

The Senate

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Committee for the
Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, 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.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

Introduction

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 in relation to:

- whether it unduly trespasses on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan 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 often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. 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* 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 legislation committee for information.

Chapter 1

Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Australian Border Force Amendment (Protected Information) Bill 2017

Purpose	This bill seeks to amend the <i>Australian Border Force Act 2015</i> (the Act) to: <ul style="list-style-type: none"> • repeal the definition of 'protected information' in subsection 4(1) of the Act; • remove the current requirement for bodies to which information can be disclosed and classes of information to be prescribed in the Australian Border Force (Secrecy and Disclosure) Rule 2015; and • add new permitted purposes for which 'Immigration and Border Protection information' can be disclosed to the Act
Portfolio/Sponsor	Immigration and Border Protection
Introduced	House of Representatives on 9 August 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (iv)

Broad scope of offence¹

1.2 Section 42 of the *Australian Border Force Act 2015* (the Act) currently contains a provision that provides that a person commits an offence if they are, or have been, an entrusted person and they make a record of, or disclose information, and the information is protected information. The offence is subject to up to two years imprisonment. The bill proposes replacing the current definition of 'protected information' in the Act with a new definition of 'Immigration and Border Protection Information'. This new definition narrows the type of information which, if recorded or disclosed, would make a person liable to prosecution under section 42 of the Act.

1.3 The new definition provides that 'Immigration and Border Protection information' includes 'information the disclosure of which would or could reasonably

1 Item 5, proposed subsection 4(5) and item 21. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

be expected to prejudice the security, defence or international relations of Australia'.² Proposed subsection 4(5) provides that the kind of information which is taken to so prejudice security, defence or international relations, includes 'information that has a security classification'.³ There is no definition in the bill of what a 'security classification' means. The explanatory memorandum states that this 'picks up the Australian Government's *Protective Security Policy Framework*' and the security classifications 'reflect the level of damage done to the national interest, organisations and individuals, of unauthorised disclosure, or compromise of the confidentiality, of information'.⁴ It goes on to give examples of the type of information that has a security classification:

- new policy proposals and associated costing information marked as Protected or Cabinet-in-Confidence;
- other Cabinet documents, including Cabinet decisions;
- budget related material, including budget related material from other government departments; and
- adverse security assessments and qualified adverse security assessments of individuals from other agencies.⁵

1.4 Additionally, proposed section 50A provides that if an offence against section 42 relates to information that has a security classification, a prosecution must not be initiated 'unless the Secretary has certified that it is appropriate that the information had a security classification at the time of the conduct'.⁶ The explanatory memorandum states that the purpose of the provision is to ensure that a person cannot be prosecuted where 'it was not appropriate that the information had a security classification'.⁷

1.5 The inclusion of proposed section 50A suggests there may be circumstances where information has a security classification which was not appropriately applied. In this regard, the government's *Information security management guidelines* (part of the *Protective Security Policy Framework*) states that '[i]f information is created outside the Australian Government the person working for the government actioning

2 See item 1, definition of 'Immigration and Border Protection information', paragraph (a).

3 See item 5, proposed paragraph 4(5)(a).

4 Explanatory memorandum, p. 15.

5 Explanatory memorandum, p. 15.

6 See item 21, proposed section 50A.

7 Explanatory memorandum, p. 18.

this information is to determine whether it needs a protective marking'.⁸ This indicates that any outside contractor or consultant working for the government can mark information with a security classification. A person who makes a record of, or discloses, such information would then be liable for prosecution, unless the Secretary does not certify that the information was appropriately classified. However, if the Secretary does certify that the information was appropriately classified, there does not appear to be any defence on the basis that the information was inappropriately classified. As such, it does not appear that an inappropriate security classification would be a matter that a court could consider in determining whether a person had committed an offence under section 42. It also does not appear that any merits review would be available in relation to the Secretary's decision to issue a certification that the information was appropriately classified.

1.6 The committee requests the Minister's advice as to why it is necessary and appropriate to include a broad definition that effectively makes it an offence to disclose or record any information that has a security classification, in circumstances where there is no defence available if the classification was inappropriately applied and where there is no definition of what constitutes a 'security classification'.

Significant matter in delegated legislation⁹

1.7 The proposed definition of 'Immigration and Border Protection information' also includes 'information of a kind prescribed in an instrument under subsection (7)'. Proposed subsection 4(7) provides that the Secretary may make a legislative instrument prescribing information if satisfied that disclosure of the information would or could reasonably be expected to 'prejudice the effective working of the Department' or 'otherwise harm the public interest'.

