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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 report also includes consideration of two bills deferred from consideration in *Scrutiny Digest 8 of 2024*, namely the Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024 and the Customs Licensing Charges Amendment Bill 2024. Also included in this Digest is the committee's consideration of the Treasury Laws Amendment (Build to Rent) Bill 2024, which was divided on 2 July 2024 from the Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024 (which the committee had initially considered in *Scrutiny Digest 7 of 2024* and has concluded its consideration in this Digest.

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.

Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024[2]

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

Reversal of the evidential burden of proof[3]

1.2 Section 15 of the *AusCheck Act 2007* (AusCheck Act) makes it an offence for an AusCheck staff member (or former member) to disclose information obtained relating to the AusCheck Scheme. This bill seeks to create an additional defence to this offence if the information is AusCheck scheme personal information that is disclosed to a Customs officer for the purposes of assisting in the performance of the officer's functions or the exercise of the officer's powers under the *Customs Act 1901* (Customs Act).[4] By making this an exception to the offence, this reverses the evidential burden of proof (requiring the defendant to bear the burden of adducing or pointing to

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 143.

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

4 Schedule 1, item 121.

evidence that suggests a reasonable possibility that the matter exists or does not exist).[5]

1.3 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.

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

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[6]

1.5 In relation to proposed paragraph 15(2)(e), while the explanatory memorandum provides a detailed explanation as to the necessity for disclosing information obtained through the AusCheck Scheme to a Customs officer, as well as privacy safeguards (including the application of the *Privacy Act 1988*), it does not provide a justification as to the creation of a new defence which reverses the evidential burden of proof.

1.6 It is not clear to the committee that the matters made out in the defence are peculiarly within the defendant's knowledge or would be significantly more costly and difficult for the prosecution to disprove. The committee understands that the matter the defendant would need to raise evidence about relates to whether the disclosed information was provided to a Customs officer for the purpose of them performing their functions or exercising a power. This would appear to be evidence that would also be within the knowledge of the Customs officer.

1.7 The committee considers that where a provision reverses the burden of proof the explanatory memorandum should explicitly address relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[7]

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5 See section 13.3 of Schedule 1 to the *Criminal Code Act 1995*.

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

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

1.8 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*), the committee considers that a justification for reversing the evidential burden of proof should have been included within the explanatory memorandum.

1.9 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the offence under section 15 of the *AusCheck Act 2007*.

Coercive powers[8]

1.10 This bill also seeks to amend the Customs Act to provide that a collector may, at any time, gain access to and enter, if necessary by force, any place covered by a depot licence and examine any goods at the place.[9] A collector is taken to be either the Comptroller-General or a Customs officer under the Customs Act.[10]

1.11 Under common law, government officials cannot enter and search the premises of a person without consent. Although this common law position may be appropriately modified by legislation, the committee will closely scrutinise any conferral of coercive powers. As noted in the *Guide to Framing Commonwealth Offences*, the default position is that entry into a premises without consent should generally be authorised by a warrant issued by a judicial officer, such as a magistrate, and any departure from this should be accompanied by a compelling justification.[11]

1.12 In accordance with the *Guide to Framing Commonwealth Offences,* there may be limited circumstances in which it is appropriate for entry and search without consent or judicial warrant.[12] These may include licensed or registered non-residential premises by an inspector, though the applicable legislation should impose, as a condition of all licences, consent to entry where the licensed activity happens.[13] Another circumstance that may justify entry without consent or warrant is where

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8 Schedule 1, item 162, proposed section 77ZAA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

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

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

11 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) pp. 72-73.

12 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 78.

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

there is a situation of emergency, serious danger to public health or where national security is involved.[14]

1.13 In relation to this matter, the explanatory memorandum provides:

> There is no requirement under new section 77ZAA for a Collector to first obtain a warrant for the entry and examination of goods at a place licensed as a depot. This is appropriate in principle, and is consistent with those declared in the Guide, where the purpose of entry is to access or examine goods under customs control or to monitor compliance rather than to seek and collect evidence of an offence, and it is impracticable to obtain a warrant to carry out the day to day compliance monitoring activities. However, it has been suggested that where there is no requirement for obtaining a warrant to enter premises without consent, a reasonable period of notice should be given.
>
> In the context of the regulation of customs functions it would defeat the purpose of granting powers of entry and examination if a reasonable period of notice were given to licence holders. The purpose of entry under proposed section 77ZAA is for an audit of goods in a place covered by a depot licence to be undertaken to monitor compliance by a licence holder with their obligations in order to maintain the integrity of the customs regulatory regime, and thus to facilitate legitimate trade and cross-border movements. Were a period of notice mandated, it would provide non-compliant licence holders the opportunity to conceal their non compliance and thus continue to engage in potentially criminal activities to the detriment of Australian industry, the community and the revenue of the Commonwealth.[15]

1.14 While the committee notes the importance of monitoring compliance and of preventing non-compliant licence holders the opportunity to conceal their non-compliance, it is still not clear to the committee what circumstances necessitate search and entry without a warrant or make seeking a warrant impractical as part of monitoring. The committee understands that seeking a warrant is not a process that would require the license holder to be alerted to a search and entry procedure.

1.15 Further, the committee notes that presently, depot licences are subject to a condition that the holder of the licence must permit an authorised officer entry and the ability to search a licensed area when requested to do so under subsection 77N(10) of the Customs Act. It is unclear why this existing power is not sufficient, noting that licence holders (to whom this power is directed) would be in breach of their licence conditions if they do not permit an authorised officer to enter. This existing power can be used at 'any reasonable time' (within a relevant licence period, without the need to provide notice. It is unclear in what circumstances it would be necessary to enter

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14 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) p. 80.

15 Explanatory memorandum, p. 52.

without consent and potentially use force to enter. Breach of these conditions is an offence subject to 60 penalty units. It is unclear why provisions requiring a licence holder to grant entry could not be strengthened if necessary, rather than providing a general power for a collector to gain entry at 'any time'. This would be consistent with the Guide to Framing Commonwealth Offences which provides that in relation to licenced premises the 'applicable legislation should impose as a condition of all licences consent to entry onto non-residential premises where the licensed activity happens'.[16]

1.16 The committee notes that without the requirement for a warrant, there is no independent assessment of whether search and entry in the specific circumstance is justified. The proposed provision is not accompanied by any safeguards regarding its use, requiring only that a collector may 'at any time' enter premises covered by a depot licence 'if necessary by force'. There is no requirement that a senior officer authorise the entry or use of force. There are also no reporting requirements. Further, licence holders may be unaware that search and entry of licensed premises may occur without a warrant and, if not present at the time of the search, may be unaware the premises were searched. The committee's concerns are also heightened as the proposed power would grant a collector the power to use force if necessary and this power may be exercised by any Customs officer in the absence of a warrant. The explanatory memorandum states that the officers who exercise these powers 'are highly trained and subject to rigorous integrity checks'.[17] However, it is not clear if they are trained in the use of force, noting that such officers do not currently have such powers.

1.17 In light of the above, the committee seeks the minister's advice on:

- **why subsection 77N(10) of the *Customs Act 1901*, which currently makes it a condition for licence holders to permit authorised officers to enter and search premises is insufficient, and whether consideration was given to amending this provision (rather than allowing a general right of warrantless entry at any time);**
- **why seeking a warrant would be impractical (noting the bill could provide no requirement for prior notification to be given regarding the warrant);**
- **what safeguards would apply if a collector were to enter premises without consent and without a warrant, including oversight of the officer's actions and reporting requirements;**
- **in what circumstances is it envisaged that an officer would need to use force to enter premises;**

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

17 Explanatory memorandum, p. 52.

- **whether training will be provided to any officer exercising these proposed powers in relation to the use of force; and**
- **why is there no requirement that a licence holder be notified *after* a search has occurred.**

Fair Work (Registered Organisations) Amendment (Administration) Bill 2024[18]

Purpose	This bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* to put the Construction and General Division (and its branches) of the Construction, Forestry and Maritime Employees Union under administration.
Portfolio	Employment and Workplace Relations
Introduced	Senate on 12 August 2024
Bill status	Before the Senate

Significant matters in delegated legislation
Exemption from disallowance[19]

1.18 This bill seeks to provide that the minister may, in writing, determine a scheme for the administration of the Construction and General Division and its branches of the Construction, Forestry and Maritime Employees Union and its branches (the CFMEU) if satisfied that, having regard to the Parliament's intention in enacting the bill, it is in the public interest for the CFMEU to be placed under administration. The bill seeks to provide that the minister may do so by a legislative instrument that is not subject to disallowance.[20] The scheme contained in the instrument would be able determine a number of significant matters, including the suspension and removal of officers, the taking of disciplinary actions by the administrator, and the termination of employment of employees.[21] The bill also would provide that the instrument may provide for the person who is to be appointed as administrator and also that the administrator may delegate their functions or powers.[22] Further, the bill would provide that the minister is able to vary or revoke the scheme determined under the above provision by a legislative instrument that is also not subject to disallowance.[23]

1.19 Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there

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18 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Fair Work (Registered Organisations) Amendment (Administration) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 144.

19 Schedule 1, item 5, proposed sections 323B and 323D. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

20 Schedule 1, item 5, proposed subsection 323B(2).

21 Schedule 1, item 5, proposed section 323B.

22 Schedule 1, item 5, proposed paragraphs 323B(3)(a) and (i).

23 Schedule 1, item 5, proposed section 323D.

is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.20 In this instance, the explanatory memorandum explains this as follows:

> Although this is a significant delegation of power, it is justified in the specific circumstances which this Bill seeks to address. The ability to determine a scheme of administration is temporary and limited in scope (that is, because the scheme that may be determined could only apply to the Construction and General Division and its branches). … The interests of members of the union, and of the community more generally, are served by swift and decisive action. In circumstances where serious concerns have been raised about the allegedly unlawful conduct of individuals and the effective operation of the Construction and General Division, to the detriment of Division members and the wider community, the possibility of delay is an unacceptable risk.
>
> However, the Bill ensures that the General Manager would retain oversight of the implementation, operation and progress of the scheme, and the General Manager would remain accountable to the Parliament for performance of this function (for example, through the Senate Estimates process). Further accountability mechanisms may be included in the scheme. This is recognised by proposed subsection 323B(3), which contemplates that the scheme may include provision for reports from the administrator to the Minister or General Manager.[24]

1.21 The committee acknowledges that the scheme of administration is temporary and limited in scope and there is some guidance provided on the face of the bill as to the contents of the rules that may be made. The committee notes the explanatory memorandum appears to be saying that it is necessary to set out the scheme in rules because of the need to act swiftly. However, the committee reiterates the importance of parliamentary oversight of significant matters even when swift and decisive action is said to be required. Although the General Manager is able to maintain oversight of the scheme and is obligated to remain accountable to Parliament, the committee considers that this is a different function to the ordinary parliamentary oversight and scrutiny measures bills are subject to.

1.22 The committee's concerns are significantly heightened as the bill provides that these legislative instruments would not subject to disallowance. As such, they would be exempt from the primary means by which the Parliament exercises control over the legislative power that it has delegated to the Executive, which 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

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[24] Explanatory memorandum, p. 12.

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.

1.23 In this instance, the explanatory memorandum merely states that allowing the instruments to be disallowable 'could cause significant uncertainty and delay in any proposed administration that may be determined by the Minister'.[25]

1.24 It is not clear to the committee how subjecting the instruments to disallowance creates uncertainty as to the effect of the instrument or delays the administration of the scheme. An instrument has effect from the day it is registered, and will continue to have effect unless it is disallowed within the disallowance period. The committee does not consider the need for certainty or preventing delays in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance or sunsetting. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[26]

1.25 The committee reiterates its view that a need for creating certainty is not an exceptional circumstance that, in and of itself, justifies an exemption from disallowance.

