Finance, Senator the Honourable Katy Gallagher, tabled a supplementary explanatory memorandum relating to the amendments.

1.234 In *Scrutiny Digest 7 of 2023* the committee sought advice from the minister concerning a number of documents required by statute to which there was no corresponding requirement to table in the Parliament. The committee reported on its consideration of the minister's response in *Scrutiny Digest 8 of 2023*.

1.235 Proposed section 44A of the *Public Service Act 1999* (the Act) sought to provide the Australian Public Service Commissioner and the Secretary of the Prime Minister's Department with the power to cause a capability review of government agencies. However, the section did not require a report of the review to be tabled in the Parliament. The effect of agreeing to amendment no. 6 was to insert subsections 44(8A), (8B) and (8C), which require the Public Service Minister to table a report of a capability review in each House of the Parliament within 15 sitting days of that House after the report is given to the minister.

1.236 Proposed section 64A of the Act sought to provide that the Secretaries Board may cause long term insights reports to be prepared in relation to one or more matters of public policy. However, the section did not require such reports to be tabled in the Parliament. The effect of agreeing to amendment no. 9 was to insert subsections 64A(3A) and (3B), which require the Public Service Minister to table a report of a capability review in each House of the Parliament within 15 sitting days of that House after the report is given to the minister.

1.237 The committee welcomes these amendments which partially address the committee's scrutiny concerns relating to the tabling of documents in the Parliament.

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

1.238 On 16 May 2024, the Assistant Minister for Infrastructure and Transport, Senator the Hon. Carol Brown, tabled an addendum to the explanatory memorandum relating to the bill.

1.239 The committee thanks the assistant minister for tabling an addendum to the explanatory memorandum which includes key information requested by the committee in relation to provisions in the bill that retrospectively validate past assessments of the military invalidity payment.

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

1.240 On 16 May 2024, the Minister for Finance, Senator the Honourable Katy Gallagher, tabled an addendum to the explanatory memorandum relating to the bill.

1.241 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information requested by the committee in relation to various provisions in the bill which propose amendments to the *Telecommunications Act 1997* that would enable delegated legislation to modify the operation of primary legislation.

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

- Administrative Review Tribunal Bill 2024
  - On 28 May 2024 the House of Representatives agreed to 10 Government amendments made in the Senate.
- Attorney-General's Portfolio Miscellaneous Measures Bill 2023
  - On 28 May 2024 the House of Representatives agreed to 1 Government amendment to the bill.
- Australian Postal Corporation and Other Legislation Amendment Bill 2024
  - On 15 May 2024, a replacement explanatory memorandum was circulated by the Minister for Communications (the Honorable Michelle Rowland MP).
- Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023
  - On 14 May 2024 the House of Representatives agreed to five Government amendments to the bill and the Minister for Communication (The Honorable

Michelle Rowland MP) circulated a supplementary explanatory memorandum to the bill.

- Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024
  - On 29 May 2024, the House of Representatives agreed to 1 Crossbench amendment to the bill.
- Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023
  - On 28 May 2024 the House of Representatives agreed to 6 Government amendments and 3 Opposition amendments to the bill.
- National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023
  - On 14 May 2024, the Minister for Home Affairs (the Honorable Clare O'Neil MP) tabled an addendum to the explanatory memorandum to the bill.
- Net Zero Economy Authority Bill 2024
  - On 4 June 2024, the House of Representatives agreed to 23 Government amendments to the bill, and the Assistant Minister to the Prime Minister, the Honorable Patrick Gorman MP, presented a supplementary explanatory memorandum to the bill.
- Treasury Laws Amendment (Delivering Better Financial Outcomes and Other Measures) Bill 2024
  - On 29 May 2024 the House of Representatives agreed to 11 Government 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.

Australian Postal Corporation and Other Legislation Amendment Bill 2024[160]

Purpose	The bill seeks 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 Senate

Reversal of the evidential burden of proof
Significant matters in delegated legislation
Privacy[161]

2.2 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.

2.3 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.

2.4 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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160 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 7 of 2024*; [2024] AUSStaCSBSD 120.

161 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)).

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

2.6 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.

2.7 In *Scrutiny Digest 6 of 2024* the committee requested 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), 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 mail articles are opened and examined under proposed subsections 90N(2) and (3), including the 'strict parameters' that will be imposed.[162]

Minister for Communication's response[163]

2.8 In relation to the offence-specific defences, the Minister for Communications (the minister) advised that offence-specific defences have been used in this context in the Act for approximately 30 years, and that policy intent had not changed.

2.9 The minister further stated that offence-specific defences are planned to be retained in the relevant subsections, providing the following justification:

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162 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 2–5.

163 The minister responded to the committee's comments in a letter dated 5 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

> A person conducting the opening or examining of a postal article or its contents would be doing so in an official capacity performing their functions and duties as part of their employment. Accordingly, the person and their employer are expected to know under what legal basis they are permitted to carry out such conduct, in advance of carrying out the conduct. This would be informed by guidance materials, internal operating procedures, and relevant training made available by the person's employer. In some instances, a person opening or examining articles may also be required to keep records of their decision-making in exercising legislative powers, and performing of duties or functions that led to carrying out the conduct, and which would clearly demonstrate decision-making in this regard.

2.10 The minister advised that the replacement explanatory memorandum does not expressly state the reason for placing the burden of proof on the defendant and undertook to prepare an addendum addressing these matters.

2.11 On the matter of expanding classes of persons in delegated rather than primary legislation, the minister advised that the intention of proposed paragraph 90N(3)(c) is to enable government agencies and Australia Post to adapt and respond quickly to emerging risks. The minister advised that providing for the persons who may lawfully open mail articles in delegated legislation will provide 'flexibility and agility' to ensure the robustness of the postal system.

2.12 In addition, the minister stated that the development of any legislative instruments would consider the issue of privacy closely, including a privacy impact threshold assessment and a privacy impact assessment, if warranted, consistent with the Australian Privacy Principles requirements. Noting this information was not addressed in the explanatory memorandum, the minister undertook to prepare an addendum to address the committee's concerns regarding delegated legislation for classes of people who may lawfully open and examine articles.

2.13 On the matter of examples of the classes of persons who may be determined by the minister for exemption to the subsection 90N(1) offence, the minister assured the committee that 'any additional classes of persons which would be determined in the future by the Minister would be persons with relevant qualifications and experience necessary to perform their official role.'

2.14 Further, the minister added that, if the bill passes, the department will develop regulatory guidelines in consultation with relevant bodies, such Australia Post. These guidelines would deal with applicable parameters to the classes of persons determined by the minister, including relevant skills, experience and training. Additionally, the guidelines would also address privacy protections.

2.15 The minister advised that,

> [t]here are no known examples of persons or classes of persons that may need to be determined in a legislative instrument by the Minister at this time. As outlined above, the intent is to allow Australia Post and border

agencies to adapt and respond quickly in response to risks that emerge or evolve in the postal systems.

2.16 The minister undertook to prepare an addendum to the replacement explanatory memorandum containing the relevant information.

2.17 Finally, the minister responded to the committee's concerns surrounding privacy by noting that the Australian Federal Police is subject to the *Privacy Act 1988* and that state and territory privacy legislation may also apply in situations where mail was opened under a state or territory law, or by a police force or service of a state or territory.

2.18 The minister advised '[t]here would necessarily be privacy safeguards built into operational systems and processes' so as to not allow the exceptions proposed in section 90N to be exceeded. Further, the minister noted that the exceptions to the offences in proposed subsections 90N(2) and (3) are designed with regard to human rights conventions and the Australian Privacy Principles to ensure privacy protections are taken into account while also ensuring public interest and safety.

2.19 The minister advised that this strikes an appropriate balance to protect the right to privacy against the public interest in preventing threats to security and unlawful conduct. The minister proceeded to list various section of the Act which detail limits on the physical examination of mail articles.[164]

Committee comment

2.20 Regarding the offence-specific defences, the committee notes the advice provided by the minister but does not consider that the matters set out in proposed subsection 90N(3) are peculiarly within the knowledge of the defendant. The committee notes that the minister's response indicated that the matters would be of knowledge to both a defendant and their employer, and that records may also be kept in some circumstances. It therefore appears to the committee that an employer would also be able to provide evidence of the relevant matters relatively easily and that the matters therefore are not peculiarly within the knowledge of the defendant, nor does it appear particularly costly for the prosecution to obtain the relevant evidence.

2.21 In relation to the expansion of classes of persons who can lawfully open mail items under proposed paragraph 980N(3)(c), the committee thanks the minister for the further information as to why these powers are necessary and appropriate. The committee notes the advice that the persons to be declared in a legislative instrument would possess relevant qualifications and experience necessary to undertake this duty, and that regulatory guidance will be implemented to set out these requirements. While the committee's preferred position is for such a safeguard to be set out in primary law, the committee nevertheless welcomes this additional information and considers it would be a useful inclusion for the bill's explanatory memorandum. The

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164 Section 90P, section 90Q, section 90R, proposed section 90S, section 90U, and section 90UB.

committee notes the minister's undertaking to provide an addendum to the explanatory memorandum in relation to these matters and their privacy implications.

