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Committee for the Scrutiny of Bills

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Committee information

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

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[1] This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot, Scrutiny Digest 8 of 2024; [2024] AUSStaCSBSD 133.

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.

Communications Legislation Amendment (Regional Broadcasting Continuity) Bill 2024[2]

Purpose	The bill seeks to amend the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* to support continued access to television broadcasting services in regional Australia.
Portfolio	Infrastructure Transport, Regional Development, Communications and Arts
Introduced	House of Representatives on 26 June 2024
Bill status	Before the Senate

Exemption from disallowance
Exemption from sunsetting[3]

1.2 Item 11 of Schedule 1 to the bill seeks to insert proposed section 102AE into the *Radiocommunications Act 1992* (the Radiocommunications Act) to provide for consolidating transmitter licences for certain broadcasting services. Proposed subsection 102AE(6) provides that the minister may, by legislative instrument, give directions to the Australian Communications and Media Authority (ACMA) in relation to the exercise of the ACMA's powers in making rules under subsection 102AE(5).[4]

1.3 A note to proposed subsection 102AE(6) confirms that section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* do not

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Communications Legislation Amendment (Regional Broadcasting Continuity) Bill 2024, *Scrutiny Digest 8 of 2024*; [2024] AUSStaCSBSD 134.

3 Schedule 1, item 11, proposed subsection 102AE(6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

4 Proposed subsection 102AE(5) provides that the ACMA can make rules by legislative instrument prescribing specified matters.

apply in relation to these directions, as per regulations made under paragraphs 44(2)(b) and 54(2)(b) of the *Legislation Act 2003*.[5]

1.4 In relation to the exemptions from disallowance and sunsetting, the explanatory memorandum states:

> The note to subsection 102AE(6) explains that, as is standard, the disallowance and sunsetting provisions of the *Legislation Act 2003* do not apply to a ministerial direction given under the subsection.[6]

1.5 While acknowledging the legislative basis for the exemption as outlined in the explanatory memorandum, the committee considers 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 exceptional circumstances can be shown which would justify an exemption.[7] In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.

1.6 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*[8], and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[9]

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

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5 The committee notes that instruments made under proposed subsection 102AE(6) would be exempted on the basis of table item 2 in section 9 of the Legislation (Exemption and Other Matters) Regulation 2015 (LEOM), which exempts directions by a minister to any person or body from disallowance. Similarly, ministerial directions would be exempt from sunsetting under table item 3 in section 11 of LEOM.

6 Explanatory memorandum, p. 17.

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

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

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

1.8 In this instance, the explanatory memorandum has merely stated the source for the exemption from disallowance without providing a justification as to why it is necessary and appropriate in the context of the provision.

1.9 Further, sunsetting plays a key role in ensuring legislative instruments are regularly reviewed to determine whether they are still fit for purpose. Once they have sunset, instruments must be remade and tabled in the Parliament, which promotes parliamentary oversight and scrutiny through debate and discussion. Even where exemptions to sunsetting are created, such as through proposed amendments to the LEOM or primary legislation, the committee expects the explanatory memorandum to outline the circumstances that justify the limit on parliamentary oversight and scrutiny. Again, no such justification has been provided in this instance.

1.10 The committee requests the minister's advice as to why it is necessary and appropriate for instruments made under proposed subsection 102AE(6) of the *Radiocommunications Act 1992* to be exempt from disallowance and sunsetting.

Nature Positive (Environment Protection Australia) Bill 2024
Nature Positive (Environment Information Australia) Bill 2024
Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024[10]

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

Instruments not subject to an appropriate level of parliamentary oversight[11]

1.11 Subclause 54(1) of the Nature Positive (Environment Protection Australia) Bill 2024 (EPA bill) seeks to provide that the CEO of Environment Protection Australia (EPA) may establish an advisory group by written instrument to provide the CEO advice or assistance in relation to the performance of the CEO's functions and the exercise of the CEO's powers. Subclause 54(9) seeks to provide that instruments made under subclause 54(1) are not legislative instruments. An instrument made under subclause 54(1) must also determine the terms and conditions of the appointment of the members, the terms of reference of the advisory committee and procedures to be followed while providing advice or assistance.[12]

1.12 The establishment of committees to provide advice about matters arising under the Act in relation to the CEO's powers and functions is a significant part of the overall legislative scheme.