1.26 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving to non-disallowable delegated legislation the power to establish, vary and revoke a scheme for the administration of the CFMEU.

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

Modification of primary legislation by delegated legislation (akin to a Henry VIII clause)

1.28 The bill also provides that the minister may, by legislative instrument, make rules that prescribe 'the effect of actions taken under the scheme for the purposes of

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25 Explanatory memorandum p. 12 and see also p.14.

26 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) p. 109.

other laws'.[27] Depending on the breadth of any such rules made pursuant to this power, this could have the effect that the rules may provide that specified laws do not apply to any actions taken under the scheme, which could result in the rules modifying the operation of primary legislation.

1.29 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 the level of parliamentary scrutiny applicable 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.

1.30 In relation to this, the explanatory memorandum provides the following justification:

> The proposed rule-making power is necessary to ensure that actions taken by the administrator are effective and not inadvertently undermined by the operation of other laws. The proposed rule-making power would, in a practical sense, be time-limited, as rules may only apply in relation to actions taken under the scheme, which itself is time-limited. The rules could only have narrow application, in relation to actions taken under the scheme during an administration determined by the Minister.[28]

1.31 While the committee acknowledges it may be necessary to ensure actions taken by the administrator are not inadvertently undermined, it is unclear to the committee why the rule-making power is so broad in its scope and is not subject to specific constraints, such as applying in relation to particular actions or particular laws. The committee's concerns are heightened as the provision currently would allow the minister to prescribe the effect of actions taken for the purposes of 'any laws'. This would, in theory, include laws such as work health and safety legislation or anti-discrimination legislation. Although the committee notes the explanation provided that the rules could only have narrow application, the committee queries why this narrow application is not defined on the face of the bill.

1.32 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of enabling delegated legislation to potentially modify the operation of primary legislation.

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

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27 Schedule 1, item 5, proposed subsection 323G(2).

28 Explanatory memorandum, p. 15.

Procedural fairness[29]

1.34 As set out above, the bill provides that the minister may, by legislative instrument, determine a scheme for the administration of the CFMEU. In doing so, the bill provides a non-exhaustive list of matters that may be provided for in the legislative instrument in relation to the scheme, including, for example, the suspension or removal of officers and termination of employment. The bill further provides that the minister is not required to observe any requirements of the natural justice hearing rule in making a decision under this section. In relation to this, the explanatory memorandum states:

> The exercise of this power is contingent on the Minister being satisfied that it is in the public interest for the Construction and General Division to be placed under administration and the Minister must have regard to the objects of the Registered Organisations Act, including the efficient management of organisations and high standards of accountability of organisations. The administration is time limited and the exclusion of natural justice is a legitimate temporary measure to ensure that the administration of the Division, if determined, is able to proceed swiftly and effectively, and to support the public interest in ensuring the effective operation of the Division in the best interests of its members.[30]

1.35 However, the committee is concerned that, due to the broad way in which proposed section 323B is drafted, any decisions made by the minister, which may affect individual rights and liberties, set out in the relevant legislative instrument, would not be subject to the natural justice hearing rule. For example, if the minister were to determine that the legislative instrument provides that all employees are terminated, as currently drafted, those employees would not be entitled to make claims and submissions before the decision is made. Further, neither the bill nor the explanatory memorandum indicates whether any appeal rights or avenues for redress would be available to those affected by decisions made under the legislative instrument.

1.36 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that decisions made by the minister establishing the scheme of administration are not subject to the rules of natural justice, noting that some of these decisions may have impact on individual rights and liberties, such as the termination of employment.

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29 Schedule 1, item 5, proposed subsection 323(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

30 Explanatory memorandum, pp. 13-14.

Immunity from civil liability[31]

1.37 The bill provides that an administrator, or person acting under their direction, is not liable to civil proceedings for loss, damage or injury in relation to an act or omission done in good faith in connection with the performance of duties under the CFMEU administration scheme.[32]

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

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

> By providing an immunity from civil liability for acts or omissions done in good faith in the specified circumstances, this section would reduce the risk that the administrator or persons assisting the administrator would adopt a less rigorous approach to the performance of their functions to protect their personal interests at the expense of the public interest.[33]

1.40 While noting the justification provided, the committee's view is that the explanatory memorandum should have, at a minimum, addressed 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.

1.41 The committee's concerns are heightened in this instance as the bill provides that non-disallowable legislative instruments made under the bill to administer the scheme may set out delegations of the administrator's powers and functions to a seemingly unlimited class of delegates.[34] This extends the immunity from civil liability to a broader class of persons (namely, those acting under the administrator's direction).

1.42 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing immunity from civil liability for actions by the administrator or person acting under their direction, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

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31 Schedule 1, item 5, proposed section 323N.The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

32 Proposed section 323N.

33 Explanatory memorandum, p. 19.

34 Schedule 1, item 5, proposed paragraph 323B(3)(i).

Retrospective application[35]

1.43 The bill creates anti-avoidance civil penalty provisions which apply when a person engages in conduct which results in the prevention of another person or body from taking action under the scheme or prevents the administrator from effectively administering the scheme.[36] It also creates a civil penalty for a person to be 'involved' in a contravention of this civil penalty provision by, for example, being directly or indirectly knowingly concerned in or party to the contravention.[37] The penalty for contravention of the provision is 600 penalty units (currently amounting to $187,800).

1.44 The bill provides that these civil penalty provisions will apply to conduct engaged in from 17 July 2024, prior to the commencement of the bill.[38]

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

1.46 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity.

1.47 In relation to this retrospective application, the explanatory memorandum states:

> The civil penalty provisions in proposed sections 323P and 323Q, which are designed to ensure that action is not taken to interfere with or undermine the operation of the administration, will apply to conduct engaged in on and after 17 July 2024. This is the date that the Government announced its willingness to take legislative action to provide a pathway to placing the Construction and General Division into administration, in the event that concerns raised about the alleged conduct of the Construction and General Division were not resolved to an acceptable standard within a certain period of time, including as a result of court action pursued by the General Manager.

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35 Schedule 1, item 9. The committee draws senators' attention to this item pursuant to Senate standing order 24(1)(a)(i).

36 Proposed section 323P.

37 Proposed section 323Q. The definition of 'involved in' is set out in a exhaustive list in proposed subsection 323Q(2).

38 Schedule 1, item 9.

> This section is reasonable and proportionate to prevent individuals from taking steps to avoid obligations under new sections 323P and 323Q before the Bill passes. It is crucial to the effective administration of the Division that there are strong prohibitions to prevent action being taken to avoid the scheme of administration being undertaken effectively.
>
> Retrospectivity applies only to civil penalty provisions, not to the offence proposed by subsection 323P(5).[39]

1.48 The committee reiterates its long-standing scrutiny concern that provisions that back-date commencement to the date of the announcement of the bill (i.e. 'legislation by press release') challenge a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). This is especially of concern in this instance where the relevant provisions impose substantial civil penalties on individuals for actions that may not have been subject to a penalty when undertaken. This is particularly relevant in relation to the civil penalty provision of being 'involved' in the contravention, noting a person might be liable to a significant penalty for acts or omissions that indirectly made them a party to actions that prevented the administrator from taking action under a scheme that did not exist at the time the act or omission occurred. While noting the advice in the explanatory memorandum that the government previously announced its 'willingness' to take legislative action against the CFMEU, the committee does not consider that this press release provides sufficient notice of the government's intention to penalise and deter conduct that was not subject to the penalty at the time it may have been committed.

1.49 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying civil penalty provisions to conduct that may have occurred prior to commencement of the Act.

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39 Explanatory memorandum, p. 22.

Future Made in Australia (Omnibus Amendments No. 1) Bill 2024[40]

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

Broad delegation of administrative powers[41]

1.50 Currently the *Australian Renewable Energy Agency Act 2011* (the ARENA Act) provides that the Australian Renewable Energy Agency (ARENA) may delegate all or any of its powers or functions under the ARENA Act to a member of its Board or to its Chief Executive Officer (CEO). The CEO may, in writing, subdelegate a power or function to the Chief Financial Officer or a member of staff who is an SES employee, acting SES employee or an Executive Level 2 employee or equivalent. This bill seeks to amend this to allow the CEO to, in writing, subdelegate to 'a senior member of the staff referred to in section 61'.[42] The bill also seeks to replace existing sections 61 and 62 to allow ARENA to employ 'such persons as it considers necessary'. It does not provide a definition of 'senior members of staff'.[43]

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

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40 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Future Made in Australia (Omnibus Amendments No. 1) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 145.

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

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

43 See Schedule 2, item 43.

the committee considers that an explanation as to why these are considered necessary should be included in the explanatory memorandum.

1.52 In this instance, the explanatory memorandum provides:

> The ARENA Board will have oversight of any subdelegations and will identify appropriate senior staff to subdelegate powers and functions to. It is intended that the CEO would be held accountable by the ARENA Board for managing, monitoring and controlling the activities of those senior staff who perform functions or powers under a subdelegation.
>
> It is expected that, for the purposes of this provision, 'senior staff' in ARENA would generally hold managerial positions equivalent to at least an Executive Level 2 officer or higher in the Australian Public Service. It is administratively necessary to allow the CEO to subdelegate their powers or functions to senior staff of ARENA, particularly given the expansion of ARENA's workload and workforce in its delivery of the FMA agenda. This would ensure that day-to-day operations are not unduly delayed or interrupted where decisions or approvals that are required cannot be made by senior staff holding appropriate subdelegations.
>
> Subsection 73(2) of the ARENA Act requires that subdelegates must comply with any directions given by the CEO when exercising powers under a subdelegation. This ensures that appropriate oversight and limits can be placed on any subdelegated powers. [44]

1.53 While the committee notes the intention that 'senior members of staff' to whom powers or functions may be subdelegated would generally hold managerial positions equivalent to at least an Executive Level 2 (EL2), this intention is not captured on the face of the bill. The provision does not specify which senior members of staff the powers or functions may be subdelegated to. It is also noted that the ARENA Act currently provides that the CEO may subdelegate to members of the SES or EL2. As such, this amendment would appear to indicate an intention to subdelegate to levels lower than that of an EL2. It is unclear to the committee why it is necessary to subdelegate any of the ministers or functions to such a broad range of people as existing subsection 73(1) of the ARENA Act limits the persons to whom these powers may be subdelegated to.

1.54 Further, the committee notes with concern that there is also no requirement for powers and functions to be subdelegated to members of staff with the requisite skills, qualification or experience to exercise those powers or perform those functions. Although existing subsection 73(2) provides that a subdelegate must comply with any directions given by the CEO, the committee does not consider this is sufficient as a safeguard as there is no restriction on which powers or functions may be subdelegated and which persons they may be subdelegated to.

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

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[44] Explanatory memorandum, pp. 42-43.

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

Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024[45]

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

Instruments not subject to an appropriate level of parliamentary oversight[46]

1.56 Existing subsection 140GB(2) of the *Migration Act 1958* (the Migration Act) provides that the minister must approve a nomination from a person who is, or has applied to be, an approved work sponsor or a person who is a party to negotiations for a work agreement if certain criteria are met. Item 3 of Schedule 1 to the bill seeks to insert proposed subsection 140GB(2A) which seeks to provide three income threshold requirements (being the income an applicant for the visa must earn before they can be sponsored) that must be met before the minister must approve of a nomination.

1.57 In relation to one of these thresholds, the bill provides the minister with flexibility to estimate the earnings an applicant must earn per year in order to be sponsored for a Core Skills stream. In particular, proposed paragraph 140GB(2A)(c) provides that the income threshold amount that must be met is an amount that is either calculated in accordance with the regulations or is an amount specified in writing by the minister under proposed subsection 140GB(2B). Item 4 of Schedule 1 would also insert proposed subsection 140GB(6) to provide that such a specification would not be a legislative instrument.