2.22 In relation to privacy, the committee welcomes the further information provided by the minister and notes this information would be useful if included in the explanatory memorandum to the bill.

2.23 Noting the minister's advice that an addendum to the explanatory memorandum will be prepared containing key information in the minister's response, the committee makes no further comment in relation to proposed paragraph 90N(3)(c). The committee also requests that the addendum to the explanatory memorandum contain key information set out in the minister's response in relation to privacy safeguards for these measures.

2.24 The committee draws its scrutiny concerns in relation to the reversed evidential burdens of proof in proposed subsection 90N(2) to the attention of senators and leaves to the Senate as a whole for consideration the appropriateness of these measures.

2.25 The committee draws proposed paragraph 90N(3)(c) to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024[165]

Purpose	The bill seeks to extend for a further three years the declared areas offence in 119.2 of the *Criminal Code Act 1995* (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[166]

2.26 Item 1 of Schedule 1 to the bill seeks to amend subsection 119.2(6) of 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.

2.27 The committee has previously commented on past extensions to the sunsetting date for the offence and noted that similar explanations were provided to justify extending the sunsetting date until September 2021 and then to September 2024.[167] In *Scrutiny Digest 6 of 2024* the committee reiterated its previous concerns that there is a risk that measures 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. The committee considered the measures being extended by this bill raised significant scrutiny concerns and may, in some instances, unduly trespass on personal rights and liberties.[168]

2.28 Further, the committee noted that the justification for the extension of sunsetting in this instance, being to 'allow for continued, periodic review of the

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165 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 121.

166 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 order 24(1)(a)(i), (iv) and (v).

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

168 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 6–8.

appropriateness of this framework',[169] may be undermined if the body tasked to undertake this periodic review, the Parliamentary Joint Committee on Intelligence and Security (the PJCIS), had the discretion to not undertake that review. The committee noted that, in this instance, the PJCIS has resolved not to undertake the review.

2.29 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 noted 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 other 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.

2.30 As noted above, the PJCIS did not resolve to conduct the second review referred to above. Item 3 of Schedule 1 to the 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, the intention is to replace the PJCIS's specific mandate with the broader discretion for the PJCIS to inquire into any counter-terrorism or national security legislation prior to its sunsetting.[170]

2.31 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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169 Explanatory memorandum, p. 13.

170 Explanatory memorandum, p. 14. 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.

2.32 As such, in *Scrutiny Digest 6 of 2024* the committee requested the Attorney-General's advice on the necessity and appropriateness for item 3 of Schedule 1 to the bill to repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001* (IS Act) without reinstating the mandate for review specifically of the declared area offences framework by the PJCIS, as well as the Attorney-General's further advice on how the proposed broad discretion for a review into any counter-terrorism or national security legislation by the PJCIS prior to sunsetting would constitute a sufficient and equal safeguard.

2.33 The committee also drew scrutiny concerns to the attention of senators and left 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.

Attorney-General's response[171]

2.34 The Attorney-General advised that the bill would repeal paragraph 29(1)(bbaa) of the IS Act, which provides that the PJCIS may, should it resolve to do so, review the operational effectiveness of the declared areas provisions before 7 January 2024. The PJCIS did not resolve to undertake such a review, and as this mandate is exhausted, it is appropriate that this provision is now repealed.

2.35 The Attorney-General also stated that the government intends for the PJCIS to have the ability to review the declared areas provisions prior to the proposed new sunsetting date, and drew the committee's attention to item 52 of the Intelligence Services Amendment Bill 2023 (the ISLA bill). The Attorney-General advised that proposed paragraph 29(1)(ba), as inserted into the IS Act by item 52, would give the PJCIS the same review option as was provided for previously in paragraph 29(1)(bbaa) of the IS Act.

2.36 Should the ISLA bill not pass, the Attorney-General informed the committee that the government will consider options to ensure that the PJCIS has an appropriate mandate to consider the operation, effectiveness and implications of the legislation prior to the proposed new sunsetting date.

Committee comment

2.37 The committee thanks the Attorney-General for their advice in response to its scrutiny concerns. However, while noting this advice, the committee is of the view that the review provided for in proposed paragraph 29(1)(ba) of the ISLA bill is not equivalent to the review set out in existing paragraph 29(1)(bbaa) of the IS Act. This is because paragraph 29(1)(bbaa) provides that the PJCIS has the function to monitor

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171 The Attorney-General responded to the committee's comments in a letter dated 29 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

and review the performance by the Australian Federal Police of its functions under Part 5.3 of the Criminal Code, whereas proposed paragraph 29(1)(ba) provides for a broader review function to inquire into the expiry, lapsing or cessation of counter-terrorism or national security legislation as the committee sees fit. As noted by the committee in *Scrutiny Digest 6 of 2024*, paragraph 29(1)(bbaa) provides a specific mandate for the PJCIS to review the declared area offences framework. Replacing such a mandate with the discretion for the PJCIS to inquire into the expiry, lapsing or cessation of counter-terrorism or national security legislation is not, in the committee's view, an equivalent safeguard.

2.38 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of item 3 of Schedule 1 to the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 to repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001,* without reinstating the mandate for review of the declared area offences framework by the PJCIS.

Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024[172]

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 seeks to implement 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

Reversal of the evidential burden of proof[173]

2.39 Item 55 of Schedule 1 to the bill substitutes existing subsection 15YR(2) of the *Crimes Act 1914* (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.

2.40 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

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172 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 7 of 2024*; [2024] AUSStaCSBSD 122.

173 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 order 24(1)(a)(i).

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)).

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

2.42 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).

2.43 The committee had previously requested the Attorney-General's advice in relation to proposed paragraph 15YR(2)(a) to (e) in *Scrutiny Digest 3 of 2024* regarding:

- whether the reversed evidential burden defences were 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.[174]

2.44 In a letter to the committee dated 23 March 2024, the Attorney-General responded to the committee's questions from *Scrutiny Digest 3 of 2024* advising that the offence-specific defences had been deliberately framed to ensure lawful publication required consideration by the publisher of the information on whether an exemption to the general prohibition applied.

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

2.46 The Attorney-General proceeded to explain the rationale supporting the defences in proposed subsections 15YR(1) and 15YR(2)(a) to (e):

- for defences in 15YR(2)(a) and 15YR(2)(b) the Attorney-General advised that these are existing defences to the offence in subsection 15YR(1) and recognise that vulnerable person may be identified in documents either in that legal proceeding, or in other legal proceedings. Demonstrating that

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

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.

- for paragraph 15YR(2)(c), which provides a defence where the vulnerable person is identified as deceased, the Attorney-General advised that the defence recognises that publishing identifying material of a person who is deceased does not raise the same issues of re-traumatisation of the vulnerable person, and that there are legitimate public interest reasons why persons may wish to publish that information. The 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.
- for paragraphs 15YR(2)(d) and 15YR(2)(e), the Attorney-General advised that these require the publishing person to obtain the consent of the vulnerable person, and that the publication must be in accordance with the consent provided. The defence recognises strong public interest in allowing third parties (such as media outlets) to publish identifying information about vulnerable persons, but that this should only occur with that person's consent. As such, it is considered appropriate for this to be an offence-specific defence as obtaining consent is an active action of the defendant and is something of which they would have a particular knowledge.

2.47 The committee responded in *Scrutiny Digest 6 of 2024*, noting the following:

- Regarding paragraphs 15YR(2)(d) and 15YR(2)(e), that it is not clear to the committee that the knowledge of this consent would be peculiarly within the defendant's knowledge, while noting the strong public interest factors present in requiring the defendant to obtain this consent and being able to provide evidence of it.
- Regarding paragraph 15YR(2)(c), it was not apparent to the committee that the justification provided for the defence accorded with the requirements of the *Guide to Framing Commonwealth Offences*. The committee acknowledged the policy intention of requiring a publisher to have active knowledge of a vulnerable person's death prior to publishing any identifying information, but set out its view that knowledge of whether a person is alive or deceased would not be peculiarly within the defendant's knowledge in this instance.

- Finally, regarding proposed paragraphs 15YR(2)(a) and 15YR(2)(b), the committee remained unclear on how the provisions would operate in practice and, as such, found it difficult to reach a conclusion as to whether they unduly trespass on personal rights and liberties. Although the committee noted the potential necessity for a vulnerable person to be identified in documents in legal proceedings, it remained unclear to the committee how the cause for such identification could be peculiarly within one person's knowledge. The committee noted its current understanding that the use of a document identifying a vulnerable person in a legal proceeding alone would indicate the nature of its purpose.