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10 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Nature Positive (Environment Protection Australia) Bill 2024, *Scrutiny Digest 8 of 2024*; [2024] AUSStaCSBSD 135.

11 Subclauses 54(1) and 54(9), Nature Positive (Environment Protection Australia) Bill 2024. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

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

1.13 A non-legislative instrument is not subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. Noting the importance of parliamentary scrutiny, the committee expects the explanatory materials to include a justification as to why the establishment of the advisory committees has been left to non-legislative instruments. In this instance, the explanatory memorandum provides the following justification:

> Such instruments would be administrative in character as they do not determine the law or alter the content of the law. Rather they deal with administrative matters relevant to setting up the advisory group and appointing members and it would be appropriate to leave such matters for the CEO to determine.[13]

1.14 It is not clear to the committee how an instrument establishing an advisory committee that is able to provide advice on the functions and powers of the CEO is not legislative in nature, as this is a vital part of this legislative scheme. The committee also notes that while subsection 8(4) of the *Legislation Act 2003* provides that an instrument is a legislative instrument if it determines or alters the law, this does not preclude this matter being set out in a legislative instrument.[14]

1.15 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to specify that instruments made under subclause 54(1) of the Nature Positive (Environment Protection Australia) Bill 2024 are not legislative instruments (including why it is considered that the instruments are not legislative in character).

Immunity from civil liability[15]

1.16 Clause 50 of the Nature Positive (Environment Information Australia) Bill 2024 (the EIA bill) provides that the Head of Environment Information Australia (the Head), the staff assisting the Head and persons engaged by the Secretary are not liable to actions or proceedings for damages for or in relation to an act or matter done in good faith in the performance of their functions or exercise of their powers.

1.17 This therefore removes any common law right to bring an action to enforce legal rights, 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

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13 Explanatory memorandum, p. 31.

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

15 Clause 50 of the Nature Positive (Environment Information Australia) Bill 2024. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.18 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides:

> This provision would ensure that the HEIA and persons assisting the HEIA with their functions or powers under the legislation are able to do so without fear of legal action being taken against them, as long as they act in good faith when doing so. This clause would also facilitate the provision of best available data by the HEIA, by protecting against liability for damages relating to information provided under the EIA Bill in good faith.[16]

1.19 Although the committee acknowledges the need for the Head and other staff to be able to exercise their powers or perform their functions without fear of legal action, it is unclear to the committee how an affected individual or entity may seek recourse other than by providing evidence of a party named under clause 50 having acted in bad faith. Further, the committee queries how this clause is intended to operate as it is unclear in what circumstances a person or entity would have standing to seek action against Environment Information Australia.

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

- **what circumstances would necessitate Environment Information Australia relying on the immunity from civil liability provided by clause 50 of the Nature Positive (Environment Information Australia) Bill 2024; and**
- **what recourse is available for an affected individual other than by demonstrating a lack of good faith by the Head, staff assisting the Head or persons engaged by the Secretary.**

Availability of independent merits review[17]

1.21 Item 2 of Schedule 11 to the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 seeks to introduce proposed section 474A, which would allow the minister to issue environment protection orders if the minister reasonably believes that the person has engaged, is engaging in or is likely to engage in conduct that is causing or poses an imminent risk of serious damage to the environment (or another protected matter) and that it is necessary to issue the order to ensure the person's future compliance with legislative requirements or prevent or mitigate the damage caused or risk posed. Proposed subsection 474D(2) also imposes

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16 Explanatory memorandum, p. 34.

17 Schedule 11, item 2, proposed subsection 474D(2) of the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

an obligation on the minister to revoke an environment protection order if the minister reasonably believes that the order is no longer necessary. Proposed subsection 474A(3) provides that the order can impose any requirements on the person that the minister reasonably believes are necessary for the purposes detailed above.

1.22 Proposed section 474E provides that contravening an order under proposed subsection 474A(1) can be either a fault-based or strict liability offence. Proposed subsection 474E(1) provides for a fault-based offence which carries a maximum penalty of 1,000 penalty units for an individual, while proposed subsection 474E(2) provides for a strict liability offence which carries a maximum penalty of 300 penalty units for an individual.