1.58 As such specifications are stated to not be legislative instruments, they would not be subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments. As a result, Parliament would exercise no control over such specifications. Noting the importance of parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why instruments made

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45 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 146.

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

under proposed subsection 140GB(2B) are not considered to be legislative in character.

1.59 In this instance, the explanatory memorandum provides the following justification:

> New subsection 140GB(6) operates to clarify that the agreement made by the Minister in writing in new subsection 140GB(2B) is not a legislative instrument on the grounds that it is administrative in character, and the referred provision is merely declaratory of the law and is not prescribing a substantive exemption from the operation of the *Legislation Act 2003*.[47]

1.60 However, it is not apparent to the committee how an instrument made under proposed subsection 140GB(2B) would be administrative in character as the content of this instrument would determine the minimum income amount required for the minister to approve a nomination from a work sponsor or a person who is party to negotiation for a work agreement. The committee considers this would affect the rights and interests of the relevant visa applicant (who may not be eligible for sponsorship if they earn under the amount set by the minister).[48]A specification made by the minister will determine whether the minister is or is not required to approve a person's nomination under existing subsection 140GB(2). The committee considers this appears to determine the content of the law and would likely be legislative in character.[49]

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

- **why it is considered necessary and appropriate that instruments made under proposed subsection 140GB(2B) are not legislative instruments; and**
- **whether the bill can be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

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47 Explanatory memorandum, p. 9.

48 *Legislation Act 2003*, subparagraph 8(4)(b)(ii).

49 *Legislation Act 2003*, subparagraph 8(4)(b)(i).

Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024[50]

Purpose	The bill sets out a framework for the entities that are liable to top-up tax in a way that seeks to achieve outcomes consistent with the GloBE Rules.[51] This includes establishing the entities that are within scope of the GloBE Rules, relevant definitions that are used to support the framework and the description of taxes that may be charged to an entity.
Portfolio	Treasury
Introduced	House of Representatives on 4 July 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation[52]

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

- IIR Top-up Tax Amount;
- Domestic Top-up Tax Amount; and
- UTPR Top-up Tax Amount.[53]

1.63 The bill then provides that the amount of tax payable by the entity is the sum of the relevant amounts.[54] What those amounts mean would be set out in the rules,[55] effectively meaning that the rate of taxation would be set by delegated legislation.

1.64 The committee's consistent view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is offered. These include prescribing the amount or meaning of a tax, as one of the most fundamental functions of the Parliament is to levy taxation. The committee's

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50 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 147.

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

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

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

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

55 Clauses 7, 9 and 11.

longstanding view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, the committee considers that guidance in relation to the level of a tax should be included on the face of the primary legislation to enable greater parliamentary scrutiny, or further information as to how the tax rate will be calculated to be set out in the explanatory memorandum.

1.65 In relation to the inclusion of these significant matters in delegated legislation the explanatory memorandum states:

> To ensure Australia's framework is sufficiently flexible, the meaning of top-up tax amount for each of these top-up taxes is delegated to the Rules. This flexibility is necessary to ensure that Australia is best placed to accommodate internationally agreed developments in a timely and efficient manner, while still retaining sufficient parliamentary oversight of our domestic law.[56]

1.66 In this instance the committee notes the justification provided in the explanatory memorandum that setting the rate of these taxes in delegated legislation will provide flexibility to ensure that international agreements are recognised. However, the committee generally does not accept a desire for flexibility alone as sufficient justification for the inclusion of significant matters such as the rate of tax in delegated legislation. The committee is particularly concerned when there is no cap on the amount of taxation that may be provided for by delegated legislation.

1.67 The committee therefore requests the Treasurer's advice as to:

- **why it is necessary and appropriate for the meaning of IIR Top-up Tax, Domestic Top-up Tax and UTPR Top-up Tax, and therefore effectively the rate of taxation, is to be left to delegated legislation; and**
- **whether any guidance can be provided in the explanatory materials as to what the anticipated starting rate of each of these three tax amounts would be, or, how it is anticipated the amounts would be calculated.**

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

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

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56 Explanatory memorandum, p. 15.

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

1.69 The explanatory memorandum provides:

> This interpretation is necessary because the effectiveness of the GloBE Rules depends on a coordinated global common approach. This means that OECD Inclusive Framework members are not required to adopt the GloBE rules. But, if they choose to do so, then they:
>
> - must implement and administer the rules in a way that is consistent with the Model Rules and Guidance agreed to by the OECD Inclusive Framework; and
> - must accept the application of the GloBE Rules applied by other OECD Inclusive Framework members including agreement as to rule order and the application of any agreed safe harbours.
>
> Such alignment and consistency is being enforced through an OECD Inclusive Framework Peer-Review Process.[58]

1.70 The explanatory memorandum provides no explanation as to whether these incorporated documents may be freely accessible.

1.71 In addition, paragraph 31(1)(a) provides that the rules may apply, adopt or incorporate any matter contained in any other instrument or writing as in force from time to time. In relation to this the explanatory memorandum merely restates the operation of the provision without providing further information as to the types of additional documents it is intended the rules may incorporate and whether they will be freely accessible to the public and affected parties.

1.72 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

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

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

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[58] Explanatory memorandum, pp. 31-32.

1.74 Noting the above comments, the committee requests the Treasurer's advice as to:

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

Broad delegation of administrative powers[59]

1.75 The bill provides that the rules may confer on a person or body a power or function of determining any matter that may be dealt with by the rules, or a power or function relating to the operation, application or administration of the rules. Paragraph 30(2)(b) empowers the person or body to delegate the power or function, subject to a list of limitations to confine powers to make delegated legislation to vest in persons such as the relevant minister, departmental secretary, the Commissioner of Taxation and SES level departmental employees.[60]

1.76 The explanatory memorandum states in relation to this:

> The Rules may confer a power or function relating to the operation, application, or administration of the Rules, which may be exercised via a legislative instrument or notifiable instrument. However, only the Minister may make a legislative instrument in the Rules, which cannot be delegated. Similarly, only the Minister, Secretary or Commissioner may make a notifiable instrument, which can only be delegated to an SES employee within the Department or the ATO. This delegation is appropriate as the SES will have the relevant experience and expertise in making a notifiable instrument, should the need arise.[61]

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

60 See subclause 30(3).

61 Explanatory memorandum, p. 33.

1.77 While noting this advice it appears to the committee that the delegation provided for in paragraph 30(2)(b) broadly empowers any non-legislation making functions under the bill to be delegated to any person without limitation. The committee notes that, with the exception of the safeguard relating to the making of delegated legislation, there are no apparent limitations or guidance as to who may be delegated any of the functions or powers available under the bill, and the explanatory memorandum does not provide any further guidance or clarification on this matter.

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

1.79 The committee requests the Treasurer's advice as to:

- **why it is considered necessary and appropriate for clause 30 to allow for the delegation of all functions or powers under the bill (other than the power to make delegated legislation); and**
- **which persons, classes or persons or entities it is intended that the delegation power under clause 30 will be exercised in relation to, including whether such persons or entities will be required to possess any relevant skills, training or experience to exercise these powers or functions; and**
- **and whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.**

Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024[62]

Purpose	This bill seeks to amend various Acts to provide for all claims for compensation and rehabilitation received from 1 July 2026 to be determined under the *Military Rehabilitation and Compensation Act 2004*. To support this 'single ongoing Act' model, the *Veterans' Entitlements Act 1986* and the *Safety, Rehabilitation and Compensation (Defence-Related Claims Act) 1988* are proposed to continue in a limited form and be closed to new claims for compensation and rehabilitation.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 3 July 2024
Bill status	Before the House of Representatives

Standing appropriations[63]

1.80 This bill seeks to insert the following new purposes for which the Consolidated Revenue Fund may be appropriated:

- compensation under an instrument made by the Military Rehabilitation and Compensation Commission (the Commission) relating to the obtaining of financial and legal advice by persons for the purposes of the *Military Rehabilitation and Compensation Act 2004* (MRC Act);[64]
- advancing payments for compensation a person is expected to become entitled to in respect of a journey or accommodation related to their treatment;[65] and

62 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 148.

63 Schedule 1, item 200, proposed paragraph 423(da); Schedule 2, item 106, proposed paragraph 423(caa) and Schedule 3, item 14, proposed new paragraph 423(cb). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

64 Schedule 1, item 200, proposed paragraph 423(da), in relation to a legislative instrument made under proposed new section 424M (to be inserted by Schedule 1, item 201).

65 Schedule 2, item 106, proposed paragraph 423(caa) in relation to payments made in accordance with proposed section 291A (to be inserted by Schedule 2, item 103).

- fees and allowances of witnesses summoned to appear before the Veterans' Review Board.[66]

1.81 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 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.

1.82 Given the difficulty of ongoing parliamentary oversight over enacted standing appropriations, the committee generally 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.

1.83 In this instance, the explanatory memorandum does not provide a justification for why the Consolidated Revenue Fund has been appropriated for these additional purposes. The committee understands that the exact amount of compensation payable to people in respect of legal fees and travel and accommodation costs would not be ascertainable in advance making an annual appropriation potentially difficult. Nonetheless, it is unclear if any other mechanisms have been considered to provide parliamentary oversight of the amount of money expended under this standing appropriation.

1.84 In light of the above, the committee requests the minister's advice as to what mechanisms are in place to report to the Parliament on any expenditure authorised by the standing appropriations.

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66 Schedule 3, item 14, proposed new paragraph 423(cb) in relation to fees payable in relation to proposed section 353T (to be inserted by Schedule 3, item 10).

Incorporation of external materials as existing from time to time[67]

1.85 This bill seeks to amend the MRC Act to provide that an instrument made for the purpose of determining a class of persons eligible for services under the Veteran Suicide Prevention Pilot may make provision 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.[68]

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

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

1.87 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.

1.88 In this instance, the explanatory memorandum only provides a brief explanation of how this provision is intended to operate.[69]

1.89 Noting the above comments and in the absence of a sufficient explanation in the explanatory memorandum, the committee requests the minister's advice as to:

- **whether documents applied, adopted or incorporated by reference under proposed subsection 287B(3) will be made freely available to all persons interested in the law; and**
- **why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.**

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67 Schedule 2, item 124, proposed subsection 287B(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

68 Schedule 2, item 124, proposed subsection 287B(3).

69 Explanatory memorandum, p. 53.

Undue trespass on rights and liberties
Broad scope of offence provisions
Significant penalties[70]

1.90 The bill seeks to make it an offence for a person to undertake a number of actions that would be deemed to be contempt of the Veterans' Review Board (the Board).[71] The Board is a specialist tribunal that reviews decisions relating to veterans' entitlements and compensation. These include:

- engaging in conduct that insults another person in, or in relation to, the exercise of their powers or functions under the MRC Act (relating to review of original determinations by the Board);
- engaging in conduct that interrupts the proceedings of the Board;
- creating a disturbance that is in or near a place where the Board is sitting;
- takes part in creating or continuing a disturbance that is in or near a place where the Board is sitting;
- engaging in conduct that, if the Board were a court of record, constitute a contempt of that court.

1.91 The committee is concerned about the potential effect of these measures on the rights to freedom of speech and the right to protest, which have both been described as a fundamental aspect of our common law system.[72] In particular, these offences would criminalise a person engaging in conduct that 'insults' another person or 'creates a disturbance'. As such, this could in effect restrict a person's ability to impart certain information and ideas, thereby limiting freedom of speech. Prohibiting a person from interrupting the proceedings of the Board or creating, or taking part in creating or continuing, a disturbance in or near a place where the Board is sitting, could also limit the right to protest. This is particularly the case as the disturbance is not limited only to where the Board is sitting but also includes 'near a place' where it is sitting. This could result in a person taking part in a legitimate protest on a public street outside the office space where the Board is sitting being liable to up to six months imprisonment.