2.48 As such, the committee requested the Attorney-General's further advice for examples of when defences provided by proposed paragraphs 15YR(2)(a) to (b) may be used, how they are intended to operate, and how the examples illustrate the appropriateness of the matters being constructed as offence-specific defence with reference to the *Guide to Framing Commonwealth Offences*.

2.49 The committee, in relation to proposed paragraph 15YR(2)(c), drew the matter to the attention of senators and left to the matter to the Senate as a whole regarding the appropriateness of reversing the evidential burden of proof under proposed subsection 15YR(1).

2.50 Finally, the committee requested that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General in relation to proposed paragraphs 15YR(2)(c) to (e) be tabled in the Parliament as soon as practicable.[175]

Attorney-General's response[176]

2.51 The Attorney-General advised the committee that proposed paragraphs 15YR(2)(a) and (b) are measures which were introduced by the *Measures to Combat Serious and Organised Crime Act 2001*. These paragraphs are being repealed and replaced to reflect the updated structures of section 15YR(2), however, the Attorney-General noted that the bill does not change their current operation under the Crimes Act.

2.52 The Attorney-General stated that it is intended that proposed paragraphs 15YR(2)(a) and 15YR(2)(b) operate together to ensure that there is complete coverage for the court when making official publications, and for parties in conducting matters. The Attorney-General made note of their earlier comments to the committee in relation to proposed paragraph 15YR(2)(a).

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175 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 81–84.

176 The minister responded to the committee's comments in a letter dated 3 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

2.53 The Attorney-General advised that paragraphs 15YR(2)(a) and 15YR(2)(b) are intended to operate together to ensure complete coverage for the court when making official publications.

2.54 The Attorney-General also further advised on the intended uses of the terms 'official publication' and 'official document'. While the term 'official publication' is not defined, this is to ensure flexibility that official publications legitimately prepared for publications by the court or parties to the matter are captured by the defence in paragraph 15YR(2)(a). The Attorney-General concluded by noting that whether a document is an 'official document' will be determined by the particular facts of the matter.

Committee comment

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

2.56 The committee notes the Attorney-General's advice that paragraphs 15YR(2)(a) and 15YR(2)(b) are intended to operate together to ensure complete coverage for the court in making official publications and to apply to publications that do not fall within the remit of the defence in paragraph 15YR(2)(b).

2.57 However, it remains unclear to the committee how, in accordance with the *Guide to Framing Commonwealth Offences*[177], the defences under paragraphs 15YR(2)(a) and 15YR(2)(b) require the defendant to provide evidence that is in relation to information which is peculiarly within the defendant's knowledge and is significantly more difficult or costly for the prosecution to obtain. The committee understands that reasons for an official publication of a court or the publication of an official document can be inferred from the nature of the publication it itself.

2.58 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 defences in proposed paragraphs 15YR(2)(a) and 15YR(2)(b).

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[177] Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p. 40.

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024[178]

Purpose	The bill seeks to 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[179]

2.59 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.[180]

2.60 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

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178 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 7 of 2024*; [2024] AUSStaCSBSD 123.

179 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 order 24(1)(a)(i) and (ii).

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

officers in the exercise of search warrants in relation to digital assets under the Proceeds of Crime Act.

2.61 In *Scrutiny Digest 6 of 2024* the committee requested the Attorney-General'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;
- 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. [181]

Attorney General's response[182]

2.62 The Attorney-General advised that these provisions replicate existing provisions in the Crimes Act to enable search and seizure of digital assets. The effect of proposed subsection 3FA(5), the Attorney-General advised, would be to allow access to account-based data to determine whether a digital asset such as a cryptocurrency or Bitcoin exists that can then be seized under warrant. The Attorney-General advised that account-based data could include the social media, email services, subscriptions or messaging service accounts of a person of interest, or account data of another person such as a family member or friend, where the person of interest also uses those accounts. The Attorney-General advised that the bill builds on existing search warrant powers to allow a consideration of whether account-based data on a computer suggests the existence of a digital asset. Further, the Attorney-General advised that it would be impractical to limit the ability of law enforcement to searching data only connected to the person of interest as this would enable criminals to hide evidential material and proceeds of crime.

2.63 In relation to privacy, the Attorney-General advised that law enforcement agencies are required to comply with the *Privacy Act 1988* and the Australian Privacy

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181 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 10–13.

182 The minister responded to the committee's comments in a letter dated 3 June 2024 A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Principles. In addition, section 60A of the *Australian Federal Police Act 1979* (AFP Act) prevents AFP employees from making records of or communicating prescribed information except for purposes under the AFP Act or in compliance with oversight functions.

2.64 The Attorney-General advised that the power to add, copy, alter or delete data is already in the Crimes Act, and that proposed section 3FA of the Crimes Act and section 228A of the Proceeds of Crime Act use this power as required in the context of digital assets where data may need to be altered in order to seize the asset. The Attorney-General provided an example whereby a digital asset is being moved to an AFP wallet and the data on the blockchain, which contains the transaction history, needs to be altered.

2.65 Finally, the response provided examples of how it is envisaged the power will be used, including where seed phrases are uncovered on a mobile under search warrant which then allows the officer to uncover who owns the digital assets connected to that account, to determine whether those assets are evidence or tainted property.

Committee comment

2.66 The committee thanks the Attorney-General for this detailed advice, and welcomes the information provided in regard to privacy safeguards.

2.67 However, the committee remains concerned that proposed section 3FA of the bill will allow law enforcement agencies to access account-based data of any third-party user who has used a device with no apparent limitations. While noting the Attorney-General's advice that the definition of account-based data[183] is focused on a particular person, which could, in effect, be a family member or associate of the person of interest, there is nothing on the face or the bill to constrain the power, nor does the information provided indicate that the power is limited in this manner.

2.68 The committee notes the advice that these measures are necessary to ensure that criminals are not able to hide evidence or proceeds of crime, and does not comment on the policy merits of such an approach. Rather, the committee's position is that this intention could be maintained while limiting the ability of law enforcement to access and assess private information of third parties who may have used a shared device.

2.69 The committee therefore draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subparagraph 3FA(5)(a)(v), which would provide for an executing officer to access account-based data in relation to a person who uses or has used a computer found in the course of a search authorised under a warrant.

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183 As set out in section 3CAA of the *Crimes Act 1914*.

Significant penalties[184]

2.70 Item 1 of Schedule 3 to the bill seeks to 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.

2.71 The effect of this amendment would therefore be to increase the maximum civil and criminal penalties that apply across the majority of Commonwealth legislation in addition to the indexation process, which sees amounts automatically increase every three years in line with the consumer price index. Further, 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.[185]

2.72 In *Scrutiny Digest 6 of 2024* the committee requested the Attorney-General's advice as to why it is both 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. In particular, the committee noted that 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.[186]

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184 Schedule 3, item 1, section 4AA of the *Crimes Act 1914*. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

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

186 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 13–14.

Attorney General's response[187]

2.73 The Attorney-General advised that increases and indexation on the penalty unit value since it was introduced in 1992 represent an increase of 213% while average incomes have increased by 282%, and that increasing the penalty unit value to align with income levels ensures it is an effective deterrent.

2.74 The Attorney-General also advised that it is necessary for the bill to increase the penalty unit value as the next indexation process will not be for two years, with rising incomes decreasing the effectiveness of the penalty. The Attorney-General noted that as fines are the most common sentence imposed by courts in Commonwealth matters, it is important for the value of the penalty unit to be maintained so that courts have discretion to impose the most appropriate sanction.

2.75 Further, the Attorney-General advised that communities expect courts to have appropriate punishments available for sentencing, especially for serious Commonwealth criminal offences such as drug importation and people smuggling, and that the increase reflects this expectation.

Committee comment

2.76 The committee thanks the Attorney-General for this advice, and notes that the advice provided is similar to that provided to the committee in relation to the Crimes Amendment (Penalty Unit) Bill 2022 as reported in *Scrutiny Digest 3 of 2023*.[188] Considering the previous correspondence between the committee and the Attorney-General on a similar issue, the committee considers it would have been helpful for this more detailed advice to have been set out in the explanatory memorandum to the bill.

2.77 The committee accepts that it is important that penalty unit amounts are increased over time to align with income levels.

2.78 The committee also considers that it is inappropriate to only consider penalty unit amounts in the context of average incomes. Rather, it would be more appropriate to consider real wage increases, which reflect the amount of inflation over a given period. The committee notes that the Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* refers to inflation in this context, but not to average incomes, stating that 'expressing a penalty in penalty units (rather than a dollar figure) facilitates the uniform

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187 The minister responded to the committee's comments in a letter dated 3 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

188 For a copy of the Attorney-General's response considered in this Digest, see the committee's website.

adjustment of penalties across legislation from time to time to reflect the changing value of money.'[189]

2.79 Given the slower growth in real wages compared to average income over the relevant period, the discrepancy between the growth in the amount of a Commonwealth penalty unit and a person's income is more significant than the percentages stated by the Attorney-General would imply. The committee also notes that average income is not necessarily representative of general income levels given income inequality rates, and that other considerations are therefore likely to be relevant in determining an appropriate Commonwealth penalty unit amount.