1.23 The committee generally expects that if a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, those decisions should ordinarily be subject to independent merits review. Where a bill empowers a decision-maker to make a decision which has the capacity to affect rights, liberties or obligations, the committee expects that the explanatory memorandum to the bill should address whether independent merits review is available with respect to the decision and, if not, the characteristics of the decision which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*.

1.24 In this instance, the explanatory memorandum provides:

> There would be no provision for a person who is subject to an environment protection order to have the order reviewed on its merits. This is necessary and appropriate because of the urgency of the circumstances in which an environment protection order would be issued, and the possibility of serious damage to the environment that may be caused by the person's actions. Therefore, a decision to issue an environment protection order would only operate in emergency and urgent situations and it would be likely that the decision's effect would be spent by the time of review. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraph 4.50 of What decisions should be subject to merits review?). Judicial review would continue to be available under *the Administrative Decisions (Judicial Review) Act 1977* and the *Judiciary Act 1903.*[18]

1.25 In relation to the minister's obligation to revoke an environment protection order if the minister reasonably believes the order is no longer necessary, the explanatory memorandum provides:

> New subsection 474D(2) would clarify that the Minister would be required to revoke an environment protection order if they reasonably believe that the order is no longer necessary for the purposes for which it was issued.

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18 Explanatory Memorandum, p. 189.

> This would ensure that environment protection orders are only in force for the minimum period necessary to manage the damage, or potential damage to the environment.[19]

1.26 The committee notes the need for urgent action in this instance, as well as the obligation on the minister to revoke an environment protection order to ensure that an order would only remain in force for the minimum period necessary to manage the damage or potential damage to the environment. However, the committee remains concerned that the only avenue to seek any review of the decision to issue an environment protection order is to seek judicial review. The committee's concerns are heightened in this instance as the contravention of an environment protection order is associated with significant penalties, though the committee notes the justification provided that these penalties are necessary in order to maintain the integrity of the regulatory scheme and that they are broadly equivalent to penalties for similar offences under state and territory legislation.[20]

1.27 The committee queries whether it would be possible for an affected person to seek independent review where, if under proposed subsection 474D(2), the minister has considered the necessity of an environment protection order and does not revoke the order. The committee understands that in this instance, the order would remain in force while proceedings for review could be commenced.

1.28 The committee seeks the minister's advice as to whether independent review of the minister's decision to not revoke an environment protection order under proposed subsection 474D(2) of the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 can be made available.

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19 Explanatory Memorandum, p. 191.

20 Explanatory memorandum, pp. 191-193.

Telecommunications Amendment (SMS Sender ID Register) Bill 2024[21]

Purpose	The bill would amend the *Telecommunications Act 1997* to require the Australian Communications and Media Authority (ACMA) to establish and maintain an SMS Sender ID Register and related administrative arrangements, to help prevent Short Message Service (SMS) impersonation scams.
Portfolio	Communications
Introduced	House of Representatives on 26 June 2024
Bill status	Before the House of Representatives

Automated decision-making[22]

1.29 Item 4 of Schedule 1 to the bill would insert proposed section 484J into the *Telecommunications Act 1997* (the Act). Proposed subsection 484J(1) would empower the Chair of the Australian Communications and Media Authority (ACMA) to arrange for the use of computer programs to take administrative action that must be taken by the ACMA under Part 24B of the Act (as inserted by the bill). The types of administrative actions that may be subject to automated decision-making are specified in an exhaustive list in proposed subsection 484J(2) of the bill. These include:

- making decisions relating to the acceptance and refusal of applicant approvals under subsections 484F(5) or (6) (proposed paragraph 484J(2)(a));
- making decisions relating to acceptance and refusal of sender identification applications under subsections 484G(4), (6) or (7) (proposed paragraph 484J(2)(b));
- giving notices of decisions under subsections 484F(8) or 484G(8) (proposed paragraph 484J(2)(c)); and
- doing, or refusing or failing to do, anything related to making a decision under subsection 484F(5) or (6) or subsection 484G(4), (6) or (7) (proposed paragraph 484J(2)(d)).

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21 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Telecommunications Amendment (SMS Sender ID Register) Bill 2024, *Scrutiny Digest 8 of 2024*; [2024] AUSStaCSBSD 136.