1.92 While it may be necessary and appropriate in certain circumstances to limit these rights, the explanatory memorandum does not provide any information as to the necessity of these measures and only states that the contempt offences under proposed section 353L are based on an existing provision in the *Veterans' Entitlements Act 1986* (Veterans' Act) and that the policy intentions of these offences are to

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70 Schedule 3, item 10, proposed section 353L. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

71 This seeks to remake an existing provision, namely the *Veterans Entitlements Act 1986*, section 170.

72 See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)* (2016) paragraphs 4.13 and 6.13.

promote the effective operation of the Board.[73] It is unclear why it is necessary to criminalise interrupting a proceeding, creating a disturbance or conduct that insults a person in order to promote the effective operation of the Board when it appears that subsection 353L(5), which creates the offence of conduct that constitutes contempt of the Board, would be able to capture behaviour such as interruptions or causing a disturbance that would amount to contempt of the Board.

1.93 The committee also considers that there is a lack of clarity in some of these provisions. 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.

1.94 For instance, it is not clear how the terms 'creating a disturbance' or 'continuing a disturbance' in proposed subsections 353L(3) and 353L(4) should be understood or what conduct would constitute creating or continuing a disturbance as there are no definitions provided for these terms in the bill and explanatory memorandum. Similarly, it is unclear what conduct is intended to constitute 'interrupts the proceedings of the Board' under proposed subsection 353L(2).

1.95 The committee's concerns are heightened as each of the offences under proposed section 353L carries a custodial penalty of imprisonment for six months. 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 and 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. In relation to proposed section 353L, the explanatory memorandum merely states that the offences are 'not of strict liability' and does not provide any justification as to the necessity of custodial penalties for these offences.[74]

1.96 Further, in relation to the offence under proposed subsection 353L(1), the committee notes that the criminalised conduct has the effect of 'insulting' a person in relation to their functions or powers. The committee is concerned that it is not simply the conduct, but the effect of the conduct on another individual, which results in the commission of an offence.

1.97 In light of the above, the committee requests the minister's advice as to the following matters:

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73 Explanatory memorandum p. 65.

74 Explanatory memorandum, p. 66.

- **the appropriateness of the penalties proposed in subsection 353L; and**
- **whether these penalties are broadly equivalent to similar offences in Commonwealth legislation and if not, why not.**

1.98 The committee's consideration of the appropriateness of these provisions 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*.

1.99 The committee also requests the minister's advice as to:

- **whether guidance can be provided in relation to how each of the offences under proposed section 353L is intended to operate, such as by providing examples of conduct that would result in an 'interruption', 'insults' a person in relation to their functions or powers or creates or contributes to a 'disturbance';**
- **why it is necessary and appropriate in this instance to limit freedom of speech and the right to protest, including why it is necessary to extend the offence provisions not only to disturbances where the Board is sitting but also to 'near a place' where they are sitting; and**
- **why it is necessary to criminalise conduct such as an interrupting a proceeding, creating a disturbance or any conduct that insults a person in relation to their powers and functions in addition to proposed subsection 353L(5) which creates an offence of engaging in conduct that would constitute contempt of the Board.**

Reversal of the evidential burden of proof
Strict liability offences[75]

1.100 The bill proposes to introduce the following offences:

- failure of a person served with a summons to appear before the Board as required;[76]
- failure of a person appearing at a hearing to take an oath or make an affirmation;[77]
- failure of a witness to answer a question required by the Board;[78]

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75 Schedule 3, item 10, proposed sections 353H and 353J. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

76 Schedule 3, item 10, proposed section 353H.

77 Schedule 3, item 10, proposed subsection 353J(1).

78 Schedule 3, item 10, proposed subsection 353J(2).

- failure of a person served with a summons to comply with a requirement to produce a document.[79]

1.101 All of these proposed offences would be offences of strict liability with a defence of reasonable excuse available to the defendant, subject to six months imprisonment or 30 penalty units. These offences largely mirror existing provisions in the Veterans' Act.[80]

1.102 Under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict or absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so.

1.103 As the imposition of strict or absolute liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict or absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[81]

1.104 In this instance, the explanatory memorandum provides the following justification in relation to the offences:

> Both sections 353H and 353J establish offences for non-compliance to protect the integrity of the Board's merits review processes. As these offences involve acts of omission, evidence is often unlikely in the absence of admission, and therefore it would be appropriate to retain the approach for the legislation to impose a strict liability. A declaration of strict liability means there is no requirement to prove fault but allows a defence of honest and reasonable mistake of fact (in addition to the general defences) if relevant evidence is given in support.
>
> The conduct/failure to act specified in these sections is not an offence if the person has a reasonable excuse, as per subsections 353H(3) and 353J(5). Defence of reasonable excuse is open-ended and what constitutes a reasonable excuse would depend on the individual circumstances. Each

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79 Schedule 3, item 10, proposed subsection 353J(3).

80 See *Veterans' Entitlements Act 1986*, sections 168 and 169 (note the existing provisions have a penalty of 6 months imprisonment or 10 penalty units or both).

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

provision is followed by a note referring to subsection 13.3(3) of the Criminal Code that a defendant bears the evidential burden because:

- the reasons why it was not reasonable for a person to comply are likely to be entirely within the knowledge of the person on whom the summons or requirement was served; and
- it would be onerous for the prosecution to disprove the existence of all possible circumstances that would make it reasonable for a defendant to comply with the summons/requirement.[82]

1.105 In accordance with the *Guide to Framing Commonwealth Offences*, strict liability may be adopted where that is necessary to ensure the integrity of a regulatory regime, where the penalty does not include imprisonment and where the application of strict liability is necessary to protect general revenue. The committee does not consider that the inconvenience of proving the fault element is sufficient as a justification for applying strict liability to the proposed offences.

1.106 Further, it is alarming that these offences carry maximum penalties that include imprisonment, which directly contradicts the *Guide to Framing Commonwealth Offences* which states that the application of strict liability to all physical elements of an offence should generally only be considered appropriate when the offence is not punishable by imprisonment.[83] Although the offences largely mirror existing offences that carry maximum penalties of imprisonment, the committee considers that in drafting this bill, there is an opportunity to consider the appropriateness of those penalties in relation to strict liability offences. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.107 The committee's concerns are also heightened in this instance as a result of the defence of reasonable excuse that is applicable to these offences. While the committee acknowledges the need for persons not to be penalised when able to provide a reasonable excuse which will depend on personal circumstances, the context of these offences makes a reversal of the evidential burden of proof concerning. The prosecution will not be required to prove fault as to any of these offences even though at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence, and this is an important aspect of the right to be presumed innocent until proven guilty. The process by which a person is convicted of an offence that carries a custodial penalty has been greatly simplified by removing the burden on the prosecution to prove fault, and in addition to this, the defendant bears an evidential burden of proof.

1.108 The committee queries whether it is appropriate for these offences to be offences of strict liability in the context of their custodial penalties and considers that

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82 Explanatory memorandum, p. 66.

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

these offences would be more appropriately classified as fault element offences, unless the penalties are revised.

1.109 The committee requests the minister's advice as to why it is necessary and appropriate to impose strict liability on the offences under proposed sections 353H and 353J of the bill, noting that these offences carry maximum penalties of six months imprisonment and impose an evidential burden on the defendant to provide evidence of a reasonable excuse.

Broad delegation of administrative powers[84]

1.110 Currently, the Veterans' Act provides that the minister may delegate to a commissioner of the Military Rehabilitation and Compensation Commission (the Commission) or person appointed or engaged under the *Public Service Act 1999* any or all of the minister's powers.[85] This bill seeks to repeal and remake this with a power to allow the minister to delegate any or all of the minister's powers to a commissioner or an APS employee.[86] The Veterans' Act and the MRC Act also currently provide that the Commission may delegate any or all of its powers to a commissioner, a member of staff assisting the Commission, an APS employee or a contractor.[87] The bill would amend this to provide the Repatriation Commission may delegate any or all of its functions or powers to a commissioner, a member of staff assisting the Commission, or a contractor engaged by the Commission.[88]

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

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84 Schedule 3, item 105, proposed subsection 212(1) and Schedule 4, item 23, proposed section 360DB. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

85 *Veterans' Entitlements Act 1986*, section 212. A person engaged under the *Public Service Act 1999* refers to an APS employee under section 22 of that Act.

86 Schedule 3, item 105, proposed subsection 212(1).

87 *Veterans' Entitlements Act 1986*, section 213 and *Military Rehabilitation and Compensation Act 2004*, section 384.

88 Schedule 4, item 23, proposed section 360DB.

1.112 In this instance, the explanatory memorandum provides the following in relation to proposed subsection 212(1):

> While the wording of the provision has changed in new subsection 212(1), the breadth of the delegation power remains the same. (See Schedule 4 items 53 and 68 for terminology updates upon commencement of the single ongoing Act.)
>
> The scope, nature, and purpose of the exercise of power involve many routine administrative powers, which do not require personal attention of the Minister. For administrative necessity, including the volume of decision-making, the provision means they could be exercised by a departmental official for and on the Minister's behalf.[89]

1.113 While the breadth of these delegations may be unchanged, the committee considers that this bill provides an opportunity to reassess the appropriateness of the breadth of these delegations and that a justification should still be provided in the explanatory memorandum for a delegation of any or all of the minister's or the Commission's powers to such a broad group of people, including contractors under section 360DB. The explanatory memorandum and the information provided on the face of the bill do not include safeguards to ensure that the persons to whom these powers are delegated possess the appropriate skills, qualifications and experience to exercise the Commission's or the minister's powers. It is also unclear why the minister's powers should be delegated to *any* APS employee under proposed subsection 212(1) and why the Commission's powers can be delegated to contractors under proposed section 360DB.

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

- **why it is necessary and appropriate for any or all of the minister's powers to be delegated to any APS employee under proposed subsection 212(1) of the bill; and**
- **why it is necessary and appropriate for any or all of the Commission's powers to be delegated to contractors engaged by the Commission under proposed section 360DB.**

89 Explanatory memorandum, pp. 75-76.

Private senators' and members' bills that may raise scrutiny concerns[90]

The committee notes that the following private senator's bill may raise scrutiny concerns under Senate standing order 24. Should this bill proceed to further stages of debate, the committee may request further information from the bill's proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Truth and Justice Commission Bill 2024	Clauses 14 and 15	The provisions may raise scrutiny concerns under principle (i) in relation to coercive powers.
	Subclauses 18(3) and 23(3)	The provisions may raise scrutiny concerns under principle (i) in relation to the reversal of the burden of proof.

90 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 149.

Bills with no committee comment[91]

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

- Customs Licensing Charges Amendment Bill 2024
- Future Made in Australia Bill 2024
- Interactive Gambling Amendment (Ban on Gambling Advertisements) Bill 2024
- Tax Laws Amendment (Incentivising Food Donations to Charitable Organisations) Bill 2024
- Taxation (Multinational—Global and Domestic Minimum Tax) Imposition Bill 2024
- Treasury Laws Amendment (Build to Rent) Bill 2024
- Treasury Laws Amendment (Multinational—Global and Domestic Minimum Tax) (Consequential) Bill 2024

[91] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 150.

Commentary on amendments and explanatory materials[92]

Primary Industries Levies and Charges Disbursement Bill 2023

1.115 On 1 July 2024 the Minister for Agriculture, Fisheries and Forestry (Senator the Hon. Murray Watt) tabled an addendum to the explanatory memorandum to the bill.

1.116 The committee thanks the minister for tabling an addendum to the bill which addresses the committee's scrutiny concerns in relation to significant penalties.

92 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 151.

Chapter 2
Commentary on ministerial responses

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

Appropriation Bill (No. 1) 2024-2025
Appropriation Bill (No. 2) 2024-2025
Appropriation Bill (No. 5) 2023-2024
Appropriation Bill (No. 6) 2023-2024[93]

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	Received the Royal Assent on 26 June 2024

Parliamentary scrutiny—appropriations determined by the Finance Minister

2.2 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

93 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 1) 2024-2025, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 152.

a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

2.3 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.[94] 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.