2.80 The committee accepts that it is necessary to ensure that the amount of a Commonwealth penalty unit is adequate in ensuring effective deterrence. However, neither the explanatory memorandum for the bill nor the Attorney-General's response has provided evidence to demonstrate either that the previous amount was insufficient or that the new amount is required to ensure deterrence. The committee also notes that no explanation has been provided for how the amount of the increase was determined.

2.81 The committee expects a thorough justification for the increase to be included within the explanatory memorandum. This is particularly so as legislated penalty unit amounts may no longer align with the original intent, noting that these amounts would have been determined based on a general understanding of the way in which penalty unit increases would occur.

2.82 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.

2.83 The committee continues to have concerns about increasing the amount of a Commonwealth penalty unit outside the usual indexation process, noting the limited explanation provided in the explanatory materials for the increase and that the increase will apply in addition to the automatic indexation process.

2.84 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of item 1 of Schedule 3 to the bill amending subsection 4AA(1) of the *Crimes Act 1914* to increase the Commonwealth penalty unit amount from $313 to $330, with no justification provided as to how that amount was reached.

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[189] Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, p.41.

Broad delegation of administrative powers and functions
Significant matters in delegated legislation[190]

2.85 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).

2.86 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.

2.87 In *Scrutiny Digest 6 of 2024* the committee requested 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.[191]

Attorney General's response[192]

2.88 The Attorney-General provided detailed information on the roles and duties of the Communications Access Coordinator and the Communications Security Coordinator and advised that there is a mix of decision-making which affects legal obligations, security functions, and routine and administrative tasks. Due to this variation of tasks, the Attorney-General advised that is it necessary for delegations to lower level APS departmental staff to be made by legislative instrument.

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190 Schedule 4, item 3, proposed section 7A; and Schedule 4, item 62, proposed subsection 6R(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (iv).

191 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 15–16.

192 The minister responded to the committee's comments in a letter dated 3 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

2.89 Further, the Attorney-General provided background information about previous scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation which resulted in the Attorney-General agreeing to limit some delegations to SES level.[193]

2.90 The Attorney-General also identified the relevant legislative functions of each along with the proposed delegation level, and the committee welcomes that these proposed delegations go no lower than the EL level.

2.91 In addition, the Attorney-General noted that while it would be open under proposed section 6R to require training, skills or experience as set out in the delegation instrument, this is not proposed due to the broad scope of functions. Rather, staff with delegated functions will be supported with on the job training and professional development, and the department will continue the current practice of consulting partner law enforcement and security agencies for specialist advice to inform delegated decision making.

Committee comment

2.92 The committee thanks the Attorney-General for this detailed advice and notes the additional information in relation to the skills and training provided to staff delegated functions of the CAC or the CSC.

2.93 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Attorney-General 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*).

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[193] Further detail on this can be found in the attached ministerial correspondence.

Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024[194]

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 Senate

Use of negligence as fault element for an offence
Significant matters in delegated legislation[195]

2.94 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.

2.95 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 Act 1995* (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.

2.96 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 proposed amendment therefore seeks to leave the definition of a regulated timber product to delegated legislation, and seeks to move the definition from regulations to rules, providing even less oversight.

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194 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 7 of 2024*; [2024] AUSStaCSBSD 124.

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

2.97 In *Scrutiny Digest 6 of 2024*, the committee requested the 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. The committee also requested that, if this view did remain, that the minister consider tabling an addendum to the explanatory memorandum containing the key information provided by the minister in that correspondence.[196]

2.98 The committee drew its scrutiny concerns relating to the appropriateness of leaving the definition of a regulated timber product to rules in proposed paragraph 9(1)(c) to the attention of the Senate.[197]

Minister for Agriculture, Fisheries and Forestry's response[198]

2.99 The Minister for Agriculture, Fisheries and Forestry (the minister) advised that the Government remains of the view that negligence is the appropriate fault element for the offence in proposed subsection 9(1) and that an addendum to the explanatory memorandum will be prepared as soon as practicable.

2.100 The minister advised that proposed section 13A of the bill provides that a due diligence requirement for importing regulated timber products is that the person importing such products has a due diligence system. This would require a reasonable person, as an importer of a regulated timber product, to be aware of the relevant risks and circumstances that may give rise to the risk of importing illegally logged timber products. The minister advised that as such, negligence is the appropriate fault element. This aligns with the *Criminal Code Act 1995*, where negligence requires such a great falling short of the standard of care that a reasonable person would exercise in the circumstances together with the likelihood that the physical elements exist, or may exist, that the conduct merits criminal punishment. It also aligns with the *Guide to Framing Commonwealth Offences*, which states that only where it is necessary for a person to be criminally liable based in part on objective standards, rather than subjective mental state, should negligence be specified as the fault element of an offence.

2.101 In relation to the definition of a regulated timber product being left to the rules, the minister advised that this is appropriate because it would continue to enable the definition to be updated to include emerging products and respond to changing operational circumstances. This would maintain the flexibility of the legislation to support industries' needs and the efficient and effective administration of the illegal logging framework. The minister further advised that the rules would be subject to

196 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 17–19.

197 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 17–19.

198 The minister responded to the committee's comments in a letter dated 29 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

disallowance and therefore Parliament would have the same level of oversight over rules as it has over regulations.

Committee comment

2.102 The committee thanks the minister for this response.

2.103 The committee welcomes the minister's undertaking to prepare an addendum to the explanatory memorandum with the additional information provided in relation to the inclusion of negligence as the fault element for the offence in subsection 9(1).

2.104 In relation to the definition of a regulated timber product being left to the rules, the committee reiterates its view that it is more appropriate for definitions that constitute an offence, particularly one subject to significant penalties, to be included on the face of the bill rather than in delegated legislation.

2.105 Noting the minister's undertaking to prepare an addendum to the explanatory memorandum, the committee makes no further comment in relation to this matter.

Reversal of the evidential burden of proof
Significant matters in delegated legislation[199]

2.106 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.

2.107 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.

2.108 In *Scrutiny Digest 6 of 2024* the committee requested the minister's advice as to why it is proposed to use offence-specific defences in 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 circumstances prescribed by the rules.[200]

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199 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).

200 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 19–20.

Minister for Agriculture, Fisheries and Forestry's response[201]

2.109 The minister's response provided further detail as to what it is envisaged may be the circumstances prescribed by the rules as exceptions to the offences in subsections 12(4), 17(5), 18B(6) and 18C(5). For example, the minister stated that the circumstances envisaged for the purposes of subsection 12(4) would include the importation of consignments of regulated timber products that do not exceed $1,000 and the import of certain regulated timber products that are made from recycled materials. The minister stated that maintaining these exceptions in a disallowable legislative instrument would continue to enable adjustments in response to changing policy settings and industry needs. Similar reasoning was provided for including exceptions to the offences in rules in relation to the other provisions.

2.110 The minister further advised that the reversal of the evidential burden for these provisions is appropriate because, consistent with the *Guide to Framing Commonwealth Offences*, the circumstances relevant to the defence would be peculiarly within the knowledge of the defendant and it would be significantly more time consuming and costly for the prosecution to disprove than for the defendant to establish the matters.

Committee comment

2.111 The committee thanks the minister for this response.

2.112 The committee welcomes the additional guidance on what may be included in the rules as exceptions to these offences, however it considers the information insufficient to justify why it is appropriate for an offence-specific defence to include circumstances prescribed by the rules. While the minister may have an anticipated view of what may be included as an exception, this is not a legislated exception and can readily change. It is therefore not possible for the committee to conclude whether the exceptions are appropriately included as offence-specific defences as it is not possible for the committee to know whether they are or will be peculiarly within the knowledge of the defendant or significantly more difficult and costly for the proposed to disprove than for the defendant to establish the matter.

2.113 The committee draws its scrutiny concerns to the attention of the senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the offences in subsections 12(4), 17(5), 18B(6) and 18C(5), in circumstances where rules can provide for exceptions to the offences and therefore it is not possible to know whether the reversal is consistent with the test in the *Guide to Framing Commonwealth Offences*.

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[201] The minister responded to the committee's comments in a letter dated 29 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Abrogation of privilege against self-incrimination[202]

2.114 Item 52 in Schedule 1 to the bill seeks to substitute section 82 of the Act.

2.115 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.

2.116 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.[203]

2.117 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'. In *Scrutiny Digest 6 of 2024* the committee requested the minister's advice as to:

- whether consideration had 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 had been given to including derivative use immunity to ensure information or evidence indirectly obtained from a person could be used in evidence against them.[204]

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

203 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.