22 Schedule 1, item 4, proposed section 484J. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

1.30 In relation to the decisions that can be automated, proposed section 484F provides for the ACMA to approve entities, and subsequently proposed subsection 484G provides for the ACMA to approve an application by an approved entity for one or more sender identifications to be registered in the SMS Sender ID Register.

1.31 Proposed paragraph 484F(3)(d) provides that an application for approval by an entity under proposed subsection 484F(1) must comply with any requirements determined under subsection 484L(1) of this Act. Similarly, proposed paragraphs 484G(4)(a) and (b) provide that the ACMA must accept one or more sender identifications applied for under subsection 484G(1) if the criteria determined under subsection 484L(1) for the purposes of paragraphs (a) or (b) are met in relation to those sender identifications and the application, respectively. Proposed subsection 484L(1) empowers the ACMA to determine specified matters in a legislative instrument.

1.32 The committee notes that a number of welcomed oversight and safeguard mechanisms are set out in proposed section 484J, including:

- subsection 484J(3), which provides that administrative actions taken by a computer are treated as taken by ACMA, preserving the right to merits review of such decisions; and
- subsection 484J(4), which provides that the ACMA may substitute an automated decision if satisfied that the decision is not correct or if the decision to accept sender IDs related to IDs the ACMA is satisfied are spoofing.

1.33 In addition, proposed section 484K provides further safeguards, including:

- subsection 484K(1), which provides that the Chair of ACMA must take all reasonable steps to ensure that automated administrative action is action that the ACMA could validly take under this Part of the Act;
- subsection 484K(2), which provides that the Chair of ACMA must comply with any things specified in regulations for the purposes of this subsection;
- subsection 484K(5), which provides that information about automated arrangements must be published on the ACMA's website; and
- subsection 484K(6), which provides that ACMA's annual report under section 46 of the *Public Governance, Performance and Accountability Act 2013* must include information on the number of substituted decisions, the kinds of decisions that were substituted, and the kinds of automated decisions that the ACMA was satisfied were not correct.

1.34 Further, the committee notes that proposed subsection 484K(3) provides that a failure to comply with subsections 494K(1) or (2) does not affect the validity of the administrative action taken by a computer program.

1.35 Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.36 In this instance, the committee welcomes the detailed information that has been provided in the explanatory memorandum. The committee acknowledges that the explanatory memorandum and the bill address many of the concerns which arise when decisions are automated and notes the department's genuine engagement with this important matter. In this case, the explanatory memorandum states:

> …Where a decision involves the exercise of discretion or an evaluative judgement, a computer program will not be programmed to take action. This includes cases where an exception is raised because the case falls outside of business rules relating to the assessment of an application for a sender identification, or the case meets parameters requiring the decision to be made by a human – the required final decision would be taken by a human rather than the computer. The term 'failure' would include inaction by the computer program, either by design or by fault.
>
> 'Anything related to…' is intended to extend to the use of computer programs to assist with preliminary procedural or routine aspects leading to the final administrative action. For example, where: (i) a computer program materially contributes to the final action taken by a person; (ii) the computer program determines the non-discretionary aspects of a decision and leaves discretionary elements of a decision to be made by a human; (iii) the computer program guides a person through the decision-making process through analysis and recommending decisions that are available to the decision-maker based on the data.
>
> There may be instances where a human undertakes the substantive analysis and ultimately takes the administrative action, and in those cases legislative authority is not required for these uses of a computer system. For example, it is not necessary to provide legislative authority merely to use a spreadsheet to track the number of sender identifications registered in a particular period.
>
> Proposed subsection 484J(3) clarifies that administrative action taken with the assistance of the operation of a computer program under an arrangement made under subsection (1) is treated, for all purposes, as administrative action taken by the ACMA, for which the ACMA will be wholly