2.4 In *Scrutiny Digest 7 of 2024* the committee requested the minister's 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. [95]

Minister for Finance's response[96]

2.5 The minister advised that the AFM provisions in the current appropriation bills reflect the standard levels of appropriation from the pre-COVID era as adjusted for the passage of time.

2.6 While confirming that AFM determinations are exempt from disallowance, the minister drew the committee's attention to Senate standing order 23(4A), which enables the Senate Standing Committee for the Scrutiny of Delegated Legislation to scrutinise exempt instruments. Further, the minister noted that detail of the justification for such exemptions are set out in the explanatory memoranda to the relevant bills, and that explanatory statements to AFM instruments also include justifications for the urgent expenditure.

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

95 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024), pp. 2-16.

96 The minister responded to the committee's comments in a letter dated 16 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

Committee comment

2.7 The committee thanks the minister for this advice. However, the committee does not consider that this response directly addresses its questions and concerns in relation to the use of AFM determinations.

2.8 The committee had sought advice as to how the total expenditure cap of $1 billion had been formulated. While the minister advised that the amount of the cap across Appropriations Bills Nos 1 and 2 is consistent with pre-COVID era figures, the minister has not provided any details as to how the $1 billion figure was reached.

2.9 The committee had also sought advice as to whether any 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. The minister's response, that the Senate Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise instruments exempt from disallowance, does not, in the committee's view, give appropriate consideration to this important issue.

2.10 **However, in light of the fact that the bills have received the Royal Assent the committee makes no further comment in relation to this matter.**

Parliamentary scrutiny—measures marked 'not for publication'[97]

2.11 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.

2.12 Noting the important role of the PBS in interpreting these Appropriation Bills, 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.

2.13 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

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97 Clauses 4 and 6 and Schedule 1 to Appropriations 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).

not publish the financial details for the measure due to the public interest.[98] The minister responded advising that they had asked the department to 'consider, where possible, enhancing the guidance on information which may be provided…'.[99] The committee noted in *Scrutiny Digest 7 of 2024* that this recent commitment has likely not yet been implemented, as the level of explanation provided within the PBS remains high-level.[100] 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.[101]

2.14 In *Scrutiny Digest 7 of 2024* the committee:

- reiterated its significant concerns on the Parliament authorising appropriations without clarity as to the amounts appropriated under each individual budget measure. These concerns were heightened due to the committee's observation of an upwards trend in the number of measures marked 'not for publication' (nfp);
- reiterated 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; and
- affirmed that it will continue to consider this important matter in its scrutiny of future Appropriation bills.[102]

Minister for Finance's response[103]

2.15 Although the committee did not seek any further advice on this issue, the minister provided the committee an update on a previous undertaking to consider enhancing the guidance provided for describing not for publication measures in portfolio budget statements. To this end, the minister advised that measures marked

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

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

100 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024), pp. 2-16.

101 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024), pp. 2-16.

102 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024), pp. 2-16.

103 The minister responded to the committee's comments in a letter dated 16 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

as nfp in the 2024-25 portfolio budget statements include additional detail in their description.

Committee comment

2.16 The committee thanks the finance minister for providing this additional information. However, the committee's assessment of measures marked as nfp in the 2024-25 portfolio budget statements is that their descriptions do not appear to contain any substantially different or improved information to assist the committee in considering the appropriateness of such budget allocations from being withheld from the Parliament and the public.

2.17 However, in light of the fact that the bills have received the Royal Assent the committee makes no further comment in relation to this matter. The committee will continue to assess the justifications and appropriateness of measures marked as 'not for publication' in future Appropriation bills.

Communications Legislation Amendment (Regional Broadcasting Continuity) Bill 2024[104]

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[105]

2.18 This 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).[106]

2.19 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 apply in relation to these directions, as per regulations made under paragraphs 44(2)(b) and 54(2)(b) of the *Legislation Act 2003*.[107]

2.20 In *Scrutiny Digest 7 of 2024,* the committee requested the minister's advice as to why it is necessary and appropriate for instruments made under proposed

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104 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 153.

105 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).

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

107 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.

subsection 102AE(6) of the *Radiocommunications Act 1992* to be exempt from disallowance and sunsetting.[108]

Minister for Communication's response[109]

2.21 The minister advised that the approach adopted in making instruments made under proposed subsection 102AE(6), which are ministerial directions, as being exempt from sunsetting and disallowance is consistent with the Legislation (Exemptions and Other Matters) Regulation 2015.

2.22 The minister also advised that it would be important for any ministerial direction made under this provision to deliver certainty and continuity over time. The minister stated that if broadcasters are to consolidate their transmission arrangements, it is critical that they have certainty regarding policy settings which may impact those decisions and that therefore it is appropriate that ministerial directions made under proposed subsection 102AE(6) be exempt from sunsetting and disallowance.

Committee comment

2.23 The committee thanks the minister for this response. The committee understands the need for commercial certainty but reiterates that 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.[110] 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.

2.24 In this instance, it is not clear to the committee how subjecting the instruments to disallowance or sunsetting creates uncertainty as to the effect of the instrument. An instrument has effect from the day it is registered, and will continue to have effect unless it is disallowed within the disallowance period. The committee does not consider the need for certainty in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance or sunsetting. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many

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108 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (3 July 2024) pp. 2–4.

109 The minister responded to the committee's comments in a letter dated 22 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

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

> rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[111]

2.25 Further, given that instruments only sunset ten years following their commencement, it is unclear how making an instrument exempt from sunsetting promotes certainty. Sunsetting is vital in ensuring that legislative instruments are regularly reviewed, remain fit for purpose and are subject to a level of parliamentary oversight when the relevant instruments are remade.

2.26 The committee reiterates its view that a need for administrative flexibility or creating certainty are not exceptional circumstances that, in and of themselves, justify an exemption from sunsetting or disallowance.

2.27 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of instruments made under proposed subsection 102AE(6) of the bill being exempt from sunsetting and disallowance.

111 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) p. 109.

Criminal Code Amendment (Deepfake Sexual Material) Bill 2024[112]

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's Department
Introduced	House of Representatives on 5 June 2024
Bill status	Before the Senate

Broad scope of offence provisions
Reversal of the evidential burden of proof[113]

2.28 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[114] and carries a maximum penalty of imprisonment for 6 years.

2.29 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'.[115] As this bill 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.

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112 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Criminal Code Amendment (Deepfake Sexual Material) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 154.

113 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).

114 Proposed subsection 474.17AA(1).

115 *Criminal Code*, section 473.1.

2.30 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'.

2.31 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;[116]
- the transmission is necessary for the purposes of proceedings in a court or tribunal;[117] 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.[118]

2.32 In *Scrutiny Digest 7 of 2024,* the committee requested the Attorney-General's advice on a number of matters including whether a definition of the term 'sexual pose' can be provided, why the existing offence has been broadened to capture AI-Generated material rather than the creation of a separate offence to prosecute that material and why it was proposed to use offence-specific exceptions (which reverses the burden of proof) and why certain matters were not included as elements of the offence.[119]

Attorney-General's response[120]

2.33 In answer to the committee's first query, the Attorney-General advised that the language of 'sexual pose' is not new and already exists within the Criminal Code in the definitions of 'child abuse material' and 'private sexual material' which are both found in section 473.1. The Attorney-General advised that not defining the term 'sexual pose' ensures that the relevant offences are interpreted in line with societal norms, and in-line with the complexities of sexuality and sexualisation of persons

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

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

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

119 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 17-19 and 20-21.

120 The minister responded to the committee's comments in a letter dated 12 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

when related to adults, noting that a specific statutory meaning could lead to conduct being criminalised that over time reasonable persons would come to accept. The Attorney-General stated that the current approach is reliant upon case law to determine how these offences are applied and that this approach is broadly consistent with comparative Commonwealth, state and territory offences.

2.34 In relation to the committee's query regarding why the existing offences were not broadened to capture AI-generated material, the Attorney-General noted that offences are technology-neutral and can apply to existing and future technologies. The Attorney-General stated that the new offences capture both simulated and real material, and that ultimately what is being criminalised is the transmission of sexual material without consent.

2.35 In relation to the reversal of the evidential burden of proof, the Attorney-General stated that this is appropriate as the matters identified in each of the exceptions are expected to be peculiarly within the defendant's knowledge and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Attorney-General also stated in relation to the defence of whether a reasonable person would consider transmitting the material to be acceptable,[121] that the test is an objective one and has been introduced 'to ensure that conduct that would otherwise be acceptable by a reasonable person is not subject to overly-broad criminalisation'. The Attorney-General advised that material considered socially acceptable to transmit can in fact be transmitted notwithstanding that they meet the meaning of sexual material. The Attorney-General did not directly address the question of why this exception was not included as an element of the offence rather than being made a defence. Rather, the Attorney-General advised that the circumstances around the transmission of the material will be uniquely in the knowledge of the defendant and significantly more difficult for the prosecution to prove that certain matters were not reasonable according to socially acceptable standards.

Committee comment

2.36 The committee thanks the Attorney-General for this advice which addresses some of the committee's concerns.

2.37 The committee notes the advice around the difficulty in defining 'sexual pose'. The committee notes that this term was first introduced in relation to child sexual abuse material and notes that what constitutes a sexual pose may be clearer when it comes to criminalising conduct relating to children rather than sexual poses by adults where, as the Attorney-General notes, there may be complexities relating to sexuality or sexualisation of adults. However, the committee appreciates the difficulty in defining this further in the legislation, and notes that its discussion below regarding the breadth of the offence is discussed further below.

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121 Proposed subsection 474.17A(3)(d).

2.38 The committee also appreciates the advice provided in relation to why the offence has been broadened to encompass real and simulated material in order to apply to existing and future technologies, and makes no further comment in relation to this.

2.39 However, it remains unclear why it is necessary to place an evidential burden on the defendant to raise evidence demonstrating that the transmission was necessary for the enforcement of a law or for the purposes of a court or tribunal proceeding.[122] It is still unclear to the committee how these matters may be peculiarly within a defendant's knowledge or more difficult for the prosecution to prove as they relate to transmissions that are required for law enforcement or proceedings in a court or tribunal – matters which the state would appear to be more in a position to raise evidence in relation to rather than the defendant. The committee does not consider the justification provided to be sufficient for reversing the evidential burden of proof in these instances.

2.40 The committee also remains concerned that in order to limit the breadth of the offence provision, the approach adopted has been to create an exception to the offence which relies on a defendant providing evidence to suggest a possibility that a reasonable person would consider transmitting the material to be acceptable, having regard to a range of circumstances. The Attorney-General advised that this exception was included to ensure that conduct that would otherwise be acceptable by a reasonable person is not subject to overly broad criminalisation. This indicates that the offence as it stands is overly broad and relies on exceptions to ensure conduct is not captured that a reasonable person would not consider should be criminalised. However, in making this an exception it means a person would be liable to be prosecuted for such an offence and it would be incumbent on the person to raise evidence to demonstrate that a reasonable person would consider transmitting the material to be acceptable. So, using the example provided by the Attorney-General, where a person downloads material published online in circumstances where, due to the commercial nature of the material, they expected consent had been provided such persons would be liable to be prosecuted under these proposed provisions and it would require them to raise at trial evidence that a reasonable person would consider the transmission to be acceptable.

2.41 As this is an objective test, it is unclear why this should rest on the defendant to raise evidence in relation to and how such matters are peculiarly within any person's knowledge. The relevant concern is whether a reasonable person would consider it socially acceptable to transmit the material. Further, the matters that a reasonable person would have regard to do not relate to information as much as they relate to observations that a person would make of another person (for example, in relation to

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[122] See proposed paragraphs 474.17A(3)(a) and 474.17A(3)(b).

that person's age, vulnerability or intellectual capacity) having viewed the transmitted material.