204 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 21–22.

Minister for Agriculture, Fisheries and Forestry's response[205]

2.118 The minister advised that consideration was given to including derivative use immunity in the bill to ensure information or evidence indirectly obtained from a person could not be used in evidence against them, and that paragraph 82(2)(c) of the bill, when read with paragraph 82(2)(d) and (e) provides for this. The minister advised that:

> any information, document or thing obtained as a direct or indirect consequence of making of the declaration under section 13, the giving of the notice under section 18B or 18C, giving information or producing a document under section 18E, 18F or 31 or answering a question under section 31 are not admissible in evidence against the individual in criminal proceedings, other than proceedings for an offence against section 13, 18B, 18C, 18E, 18F or 31, or proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to the Act or the rules.

2.119 The minister further advised that less coercive avenues to obtain the information are likely to be ineffective in light of the overall lack of responsiveness to requests from the Department for information and documents relevant to compliance with the current illegal logging prohibition legislation.

Committee comment

2.120 The committee thanks the minister for this response.

2.121 In light of the information provided the committee makes no further comment in relation to this matter.

Immunity from civil liability[206]

2.122 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 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.

2.123 In *Scrutiny Digest 6 of 2024* the committee requested 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

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[205] The minister responded to the committee's comments in a letter dated 29 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

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

an action to enforce their legal rights limited to situations where a lack of good faith is shown. The committee also noted that its consideration of the issue would 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.[207]

Minister for Agriculture, Fisheries and Forestry's response[208]

2.124 The minister advised that the immunity provision is necessary to protect certain officials from the legal risk arising in the course of conducting their duties in good faith and is consistent with other portfolio legislation, such as section 644 of the *Biosecurity Act 2015*.

2.125 In relation to the breadth of the power, the minister advised that:

> [p]owers and functions under the Act as proposed are generally exercised, or are to be exercised, by the Secretary personally or by appropriately qualified persons whom the Secretary has appointed as inspectors and auditors under the Act. In practice the immunity will only apply to a small number of persons given that few officers are appointed inspectors under the Act and this is likely to continue in the event that the Bill is passed.

2.126 The minister further advised that the immunity does not protect the conduct of officers acting in good faith in the course of their duties from oversight by the Ombudsman or similar scrutiny bodies, nor affect access by individuals to the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration.

Committee comment

2.127 The committee thanks the minister for this response.

2.128 The committee notes the minister's advice that the apparent breadth of the range of persons upon whom immunity is conferred may in practice be more limited.

2.129 While acknowledging the explanation for the necessity of the immunity where individuals are acting in good faith, the committee is nevertheless concerned with what recourse affected persons may have to bring an action to enforce their legal rights. The committee notes the advice the individuals can still access the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration however it is unclear to the committee whether this scheme provides recourse for individuals where detriment is caused by lawful and valid action.

2.130 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing protected persons

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207 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 22–23.

208 The minister responded to the committee's comments in a letter dated 29 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

Incorporation of external materials as existing from time to time[209]

2.131 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.

2.132 In *Scrutiny Digest 6 of 2024*, the committee requested 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.[210]

Minister for Agriculture, Fisheries and Forestry's response[211]

2.133 The minister advised that where the rules incorporate such documents, the explanatory statement would, in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003*, contain a description of the relevant incorporated material and indicate how it may be obtained.

2.134 Further, the minister confirmed that material incorporated from time to time would be made freely available to all persons interested in the law, with the explanatory statements including website details on where documents could be obtained, which Australian public libraries would contain the material or include relevant extracts, in full, from the incorporated documents as appropriate.

Committee comment

2.135 The committee thanks the minister for this response.

2.136 In light of the information provided the committee makes no further comment in relation to this matter.

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209 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).

210 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 24–25.

211 The minister responded to the committee's comments in a letter dated 29 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024[212]

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 Senate

Exemption from sunsetting
Significant matters in delegated legislation[213]

2.137 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.

2.138 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.

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212 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 7 of 2024*; [2024] AUSStaCSBSD 125.

213 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 order 24(1)(a)(iv) and (v).

2.139 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.[214]

2.140 In *Scrutiny Digest 6 of 2024* the committee requested the minister's 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 NDIS Act, with particular consideration to the implications this would have on parliamentary rather than executive oversight;
- why it is appropriate to include such extensive rule-making powers, and
- whether more specific consultation requirements with people impacted by the NDIS rules can be included in the bill, namely the disability community.[215]

Minister for the National Disability Insurance Scheme's response[216]

2.141 The Minister for the National Disability Insurance Scheme (the minister) advised the committee that the NDIS is an intergovernmental scheme. As such, the minister advised that the rules are likely already exempt from sunsetting under subsection 54(1) of the *Legislation Act 2003* and that this amendment seeks to clarify the exemption from sunsetting.

2.142 The minister advised that it is not appropriate for the Commonwealth to unilaterally repeal instruments that require agreement from state and territory governments to be made. The minister provided further explanation as to the consultation requirements for policy matters under the NDIS by the Ministerial Council in section 12 of the NDIS Act and graded levels of consultation for NDIS rules in section 209 of the NDIS Act. The minister explained that these requirements create a unique operating environment for the NDIS in terms of legislative instruments, compared to

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214 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)). The committee further notes that some amendments have passed the House of Representatives on 5 June 2024 which further seek to expand the rule-making powers in the NDIS Act: see for example, items 5 and 8 to sheet SK113.

215 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 26–28.

216 The minister responded to the committee's comments in a letter dated 30 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

other Commonwealth legislative schemes, and that is why exemption from sunsetting is appropriate in this particular statutory context.

2.143 The minister further advised that these instruments are made in the best interests of people with disability and are subject to consultation and co-design with the disability community, and as such it would be disempowering for the disability community for them to sunset.

2.144 In relation to the committee's concerns on the appropriateness of including extensive rule-making powers, the minister advised that the inclusion of detail in legislative instruments rather than the Act enables deeper engagement on operational matters through consultation and co-design. Additionally, this detail ensures that how the NDIS operates is not decided by the Commonwealth in isolation and is, instead, co-designed by NDIS participants and is consistent with the intergovernmental nature of the NDIS.

2.145 The minister further stated that the expanded rule-making powers allow for the National Disability Insurance Agency (NDIA) Operational Guidelines to become legislative instruments and the inclusion of these in rules rather than primary legislation improves flexibility in response to changing circumstances. The minister advised this will provide greater transparency and parliamentary oversight as well as greater clarity and certainty for participants as to the basis of their eligibility to the NDIS.

2.146 In relation to whether more specific consultation requirements with people impacted by the NDIS rules could be included in the bill, the minister advised that the NDIS Act requires the Minister to have regard to the NDIS Act's objects and principles when making NDIS rules and, further, subsection 4(9A) provides that '[p]eople with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity.'

2.147 The minister further advised that section 17 of the *Legislation Act 2003* requires rule-makers to undertake appropriate consultation before an instrument is made, including representatives of persons who are likely to be affected by the proposed instrument.

2.148 The minister advised that the inclusion of any additional reference to consultation with the disability community beyond what appears in the NDIS Act and the *Legislation Act 2003* is unnecessary and may lead to unintended consequences. For example, as there is no accepted process for 'co-design' and no existing statutory definition, the inclusion of an express reference to co-design could result in legal uncertainty on whether an instrument is made legitimately, therefore impacting the operation of the NDIS.

Committee comment

2.149 The committee thanks the minister for this response.

2.150 While acknowledging the minister's advice that the rules are exempt from sunsetting because the NDIS is an intergovernmental scheme subject to separate consultation requirements with states and territories and the disability community, the committee reiterates its view that it 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.

2.151 The committee notes that the making of the NDIS 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 Parliament to maintain oversight of such instruments through the sunsetting process.

2.152 The committee strongly disagrees with the characterisation of the operation of the sunsetting scheme in the *Legislation Act 2003* as a unilateral decision by the Commonwealth to repeal rules agreed to under the NDIS with the effect of disempowering the disability community. Sunsetting provides for the automatic repeal of delegated legislation ten years after registration on the Federal Register of Legislation in order to provide the opportunity for Parliament, ministers and agencies to reconsider the content of delegated legislation and ensure it remains appropriate. Sunsetting allows Parliament to maintain effective, regular oversight over powers it has delegated to the Executive.[217] The sunsetting process therefore operates to ensure appropriate consideration is made as to whether rules made remain fit for purpose and can encourage ongoing consultation with the disability community.

2.153 In relation to the minister's advice that the extensive rule-making powers are appropriate to enable greater consultation and co-design, it is unclear to the committee how including greater detail in the NDIS Act itself would preclude co-design with the disability community. The committee notes with concern the minister's advice that inclusion of matters in a bill means that the Commonwealth is acting in isolation rather than in a co-designed process, instead of consulting appropriately on the development of primary legislation.