> accountable. This provision preserves the review mechanisms that would be available should a human have taken the administrative action.
>
> If the ACMA is not satisfied that an administrative action taken by the operation of a computer program under subsection (3) is correct, proposed paragraph 484J(4)(a) provides an additional safeguard by allowing the ACMA the discretionary power to substitute such a decision with another one should the ACMA consider the original decision taken by the operation of the computer program to be incorrect. Proposed paragraph (4)(b) also provides a safeguard by allowing the ACMA to substitute a computer-made decision under subsection 484G(4) to accept a sender identification where the ACMA is satisfied that the sender identification is a spoofing sender identification.
>
> The proposed subsection recognises the potential for errors to occur in the decision-making process, including through computer errors, coding or system malfunctions. It is important to enable the substitution of a decision or administrative action taken with the assistance of a computer program in these situations. This provision would ensure that the ACMA can override or substitute a decision informed through the use of a computer when required.
>
> […]
>
> It is expected that the ACMA, in developing any systems to support automation of administration actions related to the Register, will apply high standard information technology project methodologies and techniques. Further, consistent with the Australian Government privacy framework, the ACMA will need to have privacy project planning and governance mechanisms in place (including completed privacy impact assessments) and ensure that the system has transparency and accountability characteristics. Verification and quality assurance processes are also required. Any approach taken to deal with discretion or judgement with support of a computer program should ensure that the automated system's audit trail clearly sets out each of the decision points involving discretion or judgement and referrals to a human decision maker.[23]

1.37 Further detail on the safeguards set out in proposed section 484K is also welcomed by the committee, including:

> These measures are in recognition of the Government's work to develop a consistent legislative framework for automated-decision making, as part of the Government's response to recommendation 17.1 of the Royal Commission into the Robodebt Scheme Report. They are intended to ensure automated systems comply with administrative law principles of legality, fairness, rationality and transparency.[24]

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[23] Explanatory memorandum, pp. 24-26.

[24] Explanatory memorandum, pp. 26. Further detail and explanation of proposed section 484K is set out on pages 26- 28.

1.38 In relation to proposed subsection 484K(3) which provides that automated decisions are not invalid if oversight mechanisms in proposed subsections 484K(1) and (2) are not complied with, the explanatory memorandum states:

> Proposed subsection 484K(3) would clarify that the administrative actions taken by a computer program under an arrangement under proposed subsection 484J(1), are not rendered invalid due to failure to take 'reasonable steps' in accordance with the requirements set out in proposed subsection 484K(1) or (2).
>
> A computer program may generate a legally valid decision even if the person with oversight failed to take reasonable steps to ensure validity of the action taken. Legal validity will depend on whether the computer program took valid and correct action under this Part. The Chair of the ACMA will have a duty to ensure that this is the case, but this duty is distinct from the general administrative law requirements to make valid decisions.
>
> Although a failure to take all reasonable steps will not, in itself, invalidate decisions, there is a substantial risk that a failure to take reasonable steps could result in scenarios where decisions produced by the system are not valid. For example, inadequate controls could result in the computer program not being monitored and updated in line with legislative changes. In this situation, the computer program would become outdated and no longer generate correct decisions.[25]

1.39 Overall, the committee welcomes the inclusion of these safeguards and oversight measures on the face of the bill. The committee notes that the explanatory memorandum explains that '[w]here a decision involves the exercise of discretion or an evaluative judgement, a computer program will not be programmed to take action'.[26] While this additional safeguard is welcomed, the committee is concerned that its effect is diminished as it is not enshrined on the face of the bill. The committee's position is that administrative automated decision-making should only be applied to non-discretionary decisions, and while this intent is reflected in the explanatory memorandum, this protection would be strengthened by being included on the face of the bill itself. These concerns are heightened by the operation of proposed paragraphs 484F(3)(d), and 484G(4)(a) and (b) which allow for criteria relevant to the decisions to be set out in legislative instruments. This prevents the committee from assessing whether or not such criteria could be considered discretionary and therefore whether it is appropriate for decisions made under proposed subsections 484F(5) or (6) and 484G(4), (6) or (7) to be subject to automated decision-making.

1.40 Further, the committee is concerned that the impact of proposed subsection 484K(3) is to water down the effectiveness of the oversight measures in proposed

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25 Explanatory memorandum, p. 27.

26 Explanatory memorandum, pp. 24-25.

subsections 484K(1) and (2) by providing that a failure to comply with these safeguards does not invalidate decisions.