2.42 It is unclear to the committee why this exception cannot instead be made an element of the offence and why the prosecution cannot engage in this test to determine whether a reasonable person, having regard to the listed circumstances, would consider the material socially acceptable to transmit as part of proving the elements of the offence under proposed subsection 474.17A(1). The committee notes that the *Criminal Code Act 1995* already places requirements on the prosecution to prove that something occurred in circumstances that a reasonable person would consider amounted to a specified matter. For example, using a carriage service in ways that a reasonable person would regard as being, in the circumstances, menacing, harassing or offensive, or that the depiction of material is in circumstances that a reasonable person would regard as giving rise to an expectation of privacy.[123]

2.43 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of relying on an offence-specific exception to ensure the offence is not overly broad, noting that this would criminalise conduct in circumstances that a reasonable person would consider to be socially acceptable – placing the burden on the defendant to raise evidence to prove otherwise (rather than making this an element of the offence).

Undue trespass on rights and liberties[124]

2.44 The bill also 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 (on the basis that unrelated civil penalties have been set aside),[125] the setting aside of the conviction does not prevent the prosecution from instituting proceedings against the person for the underlying offence[126] for the same conduct. In order to be convicted of the aggravated offence, an individual has to commit the offence under subsection 474.17A(1), which is the underlying offence.[127] 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.

2.45 In *Scrutiny Digest 7 of 2024,* the committee requested the Attorney-General's advice as to why it was necessary for the prosecution to institute proceedings as a

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123 *Criminal Code*, section 474.17 and 473.1 (definition of 'private sexual material').

124 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).

125 Under proposed subsection 474.17AB(4).

126 Under proposed subsections 474.17A(1) or 474.17AA(5).

127 Proposed paragraph 474.17AB(1)(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 474.17AB(4), noting that this would require a person to stand trial twice for the same factual circumstances when guilt as to the underlying offence would already have been established in a previous proceeding.[128]

Attorney-General's response[129]

2.46 The Attorney-General advised that proposed subsection 474.17AB(4) largely mirrors a similar provision under existing offences and critically preserves the ability for separate criminal proceedings to be undertaken against a defendant to hold them accountable for their actions where the grounds forming the basis for a conviction against subsection 474.17AA(1) have fallen away. The Attorney-General also advised that this is important and appropriate to ensure that perpetrators are held accountable for their conduct.

Committee comment

2.47 The committee thanks the Attorney-General for this advice and acknowledges the necessity of ensuring that a person is held accountable for their conduct. However, the committee notes that the Attorney-General's advice does not address whether proposed subsection 474.17AB(5), which does not prevent the prosecution from instituting new proceedings in relation to the underlying offence after a conviction has been set aside, is consistent with the rule of double jeopardy.

2.48 At common law, the concept of double jeopardy is used in connection with several stages of the process of criminal justice, including prosecution, conviction and punishment. The High Court in *Pearce v The Queen* quoted from a United States Supreme Court case as to the rationale for the rule against double jeopardy:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[130]

2.49 The High Court has noted the importance of the value of the prohibition against double jeopardy. But in *Pearce v The Queen* McHugh, Hayne and Callinan JJ

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128 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 22-23.

129 The minister responded to the committee's comments in a letter dated 12 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

130 Black J in *Green v United States* 355 US 184 (1957) as cited by McHugh, Hayne and Callinan JJ in *Pearce v The Queen* [1998] HCA 57 at [10].

also noted that while this value is pervasive 'it is not the only force at work in the development of the common law'. One relevant consideration is that 'a single series of events can give rise to several different criminal offences to which different penalties attach.[131] However, issues of double jeopardy may arise where there is overlap between different charges, in particular whether the essential elements of each offence are said to be duplicated. As Kirby J put it in *Pearce v The Queen*: 'it is necessary to show that the subject of the second prosecution or charge is the same offence or substantially or practically the same'. Elements which add distinct and different features (normally of aggravation) 'will result in differentiation between charges which is legally significant' and prosecution of these two different offences would not offend the concept of double jeopardy.[132]

2.50 In this case, proposed subsection 474.17AA(1) makes it an aggravated offence if the person has committed the underlying offence and, before the commission of this offence, three or more relevant civil penalty orders had been made against the person. The question of whether the civil penalty orders were made is subject to absolute liability, meaning there is no requirement for the prosecution to prove any fault in relation to this, it is enough that the orders were made. The trial for this aggravated offence would therefore need to focus on whether the underlying offence had been committed. If a conviction for this offence was later set aside on the basis that one or more of the civil penalty provisions had been set aside or reversed on appeal, a prosecution for the underlying offence would be a trial based on the exact same fault elements as the earlier trial. This would appear to indicate that this new trial in relation to the underlying offence is for practically the same charge as the aggravated offence.[133] As such, under common law, the courts may find this to be in violation of the principle of double jeopardy. However, as a result of proposed subsection 474.17AB(5) the courts would have no such discretion as this provision would override the common law position.

2.51 However, the committee also notes that the courts would appear to retain their general discretion to grant a permanent stay of a subsequent prosecution if a second trial would be oppressive because the defendant could be subjected to two separate and lengthy trials for offences arising largely out of the same facts and circumstances.[134]

2.52 Noting that subsection 474.17AB(5) appears likely to override the common law prohibition against double jeopardy, the committee draws these scrutiny concerns to the attention of senators and leaves to the Senate as a whole

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131 *Pearce v The Queen* [1998] HCA 57 at [11]

132 *Pearce v The Queen* [1998] HCA 57 at [125].

133 Under proposed subsection 474.17A(1) (but not subsection 474.17A(5)).

134 See, for example, *The Queen v Carroll* [2002] HCA 55 at [47] and *Joud v The Queen* (2011) 32 VR 400.

the appropriateness of enabling a new trial to be instituted after a conviction under subsection 474.17A(1) has been set aside.

Defence Amendment (Parliamentary Joint Committee on Defence) Bill 2024[135]

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	Not proceeding

Significant penalties[136]

2.53 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.[137] 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).

2.54 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.

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135 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 9 of 2024*; [2024] AUSStaCSBSD 155.

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

137 Proposed section 110ADH.

2.55 In *Scrutiny Digest 7 of 2024* the committee requested the minister's advice as to the appropriateness of the penalty proposed in subsection 110ADG(1).[138]

Minister for Defence's response[139]

2.56 The minister noted that a response could not have been provided to the committee prior to the bill's debate in the Senate, and that as the bill was not agreed to in the Senate on 4 July 2024 the bill is not proceeding.

2.57 Further, the minister noted that should the bill be reintroduced by the Government in the future, the Department would consider the committee's scrutiny concerns as part of any future drafting processes and would also furnish the committee with a response to its existing concerns through the usual processes.

Committee comment

2.58 The committee thanks the minister for this advice and welcomes the minister's undertaking to consider the scrutiny concerns raised by the committee in relation to this bill in any future versions of the legislation. In relation to the timeliness of the response, while noting the minister's advice that it was not possible to provide a response to the committee prior to the bill's introduction in the Senate, nevertheless the committee's position is that a response should still be provided as soon as possible. In this instance, the committee notes that it requested a response from the Minister for Defence that was due over one month before the tabling of this report.

2.59 In relation to any future versions of the bill, the committee reiterates 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.

2.60 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 order to allow close scrutiny by the Committee of defence operations and other matters.[140]

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138 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 26–27.

139 The minister responded to the committee's comments in a letter dated 13 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

140 Explanatory memorandum, p. 18.

2.61 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.[141] It remains 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.

2.62 However, in light of the fact that the bill was negatived in the Senate the committee makes no further comment in relation to this bill.

141 *Intelligence Services Act 2001*, section 12.

Education Services for Overseas Students Amendment (Quality and Integrity) Bill 2024[142]

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 addresses 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

Exemption from disallowance[143]

2.63 This bill seeks to insert proposed section 14C into the *Education Services for Overseas Students Act 2000* (the Act). Proposed subsection 14C(1) empowers the minister to make legislative instruments determining that an Education Services for Overseas Students (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.

2.64 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.

2.65 In *Scrutiny Digest 7 of 2024*, the committee requested 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 the legislative instruments made under subsections 14C(1) and (3),

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142 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 9 of 2024*; [2024] AUSStaCSBSD 156.

143 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).

14D(1) and (3), 14E(1) and 14F(1) are subject to appropriate parliamentary oversight through the usual disallowance process.[144]

Minister for Education's response[145]

2.66 The minister advised that it would not be appropriate for instruments made under these provisions to be subject to disallowance as this may cause uncertainty for the operations and functions of ESOS agencies, and providers. The minister advised that any instrument should be relied on from the date it takes effect and that the exemptions from disallowance for these legislative instruments give education providers confidence to make commercial decisions. The minister advised that these powers will only be exercised in limited circumstances.

2.67 The minister further advised that the matters dealt with in the legislative instruments should remain under executive control as the instruments will be used as short-term administrative measures and to appropriately manage risks within the sector. The minister finally advised that the use of these powers is constrained by the requirements in proposed subsection 14G(1) which require the minister to consult with the Tertiary Education Quality Standards Agency, the National Vocation Education and Training Regulator and the Secretary of the Department of Education. The minister also advised of the requirement to obtain the written agreement of the minister who administers the *National Vocational Education and Training Regulator Act 2011* prior to making instruments.

Committee comment

2.68 The committee thanks the minister for this response. The committee understands the need for commercial certainty but reiterates that 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.[146] 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.

2.69 In this instance, it is not clear to the committee how subjecting the instruments to disallowance creates uncertainty as to the effect of the instrument. An instrument has effect from the day it is registered, and will continue to have effect unless it is disallowed within the disallowance period. The committee does not consider the need for certainty in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated

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144 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 30-31.

145 The minister responded to the committee's comments in a letter dated 11 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

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

Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[147]

2.70 While the committee notes the advice provided by the minister that the power to make legislative instruments under proposed subsections 14C(1) and (3), 14D(1) and (3), 14E(1) and 14F(1) is constrained by other provisions, the committee does not consider that these constraints perform the same role as parliamentary oversight. Further, it is not clear to the committee that subjecting these instruments to disallowance reduces the level of executive control that can be exercised in this sector as executive control can still be maintained through disallowable legislative instruments. Rather, disallowance is the primary means by which the Parliament is able to exercise control over the legislative power that it has delegated to the executive.

2.71 The committee reiterates its view that a need for creating certainty is not an exceptional circumstance that, in and of itself, justifies an exemption from disallowance.

2.72 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of legislative instruments made under proposed subsection 14C(1) and (3), 14D(1) and (3), 14E(1) and 14F(1) of the bill being exempt from disallowance.

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147 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) p. 109.

Excise and Customs Legislation Amendment (Streamlining Administration) Bill 2024[148]

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 establishes a public register of entities that hold such licences.
Portfolio	Treasury
Introduced	House of Representatives on 16 May 2024
Bill status	Received the Royal Assent on 28 June 2024

Significant penalties[149]

2.73 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)).

2.74 A penalty of up to two years imprisonment applies to contravention of this offence.

2.75 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

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148 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 9 of 2024*; [2024] AUSStaCSBSD 157.

149 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).

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.

2.76 A penalty of up to two years imprisonment applies in contravention of this offence.

2.77 In *Scrutiny Digest 7 of 2024,* the committee requested 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. [150]

2.78 The committee noted that 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.*

Assistant Minister for Competition, Charities and Treasury's response[151]

2.79 The assistant minister advised that the offences in sections 39K and 39M of the Act are comparable to existing offence provisions in the Excise Act, and that the penalties are necessary to protect revenue for goods on which a duty has not been paid.