2.154 In relation to the minister's advice that the inclusion of extensive rule-making powers is necessary to ensure flexibility as to the NDIS Act's operation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, in itself, for leaving significant matters to delegated legislation. While making NDIS Operational Guidelines as rules as opposed to non-legislative guidance would improve transparency, parliamentary oversight, clarity and certainty, the committee considers that including significant matters such as eligibility for access to the NDIS in the NDIS Act itself would achieve this to a greater extent.

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217 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Parliamentary scrutiny of delegated legislation* (3 June 2019) p. 140.

2.155 The committee further acknowledges the minister's advice that it is unnecessary to include more specific consultation requirements in the NDIS Act than already exist. The committee notes, however, that while the general principles provision in section 4 of the NDIS Act, as well as section 17 of the *Legislation Act 2003*, may guide ministerial action, these provisions are not binding and do not provide a legislative requirement to consult with the disability community.[218]

2.156 The committee rejects the proposition that including a specific consultation requirement in the NDIS Act would lead to unintended consequences including legal uncertainty and may impact the operation of the NDIS. The committee notes that numerous other bills and Acts include specific consultation requirements where appropriate, for example sections 33 and 36 of the New Vehicle Efficiency Standard Act 2024 includes specific requirements for the minister to publicly consult before making a determination, and proposed section 826M of the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 includes requirements for the Australian Securities and Investments Commission to consult with the Reserve Bank and any other person or body prescribed by the regulations before making certain kinds of rules. The committee further notes that the House of Representatives agreed to two amendments to proposed subsections 32K(3) and 32L(10) of this bill to require the minister to have regard to the principle that people with disability are central to the NDIS. The amendments provide that people with disability should be included in a co-design capacity under subsection 4(9A) when making, respectively, a determination as to the method to work out an amount in a participant's reasonable and necessary budget, and a legislative instrument to determine assessment requirements for a participant's support needs.[219] The committee considers that specific consultation requirements beyond those in the *Legislation Act 2003* can be appropriate, particularly where significant matters are included in delegated legislation.

2.157 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for extensive rule-making powers in the *National Disability Insurance Scheme Act 2013* that are exempt from sunsetting.

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

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[218] The committee further notes that if the term 'co-design' is considered by the minister to create such legal uncertainty, it is unclear why the inclusion of the term in subsection 4(9A) is considered by the minister to amount to an appropriate guiding principle and effective consultation in the NDIS Act.

[219] Items 5 and 8 to sheet PA110 passed the House of Representatives on 5 June 2024.

Broad delegation of administrative powers or functions
Availability of independent merits review[220]

2.159 Various amendments within the bill propose to expand the decisions that the Chief Executive Officer (CEO) can make.[221] In addition, 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.[222]

2.160 It is unclear to the committee whether all of these decisions are subject to independent merits review. 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 whether all decisions of the CEO proposed to be introduced by the bill are subject to review and, if not, the justification for this.[223]

2.161 In *Scrutiny Digest 6 of 2024* the committee requested the minister's 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 NDIS Act;
- whether consideration had 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 appropriate training, qualifications, skills, and 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

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220 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 order 24(1)(a)(ii) and (iii).

221 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)).

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

223 For examples of provisions being unclear in respect to subjection to independent merits review see item 36, proposed subsection 32F(6); item 63, proposed subsection 43(2A); and items 96 to 98, subsection 73(3A), and paragraph 74(4)(b) subsection 74(4A) of the bill.

review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*[224]

Minister for the National Disability Insurance Scheme's response[225]

2.162 The minister advised that the bill does not expand the scope of the CEO's powers but rather confers necessary and appropriate powers that ensure the operation and implementation of new measures included in the bill. The minister noted that the powers conferred are comparable to existing powers under the Act and, as such, are consistent with the CEO's existing statutory responsibilities required for the operation of the NDIS.

2.163 In relation to whether consideration has been given to constraining the breadth of the delegation power with respect to the new powers or functions, the minister advised that the CEO's powers introduced in the bill are administrative in nature and consistent with existing powers and functions under the Act. The minister stated that it is appropriate for the delegation structure to remain consistent with the structure already in operation.

2.164 The minister noted that there are over 650,000 participants in the NDIS, necessitating tens of thousands of decisions made every day by delegates of the CEO on matters such as access to the NDIS and supports in a participant's plan. As such, the minister advised that restricting the delegation of the CEO's decision-making powers would not be feasible for a scheme of such size and nature. The minister further advised that decisions are guided heavily by criteria and considerations set out in the NDIS Act, legislative instruments and policy guidance.

2.165 The minister further noted that decisions that require a particular level of training, qualification, skills or experience are managed by delegates with appropriate training in administrative decision-making in line with current operational practice and therefore there is no need to change the delegation structure in the NDIS Act.

2.166 In relation to the availability of independent merits review for particular decisions, the minister advised that under the existing planning framework, the only reviewable decision about the contents of a participant's plan is the decision to approve the statement of participant supports under subsection 33(2). The minister advised that other considerations and decisions are not separate reviewable decisions but instead are considerations as part of a single reviewable decision to approve the participant's statement of participant supports. The minister further advised that even if these could each be characterised as administrative decisions, they are all preliminary decisions that lead to the making of the substantive final decision, and are therefore not suitable for independent merits review consistent with the

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224 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 29–31.

225 The minister responded to the committee's comments in a letter dated 30 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Administrative Review Council's guide, *What decision should be subject to merit review?* The minister noted that all identified provisions are capable of being reviewed as part of a review of the final decision to approve the participant's statement of participant supports.

Committee comment

2.167 The committee thanks the minister for this response.

2.168 The committee considers that the inclusion of new measures in the bill that provide for the CEO to make additional decisions is an expansion of the scope of the CEO's powers. The committee does not consider the fact that the powers are comparable to existing powers and statutory responsibilities means that there is no expansion of power. As noted in *Scrutiny Digest 6 of 2024*, the committee's concern lies in the breadth of the delegation power in light of the additional new measures introduced in the bill, and whether the broad delegation powers remain appropriate in light of this.[226]

2.169 The minister has advised that the CEO's powers are administrative powers and therefore it is appropriate for the delegation structure to remain consistent with the existing structure in operation. However, the committee considers that administrative powers can and do impact upon individuals' rights, liberties or obligations, and where there is a broad delegation of these powers the committee expects to see that these powers are appropriately constrained or exercised by individuals exercising appropriate training, qualifications, skills or experience. In this case, while the committee acknowledges the large scope of the NDIS and necessity to delegate powers and functions in order for the scheme to function, the committee considers it is still appropriate for those powers and functions to be appropriately limited to individuals possessing appropriate training, qualifications, skills or experience, and this can be set out within the NDIS Act itself rather than relying on non-legislative operational guidance.

2.170 In relation to the minister's advice on the availability of independent merits review in respect of certain decisions, the committee welcomes the information provided that the kinds of decisions not subject to merits review are preliminary decisions or considerations that operate to inform the final decision which is subject to review.

2.171 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for the Chief Executive Officer to delegate any or all of their powers or functions under the *National Disability Insurance Scheme Act 2013*, the regulations or the National Disability Insurance Scheme rules to any member of staff of the National Disability Insurance Agency or person assisting.

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226 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 29–31.

Incorporation of external materials as existing from time to time[227]

2.172 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.

2.173 The committee previously commented on subsection 209(2) of the NDIS Act in *Alert Digest 1 of 2013*.[228] 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.[229] At that time, the committee requested that a general requirement to this effect be included in the bill.

2.174 In *Scrutiny Digest 6 of 2024* the committee requested 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.[230]

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

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

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

230 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 31–32.

Minister for the National Disability Insurance Scheme's response[231]

2.175 The minister advised that incorporating external materials as existing from time to time in legislative instruments is fundamental to the operation of the Act as this ensures that decisions under the NDIS Act are made on the basis of the most current document without requiring a new legislative instrument to be made, and will also capture any intergovernmental agreements that may be updated over time.

2.176 The minister provided the examples of the documents 'NDIS Pricing Arrangements and Price Limits' which is frequently updated as well as evidence-based assessment tools which may be relevant to proposed section 32L. The minister advised that any reference material incorporated will be clearly identified in the explanatory statement for the relevant instrument and available on the NDIA's website in an accessible format, including any updated material.

2.177 The minister further advised that an addendum to the explanatory memorandum can be tabled including the advice provided on this matter before the bill is introduced in the Senate.

2.178 In relation to whether the bill can be amended to include a requirement that any changes to reference material will be widely publicised and affected individuals directly notified, the minister advised that it is a general and fundamental principle of the rule of the law that any member of the public should be able to readily and freely access the terms of the law and that the bill should be read as subject to this general operation. The minister advised that all incorporated documents will be readily and freely available to affected persons, and the public more generally, including on the NDIA's website.