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

- **whether consideration was given to providing, on the face of the bill, that only non-discretionary decisions, or non-discretionary aspects of the specified decisions set out in proposed section 484J of the Telecommunications Amendment (SMS Sender ID Register) Bill 2024 may be subject to automated decision-making; and**
- **whether the additional criteria to be set out in legislative instruments to be considered under proposed sections 484F and 484G will be limited to non-discretionary matters noting that they will form the criteria for a decision subject to automated decision-making.**

Private senators' and members' bills that may raise scrutiny concerns[27]

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
Commission of Inquiry into Antisemitism at Australian Universities Bill 2024 (No. 2)	Subclause 7(3) and Clause 8	The provisions may raise scrutiny concerns under principle (iii) appropriate review of decisions in relation to procedural fairness.
	Subclause 11(5)	The provision may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to significant penalties and principle (iii) appropriate review of decisions in relation to procedural fairness.
	Clause 10	The provision may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to privacy.
COVID-19 Response Commission of Inquiry Bill 2024	Subclause 14(1)	The provision may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to coercive powers.
	Subclause 18(3)	The provision may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to reversal of the evidential burden of proof.

[27] 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 137.

	Clauses 21 and 23	The provisions may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to significant penalties.

Bills with no committee comment[28]

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

- Digital ID Repeal Bill 2024
- Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamation) Bill 2024
- Governor-General Amendment (Salary) Bill 2024
- National Housing and Homelessness Plan Bill 2024
- National Housing and Homelessness Plan Bill 2024 (No. 2)

[28] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, [2024] AUSStaCSBSD 138.

Commentary on amendments and explanatory materials[29]

Australian Postal Corporation and Other Legislation Amendment Bill 2024

1.42 On 24 June 2024 the Assistant Minister for Infrastructure and Transport (Senator the Hon. Carol Brown) presented an addendum to the explanatory memorandum to the bill.

1.43 The committee thanks the assistant minister for tabling an addendum to the explanatory memorandum which addresses the committee's scrutiny concerns in relation to significant matters in delegated legislation and privacy, and partially addresses the committee's concerns in relation to the reversal of evidential burdens of proof.

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

1.44 On 26 June 2024, the Senate agreed to 27 Government amendments to the bill. The Minister for Health and Aged Care (Senator the Hon Mark Butler) tabled a supplementary explanatory memorandum relating to the amendments.

1.45 The Government amendments address, amongst other matters, concerns raised by the committee in *Scrutiny Digest 5 of 2024*[30] and clarified by the minister in responses, commented on in *Scrutiny Digest 6 of 2024*[31] and *Scrutiny Digest 7 of 2024*.[32]

1.46 Government amendments no. 7 and no. 9 amend subsection 41QC(11) and section 41QD to introduce exceptions to offences and contraventions relating to the possession of vaping goods. In relation to subsection 41QC(11), the supplementary explanatory memorandum provides examples of evidence that indicates a reasonable possibility of the matters contained in the exception.[33] The committee welcomes the inclusion of examples in the supplementary explanatory memorandum which partially address the committee's concerns in relation to the reversal of the evidential burden of proof.

1.47 Government amendment no. 10 inserts subsections 41RC(2A), 41RC(2B) and 41RC(2C), which relate to decision-making principles that may be established by legislative instrument, which the secretary must have regard to prior to issuing a

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29 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, [2024] AUSStaCSBSD 139.

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2024* (27 March 2024), pp. 12–18.

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024), pp. 108–117.

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2024* (26 June 2024), pp. 116–122.

33 Supplementary explanatory memorandum, p. 6.

consent to possess, supply or manufacture vaping goods. Subsection 41RC(2C) also provides guidance as to what the decision-making principles may set out.

1.48 Government amendment no. 17 inserts paragraph 60(1)(n) and subsection 60(2E), which clarify that the decision by the Secretary to give enforceable directions under subsection 42YT(2) is a decision that is subject to independent merits review. Subsection 60(2E) clarifies that only a person to whom directions were given is entitled to seek merits review.

1.49 The committee welcomes these amendments, which address the committee's concerns in relation to broad discretionary powers and the availability of independent merits review, and partially address the committee's concerns in relation to reversals of the evidential burden of proof.

Chapter 2
Commentary on ministerial responses

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

2.2 In this Digest, the committee is not commenting on any ministerial responses.

Chapter 3
Scrutiny of standing appropriations[34]

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.[35] 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.[36]

3.4 The committee notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator Raff Ciccone
Deputy Chair

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34 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, [2024] AUSStaCSBSD 140.

35 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*.

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