2.80 The assistant minister explained that the new penalties cover suspensions of excise licences for specific premises, as opposed to the existing penalties as the previous law provided licences for a single premise. It is noted that the existing penalties cited by the assistant minister are also subject to a penalty of up to two years imprisonment. Further, the assistant minister explained that the penalties are consistent with offences in similar Commonwealth legislation designed to protect excise or customs duty revenue, and that they are also consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Committee comment

2.81 The committee thanks the assistant minister for this advice. The committee welcomes the further detail provided on the formulation of the penalties in proposed subsection 39K(1A) and 39M(2) and that these are consistent with similar offences already in existence. The committee notes that its assessment of whether penalties

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150 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 33–35.

151 The minister responded to the committee's comments in a letter on 11 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

are consistent with similar Commonwealth legislative scheme is assisted if examples are provided. The committee considers that this information would have been useful if included in the explanatory memorandum to the bill.

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

New Vehicle Efficiency Standard Bill 2024[152]

Purpose	Introduced with the New Vehicle Efficiency Standard (Consequential Amendments) Bill 2024, the bill establishes a vehicle efficiency standard to regulate the carbon dioxide emissions of certain road vehicles.
Portfolio	Infrastructure, Transport, Regional Development and Local Government
Introduced	House of Representatives on 27 March 2024
Bill status	Received the Royal Assent on 31 May 2024

Significant matters in delegated legislation[153]

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

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

- why it is considered appropriate and necessary to include the content of the offences in clauses 62 and 63 in rules rather than in the bill;
- whether there are appropriate legislative safeguards in place; and
- whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*. [154]

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152 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, New Vehicle Efficiency Standard Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 158.

153 Clauses 62, 53 and 69. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

154 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024), pp. 37–38.

Minister for Infrastructure, Transport, Regional Development and Local Government's response[155]

2.85 The minister advised that it is appropriate for the content of the offences in clauses 62 and 63 to be set out in the rules as the matters in relation to the Registry are detailed administrative tools and involve a high level of administrative detail. The minister noted that this is consistent with the guidance in chapter 2 of the *Guide to Framing Commonwealth Offences* (the Guide).[156]

2.86 The minister provided an example, as set out in the bill, of the type of requirements or conditions that could be set in relation to the retention of records for seven years and compliance with the Secretary's request to provide specific information relevant to the account.

2.87 In line with the Guide, the minister advised that clauses 62 and 63 set out safeguards including that the bill clearly defines the content that will be delegated, that the matters will be available to the public as the legislative instrument will be registered on the Federal Register of Legislation, and affected persons will be consulted when the relevant changes are made to the rules.

Committee comment

2.88 The committee thanks the minister for this advice and notes that this justification would have been useful if included in the explanatory memorandum to the bill.

2.89 The committee notes the minister's assessment that the matters to be prescribed in the rules, being the recording of issuing of units and transactions involving units, are of a level of detail more appropriate for delegated legislation, consistent with the Guide.

2.90 However, the Guide also provides that where the contents of offence provisions are to be set out in delegated legislation, it would be most appropriate for inclusion in regulations, which are considered by the Federal Executive Council.[157] In this instance, it would have been preferable for the bill to specify that the matters relevant to the offences in clauses 62 and 63 are to be set out in regulations, rather than rules.

2.91 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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155 The minister responded to the committee's comments in a letter dated 24 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

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

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

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

Privacy[158]

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

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

- what extent the bill provides for the disclosure or publication of personal information; and
- what safeguards are in place to protect this information, including whether the *Privacy Act 1988* applies.[159]

Minister for Infrastructure, Transport, Regional Development and Local Government's response[160]

2.95 The minister advised that the provisions in question apply predominantly to corporations rather than individuals, with nearly all vehicle type approvals held by companies. Nevertheless, the minister confirmed that the *Privacy Act 1988* applies to any personal information that is collected, used or disclosed in relation to individuals, and that a Privacy Impact Assessment will be undertaken to assess whether any personal information may be affected.

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

159 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2024* (15 May 2024), pp. 39–40.

160 The minister responded to the committee's comments in a letter dated 24 June 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

Committee comment

2.96 The committee thanks the minister for this advice. Noting the minister's advice that most information will be about companies, that the safeguards in the *Privacy Act 1988* would apply to any personal information and that a Privacy Impact Assessment will nonetheless be undertaken, the committee considers its concerns have been addressed and makes no further comment in relation to this matter.

Telecommunications Amendment (SMS Sender ID Register) Bill 2024[161]

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[162]

2.97 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));
- 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)).

2.98 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

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161 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Telecommunications Amendment (SMS Sender ID Register) Bill 2024, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 159.

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

entity for one or more sender identifications to be registered in the SMS Sender ID Register.

2.99 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.

2.100 The committee notes that a number of welcome 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.

2.101 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.

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

2.103 In *Scrutiny Digest 8 of 2024,* the committee sought 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. [163]

Minister for Communications response[164]

2.104 The minister advised that significant consideration was given to the appropriateness of automating certain decisions made under the bill and that it is intended that only non-discretionary decisions listed in proposed subsection 484J(2) will be subject to automated decision-making. Noting the mandatory nature of the listed decisions the minister advised that it is clear on the face of the bill that automated decision-making is not authorised for discretionary decisions, as they require specific criteria to be met.

2.105 Further, the minister advised that the additional criteria to be set out in legislative instruments that must be considered when determining if an application must be granted would not change the nature of the listed mandatory decisions. These criteria may be prescribed by ACMA and would be objective criteria, and the minister noted that the explanatory memorandum to the bill contains examples of the possible types of criteria that could be set out, such as the character length limit for sender identifications.

2.106 The minister also provided a list of decisions to be made under the bill which have not been designated for computerised decision-making due to their discretionary nature.

Committee comment

2.107 The committee thanks the minister for this response. The committee welcomes the further information provided by the minister in response to the committee's concerns, and the additional assurance that only non-discretionary decisions will be subject to automated decision-making under the bill.

2.108 While welcoming these assurances the committee's view is that this safeguard would be most effective if it was explicitly set out on the face of the bill, noting that although the examples of further criteria which may be set out in legislative instruments are objective in nature, this is not a legislative requirement. For example, there is no legislative impediment in the bill that would prevent a legislative

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

164 The minister responded to the committee's comments in a letter dated 23 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

instrument being made which required that ACMA be satisfied of certain subjective matters in order for an application to be granted – which would not be appropriate for a computer to determine.

2.109 However, in light of the minister's further assurances that it is intended that only non-discretionary decisions based solely on objective criteria would be automated, the committee makes no further comment in relation to this matter.

Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024[165]

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[166]

2.110 This 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.[167] The authorisation will be provided by legislative instrument[168] and the total maximum amount specified in an authorisation must not exceed $5 billion.

2.111 In *Scrutiny Digest 7 of 2024* the committee requested the Treasurer'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);

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165 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 9 of 2024*; [2024] AUSStaCSBSD 160.

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

167 Proposed sections 846A and 846B.

168 Proposed subsection 846A(1)

- 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.[169]

Treasurer's response[170]

2.112 The Treasurer advised this provision establishes a funding mechanism for the purposes of crisis resolution, which requires rapid movement, and that it would be rare for a situation to arise which would cause the special appropriation to be drawn down. The Treasurer also advised this power is intended to be used in extenuating circumstances and is the most effective way to maintain industry and market confidence in the resolution regime.

2.113 In relation to sunsetting, the Treasurer advised it would not be appropriate for the standing appropriation to sunset as sunsetting could contribute to market instability and affect confidence that critical services will continue. In relation to the exemption from disallowance, the Treasurer advised that this is appropriate as the authorisation would only be made in exceptional circumstances and will be tabled in Parliament, which provides appropriate transparency to Parliament.

2.114 Finally, the Treasurer advised that safeguards are applicable, including a condition denoting an imminent crisis must be satisfied before a legislative instrument authorising the expenditure can be made.

Committee comment

2.115 The committee thanks the Treasurer for this response and notes the Treasurer's advice that an authorisation will only be made in extenuating circumstances. While the committee understands the need for maintaining market stability and ensuring confidence that critical services will continue, the committee reiterates that 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.[171] 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.

2.116 In this instance, it is not clear to the committee how subjecting proposed sections 846A and 846B to a sunset clause creates uncertainty. Sunsetting is vital in

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169 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 42–51.

170 The Treasurer responded to the committee's comments in a letter dated 7 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

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

ensuring that provisions are regularly reviewed, remain fit for purpose and are subject to a level of parliamentary oversight when the relevant provisions are remade. Additionally, in this instance, since authorisations are only made in extenuating circumstances (rather than regularly), it is unclear to the committee how sunsetting would cause market instability or affect confidence, as the sunsetting mechanism allows the appropriation to be reviewed and remade (before it sunsets) if necessary and fit for the purpose of crisis resolution.

2.117 Further, the committee notes that the requirement to table a legislative instrument in Parliament does not replace the role disallowance plays in maintaining appropriate parliamentary oversight. Tabling is a separate process to disallowance and disallowance is the key means by which Parliament is able to maintain control of the legislative power it has delegated to the executive.

2.118 The committee understands that a standing appropriation is the most effective means of ensuring confidence in this instance and that this power will be used in exceptional circumstances, but remains concerned that there will be no measures to ensure parliamentary oversight of the expenditure of funds under the standing appropriation, such as by subjecting the appropriations to a sunset clause or by subjecting the legislative instruments setting out the authorisations to disallowance.

2.119 In relation to the inclusion of a standing appropriation, the committee makes no further comment. The committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **proposed sections 846A and 846B not being subject to a sunset clause; and**
- **instruments made under proposed subsection 846A(1) of the bill being exempt from disallowance.**

Exemption from primary legislation akin to a Henry VIII clause[172]

2.120 The bill seeks to amend existing sections 791C and 820C of the Corporations Act to broaden the Australian Securities and Investment Commission's (ASIC) existing power to grant exemptions from all or specified provisions of Parts 7.2 and 7.3 of the Corporations Act. The amendment would allow ASIC to grant exemptions from Parts 7.2 and 7.3 to specified persons, clearing and settlement (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.[173] Where

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172 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).

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

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.[174]

2.121 In *Scrutiny Digest 7 of 2024* the committee requested 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*; and
- 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.[175]

Treasurer's response[176]

2.122 The Treasurer advised that financial markets have a diversity of participants and the law may capture entities where regulation through parts 7.2 and 7.3 would not be appropriate or effective. The Treasurer also advised that ASIC, as the regulator, has the appropriate knowledge and information to determine whether it is appropriate for an entity to be regulated under Parts 7.2 or 7.3 and that it would be impractical to amend primary legislation to provide details of an exemption from specified obligations each time a situation arises where an exemption would be appropriate.

2.123 The Treasurer advised that it is also necessary and appropriate for ASIC to grant these exemptions on an ongoing basis where appropriate as time-limiting the delegated powers more generally would unduly constrain the regulatory framework and would introduce an inappropriate level of uncertainty.

Committee comment

2.124 The committee thanks the Treasurer for this response.

2.125 Noting that ASIC is the relevant industry expert and regulator, and that it would be appropriate for ASIC to determine which entities are exempt from the operation of Parts 7.2 and 7.3 of the *Corporations Act 2001* and for what periods, the committee makes no further comment on this matter.

2.126 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic

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

175 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 42–51.

176 The Treasurer responded to the committee's comments in a letter dated 7 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act1901*).

Limitation of judicial review[177]

2.127 This bill seeks to introduce 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.

2.128 In *Scrutiny Digest 7 of 2024* the committee requested the Treasurer's advice as to:

- 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.[178]

Treasurer's response[179]

2.129 The Treasurer advised that requirement for ASIC to consult is to provide the opportunity for affected parties to comment on the CS facility rules. As a policy goal of the regime is to provide a stable and certain regulatory environment for CS facilities, the Treasurer advised that ensuring the rules are not invalidated by a failure to meet procedural requirements will not put in question the effective operation of the rules. The Treasurer also advised this is consistent with similar schemes in the Corporations Act.