Committee comment

2.179 The committee thanks the minister for this response.

2.180 The committee welcomes the minister's advice that any incorporated reference material will be readily and freely available on the NDIA's website and welcomes the minister's undertaking to include this information in an addendum to the explanatory memorandum to the bill.

2.181 In light of this response, the committee makes no further comment on this matter.

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[231] The minister responded to the committee's comments in a letter dated 30 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Net Zero Economy Authority Bill 2024[232]

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 seeks to do this by helping to facilitate the achievement of Australia's greenhouse gas emissions reduction targets and by supporting Australia's regions and workers through the associated economic transformation.
Portfolio	Prime Minister and Cabinet
Introduced	House of Representatives on 27 March 2024
Bill status	Before the Senate

Exemption from disallowance[233]

2.182 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.

2.183 In *Scrutiny Digest 6 of 2024* the committee requested the minister's 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.[234]

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232 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Net Zero Economy Authority Bill 2024, *Scrutiny Digest 7 of 2024*; [2024] AUSStaCSBSD 126.

233 Clause 20. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

234 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 33–35.

Assistant Minister to the Prime Minister's response[235]

2.184 The Assistant Minister to the Prime Minister (the assistant minister) advised that directions given by the minister to the Board of the Authority are administrative directions about the general policy focus and functions of the Authority. The possibility of disallowance would, the assistant minister advised, provide uncertainty about the policy environment for potential investors and government entities. The assistant minister further advised that the intention of clause 20 is to provide for consistency between the Authority's actions and government policies, especially in relation to investments facilitated under proposed paragraph 16(1)(b) of the bill.

2.185 The assistant minister also noted that there are a range of accountability mechanisms in the bill to ensure transparency and accountability of these directions, including by providing for annual reports to be tabled in Parliament, and that directions under clause 20 are legislative instruments subject to registration on the Federal Register of Legislation.

2.186 Further, the assistant minister noted that similar powers are provided for in other legislation including section 57 of the *Climate Change Authority Act 2011* and section 11 of the *High Speed Rail Authority Act 2022.*

2.187 The assistant minister concluded that the Government does not intend to amend the bill to provide that instruments made under clause 20 of the bill are subject to disallowance.

Committee comment

2.188 The committee thanks the assistant minister for this advice. However, while noting the information provided, the committee remains of the view that it would be more appropriate for directions issued under clause 20 to be subject to parliamentary disallowance, noting that they appear to contain policy directions as to the operation of the Authority.

2.189 Given the significant activities that are proposed to be undertaken by the Authority, the committee welcomes the fact that directions made under clause 20 are legislative instruments and are thus subject to some level of parliamentary oversight. However, the committee remains concerned that these instruments are exempt from parliamentary disallowance. The committee does not consider the fact that an instrument falls within one of the classes of exemption in the *Legislation Act 2003* to be, of itself, a sufficient justification for excluding parliamentary disallowance.

2.190 The committee reiterates that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive and that exempting an instrument from disallowance therefore has

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235 The minister responded to the committee's comments in a letter dated 30 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

significant implications for parliamentary scrutiny. The committee's concerns in this regard reflect the longstanding view of the Senate.

2.191 The committee does not consider that a desire to minimise barriers to the effective functioning of the Authority is a sufficient justification for exempting instruments made under clause 20 from disallowance.

2.192 In relation to the assistant minister's advice that similar powers exist in other Commonwealth legislation, the committee notes that it raised scrutiny concerns in relation to section 11 of the *High Speed Rail Authority Act 2022* in *Scrutiny Digest 5 of 2022* and *Scrutiny Digest 6 of 2022.*[236]In that instance the committee concluded that it was inappropriate for ministerial directions made under clause 11 of that bill to be exempt from disallowance. The committee notes that a similar justification has been provided in relation to the current bill.

2.193 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting ministerial directions made under clause 20 from disallowance.

Documents not required to be tabled in the Parliament[237]

2.194 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 minister 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.

2.195 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

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236 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022) pp. 28–30; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022* (26 October 2022) pp. 83–85.

237 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 24(1)(a)(v).

is commercial-in-confidence.[238] Subclause 75(4) provides that the minister must also omit any national security or sensitive financial intelligence information.

2.196 In *Scrutiny Digest 6 of 2024* the committee requested 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 PGPA Act.[239]

Assistant Minister to the Prime Minister's response[240]

2.197 The assistant minister advised, in relation to clause 68, that the Government will consider the matters raised by the committee noting that reports made under clause 68 are likely to be of 'significant interest' to stakeholders.

2.198 Regarding clause 72, the assistant minister advised that the clause would provide the minister with the ability to request a broad range of advice on any matter relating to the CEO, board or Authority's functions, powers or duties. The assistant minister further advised that requiring the tabling of reports in both Houses of the Parliament would result in a significant amount of administrative advice having to be tabled which may be overly burdensome. Further, the assistant minister noted that clause 75 allows the minister to publish reports or information on the internet, and provides flexibility to table reports or advice in Parliament when appropriate.

Committee comment

2.199 The committee thanks the assistant minister for this advice, and notes the undertaking to consider the committee's position that clause 68 of the bill be amended to provide for reports made under the clause to be tabled in the Parliament.

2.200 The committee further notes the advice that the level of administrative detail to be provided under clause 72 would mean that tabling reports in the Parliament may be overly burdensome on the Government and the Parliament, and that information provided under clause 75 will be available online.

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

239 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 35–36.

240 The minister responded to the committee's comments in a letter dated 30 May 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

2.201 In light of the above the committee makes no further comment in relation to this matter.

Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024[241]

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	Received the Royal Assent on 30 May 2024

Exemption from disallowance
Instruments not subject to an appropriate level of parliamentary oversight[242]

2.202 Item 32 of Schedule 1 to the bill substitutes section 16 of the *Parliamentary Business Resources Act 2017* (PBR Act). Subsection 16(1) provides 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 (paragraph 16(1)(a)); or
- a spouse or dependent child of a former Prime Minister (subparagraph 16(1)(b)(i)); or
- an employee of a former Prime Minister employed under the *Members of Parliament (Staff) Act 1984* (subparagraph 16(1)(b)(ii)).[243]

2.203 Previously, subsection 16(1) provided 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. Former subsection 16(3) of the PBR Act provided that determinations made under subsection 16(1) are

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241 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 7 of 2024*; [2024] AUSStaCSBSD 127.

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

243 Subsection 16(2) provides that a determination made under 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.

legislative instruments but are exempt from disallowance. Former subsection 16(3) was omitted by the bill.

2.204 In *Scrutiny Digest 6 of 2024* prior to the passage of the bill, the committee sought the Special Minister of State'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
- if the intention is for the determinations to be legislative instruments exempt from disallowance, the justification and legislative basis for this exemption.[244]

Acting Special Minister of State's response[245]

2.205 The Acting Special Minister of State (the acting minister) advised the committee that a determination made under subsection 16(1) of the PBR Act is a non-legislative instrument because it is administrative in character. The acting minister advised that such instruments therefore do not meet the requirements for legislative instruments prescribed in subparagraph 8(4)(b)(i) of the *Legislation Act 2003.*

Committee comment

2.206 The committee thanks the acting minister for this response.

2.207 However, the advice provided does not appear to address a key component of the committee's concerns. As noted in *Scrutiny Digest 6 of 2024*, instruments made under the earlier version of subsection 16(3) were classified as legislative in nature on the face of the PBR Act. As the bill has changed the nature of these instruments from legislative to non-legislative, the committee expects a sound justification as to why these instruments are considered administrative in character.

2.208 However, in light of the fact that the bill has received the Royal Assent the committee makes no further comment in relation to this matter.

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244 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 45–47.

245 The acting minister responded to the committee's comments in a letter dated 6 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Standing appropriation[246]

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

2.210 In *Scrutiny Digest 6 of 2024,* the committee requested the acting minister's 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.[247]

Acting Special Minister of State's response[248]

2.211 The acting minister advised that Part 5 of the NACC Regulations prescribe arrangements for the Commonwealth to provide financial assistance to current and former parliamentarians in relation to certain NACC matters, and these matters, while relating to matters arising under or in relation to the NACC Act, also arise as a result of their position or duties as a parliamentarian.

2.212 The acting minister advised that it is a constitutional requirement that legal financial assistance for current parliamentarians be provided as a statutory entitlement rather than an agreement between a parliamentarian and the

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

247 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 48–50.

248 The acting minister responded to the committee's comments in a letter dated 6 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Commonwealth. The acting minister further advised that as legal financial assistance is driven by demand, it would not be possible to predict annual requirements or appropriate to limit funding available once a current or former parliamentarian meets the requirements for financial assistance. This approach is consistent with the PBR Act.