Committee comment

2.130 The committee thanks the Treasurer for this response.

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177 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).

178 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 42–51.

179 The Treasurer responded to the committee's comments in a letter dated 7 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

2.131 The committee notes the need for the CS facility rules to operate effectively and the need for the regime to provide a stable and certain regulatory environment for CS facilities. However, the committee reiterates its concerns that affected persons seeking judicial review are unable to seek any effective remedy as the rules cannot be invalidated by a failure to comply with the requirement to consult under proposed paragraph 826M(1)(a).

2.132 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the limitation on judicial review.

Significant penalties
Significant matters in delegated legislation[180]

2.133 A number of provisions in Schedules 2 and 4 of the bill seek to 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.

2.134 In *Scrutiny Digest 7 of 2024* the committee requested 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.
- 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.[181]

Treasurer's response[182]

2.135 The Treasurer advised in relation to proposed section 826L that the offences are equivalent to similar offences under the Corporations Act and that specifying these

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

181 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 42–51.

182 The Treasurer responded to the committee's comments in a letter dated 7 August 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

penalties in delegated legislation is justified on the basis that changes may need to be made with respect to rapidly changing market dynamics. The Treasurer also advised that as these offences are of a corporate and financial nature, it is appropriate for them to exceed 20 per cent of the maximum financial penalty applicable to the offence (which is the maximum suggested penalty amount for an infringement notice under the Guide to Framing Commonwealth Offences) in order to act as a sufficient deterrent. The Treasurer also advised that doing so would provide an efficient mechanism to avoid a breach going to court and ensuring payments of penalties do not simply become a cost of doing business.

2.136 Finally, the Treasurer advised that allowing ASIC to specify the penalty up to the maximum is appropriate as ASIC has the ability to make the relevant rules and could determine penalties below the maximum penalties set in the primary legislation for lower-level breaches, where appropriate.

Committee comment

2.137 The committee thanks the Treasurer for this response.

2.138 The committee notes that a justification has not been provided in relation to the significant custodial penalties for various criminal offences under Schedules 2 and 4 of the bill, but rather only in relation to the civil penalties applicable as an alternative to civil proceedings under proposed section 826L of the bill. As such, it is not clear to the committee whether these offences are broadly consistent with penalties for existing offences that are of a similar seriousness.

2.139 Noting that the bill provides limits on the civil penalties that may be imposed by the regulations applicable under proposed section 826L, and that these penalties are likely to largely affect entities, the committee understands the need for significant penalties that act as a deterrent so that penalties are not treated as a cost of doing business. The committee also notes the need for delegated legislation in this context due to rapidly changing market dynamics.

2.140 Although the committee remains concerned that ASIC is enabled to specify penalties rather than the minister, the committee notes the advice that ASIC will assess the penalty amount applicable to the contravention in question (and in the context that Parliament has set a cap on the penalty that may be imposed).

2.141 Noting the existence of rapidly changing market dynamics, that these civil penalties are applicable to entities, and that there are limitations on these penalties under proposed section 826L of the bill, the committee makes no further comment on this matter.

2.142 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.143 Noting a justification has not been provided as to the appropriateness of the penalties under Schedules 2 and 4 of the bill, the committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of the penalties of imprisonment for the offences contained in these Schedules of the bill.

Treasury Laws Amendment (Responsible Buy Now Pay Later and Other Measures) Bill 2024[183]

Purpose	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. Schedule 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 seeks to add various deductible gift recipients to the *Income Tax Assessment Act 1997.* Schedule 6 seeks to amend 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 Senate[184]

Privacy[185]

2.144 This 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

183 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 9 of 2024*; [2024] AUSStaCSBSD 161.

184 Note that when this bill was first scrutinised by the committee it contained Schedule 1 which the committee made no comment on. The bill as initially introduced was divided on 2 July 2024 and what was in Schedule 1 formed the Treasury Laws Amendment (Build to Rent) Bill 2024 (which the committee has made no comment on in this Digest). This entry focuses on the bill as it remains (with Schedule 1 removed).

185 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).

licensees to inquire into the suitability of entering into a LCCC 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,[186] including whether the consumer is financially vulnerable and any additional matters prescribed by the regulations.[187] 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.

2.145 In *Scrutiny Digest 7 of 2024,* the committee sought the Treasurer's 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. [188]

Assistant Treasurer's response[189]

2.146 The Assistant Treasurer advised that the bill provides that buy now pay later (BNPL) contracts are included within the application of the *National Consumer Credit Protection Act 2009* (the Credit Act). In relation to privacy, the Assistant Treasurer advised that this has the effect of bringing BNPL contracts, including those with small businesses, within the privacy protections relating to credit reporting. This means that Part IIIA of the Privacy Act will apply regardless of annual turnover of BNPL entities if they are a credit provider as defined by the Privacy Act.

2.147 The Assistant Treasurer further advised that any providers with an annual turnover of more than $3 million will also be subject to further Privacy Act requirements including the Australian Privacy Principles. In addition, the Australian Finance Industry Association's BNPL Code of Practice imposes privacy obligations which apply to approximately 95% of the relevant market.

Committee comment

2.148 The committee thanks the Assistant Treasurer for this advice which provides welcome information on the level of privacy protections and safeguards applicable to BNPL contracts. The committee notes that it would have been useful if this information had been included in the explanatory materials.

2.149 Noting the Assistant Treasurer's advice that a range of privacy safeguards apply to buy now pay later contracts including the *Privacy Act 1988*, the committee

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186 Subsection 133BXC(2).

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

188 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 52 – 58.

189 The minister responded to the committee's comments in a letter dated 16 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

considers its concerns have been addressed and makes no further comment in relation to this matter.

Incorporation of external materials as existing from time to time[190]

2.150 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 country 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.

2.151 In *Scrutiny Digest 7 of 2024,* the committee sought 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. [191]

Assistant Treasurer's response[192]

2.152 The Assistant Treasurer advised that the expectation is for any incorporated documents to be freely and publicly available, noting that the materials are existing public documents. Providing for the regulations to prescribe documents for interpretation, the Assistant Treasurer advised, will allow the government to update guidance in line with changes from the relevant bodies.

Committee comment

2.153 The committee thanks the Assistant Treasurer for confirming that any documents incorporated by reference under subparagraph 3DA(7)(b)(iii) will be freely and publicly available. Noting this advice, the committee considers its concerns have been addressed and makes no further comment in relation to this matter.

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190 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).

191 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 52 – 58.

192 The minister responded to the committee's comments in a letter dated 16 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

Exemption from disallowance
Section 96 Commonwealth grants to the states
Standing appropriation[193]

2.154 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,[194] currently the National Skills Agreement that took effect on 1 January 2024 and as amended from time to time.[195]

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

2.156 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.

2.157 In *Scrutiny Digest 7 of 2024,* the committee sought the Treasurer's 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

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193 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).

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

195 Item 2, proposed section 4.

- what mechanisms are in place to report to the Parliament on any expenditure authorised by the standing appropriation. [196]

Assistant Treasurer's response[197]

2.158 In relation to the exemption from disallowance, the Assistant Treasurer advised that determinations of an amount to be paid to a State for that financial year for financial assistance are not subject to disallowance as they facilitate an intergovernmental agreement between the Commonwealth and the States. Providing for the Parliament to disallow such a determination would, the Assistant Treasurer argued, undermine relations and create uncertainty for States who expend funds based on an understanding of the amount of reimbursement they will receive from the Commonwealth. Further, the Assistant Treasurer advised that the exemption from disallowance is consistent with similar payment arrangements such as the national health reform payments.

2.159 In relation to the standing appropriation the Assistant Treasurer advised that a cap or limitation on the funds appropriated under section 22 of the FFR Act for national skills and workforce development payments would be impractical as such payments are dependent on the terms set out in Commonwealth and State agreements as well as indexation updates at Budget and the Mid-Year Economic and Fiscal Outlook. It would therefore be difficult to set a cap in advance as the cap would need to predict an entitlement for a State, and, the Assistant Treasurer added, estimating a limitation could risk a lack of sufficient funding and risk the Commonwealth not meeting its funding agreements.

2.160 In relation to a sunsetting clause for section 22 of the FFR Act, the Assistant Treasurer advised that the lack of a sunsetting clause 'reflects the ongoing financial contribution the Commonwealth makes to States under the Intergovernmental Agreement on Federal Financial Relations'. Further, it would be inappropriate to amend section 22 in relation to concerns regarding these specific payments as section 22 provides a mechanism for other, unrelated standing appropriations to be made.

2.161 Finally, in relation to oversight mechanisms, the Assistant Treasurer advised that oversight is provided through the status of the determinations as legislative or notifiable instruments which state the amounts to be paid each year. Further, the Budget Papers provide details of the funding arrangements to provide additional transparency to the Parliament.

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196 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2024* (26 June 2024) pp. 52 – 58.

197 The minister responded to the committee's comments in a letter dated 16 July 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 9 of 2024*).

Committee comment

2.162 The committee thanks the Assistant Treasurer for this response. However, the committee reiterates its concerns that 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.

2.163 In relation to the exemption from disallowance for instruments made under proposed subsection 12A(2) of the FFR Act, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny via the disallowance process. The committee therefore reiterates its advice that the fact that an instrument is made to facilitate the operation of an intergovernmental scheme is not reason, in itself, for exempting an instrument from the usual parliamentary disallowance or sunsetting process.

2.164 In this regard, the committee notes the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final inquiry report into the exemption of delegated legislation from parliamentary oversight, in relation to the exemption from disallowance of instruments made for the purposes of an intergovernmental scheme:

> The implication is there has been significant negotiation and scrutiny in the process of obtaining agreement from all government parties. While this may be the case in some instances, this is not sufficient for it to stand as a blanket exemption from disallowance.
>
> As expressed by the Centre for Comparative Constitutional Studies, this rationale establishes a domain of executive activity exempt from parliamentary oversight. And it would seem the justifications provided are not sufficient to allow for a departure from the principle of executive accountability to the Parliament. If indeed there has been significant negotiation and scrutiny, and all parties to the agreement are satisfied, that it might then be disallowed would seem a minute risk of insufficient size to justify an exemption.
>
> Nevertheless, if examined on its merits and found to provide a compelling case for exemption, and if appropriately circumscribed, an exemption may be appropriate in limited and rare circumstances. Exemption should not be automatic, and there should not be an exemption from sunsetting of such instruments.[198]

2.165 The committee considers that the Assistant Treasurer's response does not put forward such a compelling case for exemption from disallowance, and there appears no real reason for the exemption from sunsetting.

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198 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: final report* (16 March 2021) pp. 106–107.

2.166 Further, while noting the explanation provided by the Assistant Treasurer as to why a standing appropriation is necessary, the committee remains concerned that section 22 authorises significant Commonwealth expenditure with minimal parliamentary oversight and involvement.

2.167 The committee therefore draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of item 3 of Schedule 1 to the bill which seeks to insert Part 2A into the *Federal Financial Relations Act 2009* without ensuring an appropriate level of parliamentary oversight for grants of Commonwealth funding made to the States for national skills and workforce development payments.

Chapter 3
Scrutiny of standing appropriations[199]

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.[200] 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.[201]

3.4 The committee draws the following bill to the attention of senators:

- Veterans' Entitlements, Treatment and Support (Simplification and Harmonisation) Bill 2024.[202]

Senator Dean Smith
Chair

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199 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 9 of 2024*; [2024] AUSStaCSBSD 162.

200 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*.

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

202 Schedule 1, item 200; Schedule 2, item 10; and Schedule 3, item 14 seek to amend the appropriation in section 423 of the Military Rehabilitation and Compensation Act 2004 to provide additional purposes for which the Consolidated Revenue Fund is appropriated.