2.213 The acting minister advised that Part 5 of the NACC Regulations prescribes the parameters within which financial assistance can be provided including eligibility for parliamentarians. If eligible, the NACC Regulations also provide that the approving official is able to impose additional conditions on the provision of any financial assistance at any time and the costs of an applicant's legal representation and disbursements will be paid only so far as they are certified to be reasonable.

2.214 In relation to review and sunsetting, the acting minister advised there is no sunsetting clause as it would not be appropriate to limit funding for financial assistance once a parliamentarian has met the eligibility criteria and other conditions within Part 5 of the NACC Regulations. The acting minister further advised that section 278 of the NACC Act sets out the requirement for a statutory review after five years of operation and this provides an opportunity for review of the overall operation of the NACC Act. Additionally, the NACC Regulations are subject to the usual sunsetting process.

2.215 Finally, the acting minister advised that there are established processes in section 25 of the NACC Regulations for reporting to the Parliament in respect of assistance provided under Part 5. This requires the Attorney-General to inform both Houses of Parliament of each decision to pay assistance under Part 5, including reasons for the decision and any limits on expenditure, as soon as possible. It also requires the Attorney-General to, within three months after the end of each financial year, table in each House a consolidated statement of expenditure under Part 5 for the year, specifying the expenditure for each matter.

Committee comment

2.216 The committee thanks the acting minister for this detailed response.

2.217 The committee notes the advice that legal financial assistance is provided as a statutory entitlement and that, as it is driven by demand, it is not possible to predict annual requirements or appropriate to limit funding available once an individual is eligible. Nevertheless, the committee considers that this should not necessarily preclude including an appropriation in an annual appropriation bill, as it should be possible for the Executive to request the Parliament to appropriate additional money where required.

2.218 The committee further notes the acting minister's advice that the NACC Regulations prescribe the parameters within which financial assistance can be provided, including the ability to impose additional conditions by the approving official, and that these operate as safeguards in relation to expenditure. The committee further notes the advice that while there is no sunset clause tied to the standing appropriation, there are other mechanisms for review over the operation of

the NACC Act as a whole and the NACC Regulations are subject to the usual sunsetting process. The committee also notes the advice provided as to reporting requirements. While the committee considers that there could be stronger constraints and oversight mechanisms in the bill to improve transparency and oversight over any financial assistance that may be appropriated, there committee nevertheless welcomes the additional information provided. The committee considers it would have been preferable had this key information been included in the explanatory memorandum to the bill.

2.219 In light of the fact that the bill has received the Royal Assent the committee makes no further comment in relation to this matter.

Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024[249]

Purpose	The bill seeks to amend 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 Senate

Reversal of the evidential burden of proof
Strict liability offences
Significant matters in delegated legislation[250]

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

2.221 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. 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.

2.222 This has the effect of altering significant components of the offence within delegated legislation rather than primary legislation. Additionally, most if not all new offences are introduced alongside offence-specific defences which reverse the evidential burden of proof. Other new offence clauses in the bill, relating to matters

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249 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 7 of 2024*; [2024] AUSStaCSBSD 128.

250 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).

of manufacturing and possession of vaping goods, broadly follow the same framework.[251]

2.223 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.[252]

2.224 In *Scrutiny Digest 6 of 2024*, the Minister for Health and Aged Care (the minister) provided an extensive response to the committee's concerns, including by advising that the definition of a 'unit' of vaping goods only applied in relation to the civil penalty provisions of the bill, with the definition needing to be 'flexible and adaptable' to meet changing public health, technological and market circumstances.[253]

2.225 As such, in *Scrutiny Digest 6 of 2024* the committee requested 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 practicable.[254] The committee also drew the matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation, and to the attention of senators.[255]

Minister for Health and Aged Care's response[256]

2.226 The minister advised they will include the additional information on the prescription of a unit and commercial quantity of vaping goods, as well as the delegation of powers and functions to state and territory officers, in an addendum to the explanatory memorandum to be tabled in Parliament as soon as practicable.

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251 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. 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.

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

253 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 108–110.

254 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 108–110.

255 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 108–110.

256 The minister responded to the committee's comments in a letter dated 4 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 7 of 2024*).

Committee comment

2.227 The committee welcomes the minister's undertaking to prepare an addendum to the explanatory memorandum relating to the bill.

2.228 The committee makes no further comment on the matter.

Broad discretionary powers[257]

2.229 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.

2.230 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.

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

- the necessity and appropriateness of providing 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).[258]

2.232 In *Scrutiny Digest 6 of 2024*[259] the minister advised the committee 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'.

2.233 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

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

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

259 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 111–112.

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

2.234 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.

2.235 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.

2.236 In response the committee commented that it remained unclear why important detail regarding the determination of applications was being left to policy guidance rather than set out on the face of the bill. The committee stated its view that, at a minimum, 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.

2.237 As such, the committee requested the minister's advice as to the consideration of moving amendments to the bill to provide for appropriate legislative guidance relating to the granting of consent under proposed subsection 41RC(1), including criteria on resourcing, technical skills, ability to meet safety requirements, and character requirements.

2.238 Alternatively, the committee sought 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.[260]

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[260] Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 111–112.

Minister for Health and Aged Care's response[261]

2.239 In response to the committee's concerns regarding the broad discretionary powers in proposed section 41RC of the bill, the minister stated they are agreeable to facilitating amendments to the bill that would require the secretary to have regard to specific criteria determined by the minister in a legislative instrument when granting consents. The minister advised that amendments would be moved in the Senate.

Committee comment

2.240 The committee welcomes the minister's undertaking to propose amendments to the bill that would require the secretary to have regard to specific criteria determined by the minister in a legislative instrument when granting consents.

2.241 The committee makes no further comment on this matter.

Enforcement notices
Availability of independent merits review[262]

2.242 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)).

2.243 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.

2.244 As such, 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

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

262 Schedule 1, item 51, proposed section 42YT. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iii).

TG Act 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.[263]

2.245 In *Scrutiny Digest 6 of 2024* the minister wrote to the committee pointing 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.

2.246 In relation to merits review the minister advised that independent merits review is not available for the decision to issue an enforceable notice to ensure that timely enforcement action can be taken to deal with alleged unlawful goods. The minister noted 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.

2.247 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.

2.248 The minister also noted that judicial review is available to a person affected by a decision.

2.249 The committee responded to the minister's advice by stating its view 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 decisions of a discretionary nature.

2.250 While the committee acknowledged the minister's explanation for the counterbalancing need for the protections of health and safety and procedural fairness requirements as well as the constraints placed upon the secretary in the making of an enforceable direction, the committee noted that the decision to make an enforceable direction involved a final or operative determination of substantive rights. The committee concluded that, as such, it was of the view that a decision of this nature would ordinarily be subject to independent merits review.

2.251 The committee made further note that, as stated in the Administrative Review Council's guidelines, *What decisions should be subject to merit review?*, the availability

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

of judicial review is not ordinarily a reason to exclude merits review, noting that judicial review is complementary to, but distinct from, merits view.

2.252 As such, in *Scrutiny Digest 6 of 2024*, the committee requested the minister's further advice as to the justification for exclusion from merits review of decisions made under proposed subsection 42YT(2) of the TG Act with reference to principles set out in the Administrative Review Council's guidelines.[264]

Minister for Health and Aged Care's response[265]

2.253 The minister advised that proposed section 42YT is not confined to vaping goods and applies to therapeutic goods generally. The minister drew parallels between the proposed power to similar circumstances outlined in the *Agricultural and Veterinary Chemicals Code Act 1994* and the *Great Barrier Reef Marine Park Act 1975*,[266] which provide for enforceable directions without independent merits review.

2.254 The minister advised that consideration of the committee's comments has led to the decision to progress amendments to the bill to provide that decisions made under proposed section 42YT will be subject to internal merits review and external merits review by the Administrative Appeals Tribunal.

Committee comment

2.255 The committee welcomes the minister's undertaking to propose amendments to the bill with the effect of providing for internal and external merits review of decisions made under proposed section 42YT.

2.256 The committee makes no further comment on this matter.

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264 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024) pp. 113–115.

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

266 Section 145H of the Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994* and section 61ADA of the *Great Barrier Reef Marine Park Act 1975*.

Chapter 3
Scrutiny of standing appropriations[267]

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.[268] 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.[269]

3.4 The committee draws the following bills to the attention of senators:

- **Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024[270]**

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267 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, [2023] AUSStaCSBSD 129.

268 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*.

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

270 Item 14 of Schedule 1 to the bill seeks to insert proposed sections 846A and 846B into the *Corporations Act 2001* to appropriate the Consolidated Revenue Fund for making a crisis payment.

- **Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024**[271]

Senator Dean Smith

Chair

271 Item 7 of Schedule 6 to the bill seeks to amend the appropriation in section 22 of the *Federal Financial Relations Act 2009* to provide that national skills and workforce development payments are made out of the Consolidated Revenue Fund.