1.8 The committee's view is that significant matters, such as broad powers to state that particular information which, if recorded or disclosed, would lead to the commission of an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum states:

8 Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, approved November 2014, amended April 2015, p. 4, paragraph [29]. Available at: <https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf>.

9 Item 1, definition of 'Immigration and Border Protection information', paragraph (f) and item 5, proposed subsection 4(7). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

New kinds of information, not already covered by the above definition of Immigration and Border Protection information, that require protection could be identified and need to be disclosed by the Department. Such information may require protection more quickly than an amendment to the ABF Act would permit. The new power in subsection 4(7) is necessary to enable the Secretary to act swiftly to protect information that is not covered by one of the other limbs of the definition from disclosure.¹⁰

1.9 The committee notes that the explanatory memorandum does not provide any examples of the types or categories of information that may need to be captured by this provision. Rather, it gives a broad power to enable the Secretary to prescribe information in delegated legislation. An entrusted person who makes a record of or discloses such information would then be liable for an offence under section 42 of the Act. The committee considers that matters that go to whether a person has committed an offence are more appropriately matters for parliamentary enactment. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. While the committee appreciates that making amendments to primary legislation can take longer than making a legislative instrument (which can take effect on the day that the instrument is registered),¹¹ the committee notes that in urgent situations Parliament has passed legislation in as little as two sitting days.

1.10 If such matters are to remain in delegated legislation, the committee considers parliamentary scrutiny over such significant matters could be increased by requiring the positive approval of each House of the Parliament before the instrument could come into effect.¹²

1.11 The committee's view is that significant matters, such as what constitutes the type of information which, if recorded or disclosed, would result in the commission of an offence (subject to up to two years imprisonment), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's advice as to:

- **what categories of information it is envisaged may need to be prescribed under this provision; and**
- **if the matters are to be retained in a legislative instrument, the appropriateness of requiring the positive approval of each House of the Parliament before an instrument comes into effect.**

10 Explanatory memorandum, p. 16.

11 See subsection 12(1) of the *Legislation Act 2003*.

12 See, for example, section 10B of the *Health Insurance Act 1973*.

Australian Broadcasting Corporation Amendment (Regional Australia) Bill 2017

Purpose	This bill seeks to amend the <i>Australian Broadcasting Corporation Act 1983</i> to ensure that the expenditure of the ABC in regional Australia reflects the proportion of Australia's population that lives in regional Australia
Sponsor	Senator Brian Burston
Introduced	Senate on 9 August 2017

The committee has no comment on this bill.

Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017

Purpose	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to abolish access to the limited merits review regime for reviewable regulatory decisions under the national energy laws
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017

The committee has no comment on this bill.

Education Services for Overseas Students Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Education Services for Overseas Students Act 2000</i> to make consequential amendments to reflect the changes to the <i>Education Services for Overseas Students (TPS Levies) Act 2012</i> made through the Education Services for Overseas Students (TPS Levies) Amendment Bill 2017
Portfolio	Education and Training
Introduced	House of Representatives on 10 August 2017

The committee has no comment on this bill.

Education Services for Overseas Students (TPS Levies) Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Education Services for Overseas Students (TPS Levies) Act 2012</i> to enable the Minister to proactively manage the balance of the Overseas Students Tuition Fund
Portfolio	Education and Training
Introduced	House of Representatives on 10 August 2017
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

Significant matters in delegated legislation¹³

1.12 This bill seeks to enable the Minister for Education and Training to proactively manage the balance of the Overseas Students Tuition Fund (the Fund). The Tuition Protection Service (TPS) assists international students whose education providers are unable to fully deliver their course of study by ensuring that international students are able to complete their studies in another course or with another education provider, or receive a refund of their unspent tuition fees. The TPS is funded by an annual levy on all international education providers. The levy comprises administrative fee and base fee components. Amounts collected are credited into the Fund, which is a Special Account established under section 52A of the *Education Services for Overseas Students Act 2000* (the ESOS Act).¹⁴ Under section 52C of the ESOS Act amounts in the Fund can only be expended for making payments to affected international students and paying the Commonwealth's costs associated with managing the Fund.

1.13 Currently the administrative and base fee components are set out in the primary legislation, however the bill would enable the Minister to set the administrative and base fee components of the TPS levy through a legislative instrument.¹⁵ The explanatory memorandum explains this by noting that recent growth in student enrolments has resulted in an increased collection of the TPS levy and 'since this growth has not been offset by a similar proportion of claims on the

13 Schedule 1, item 5, proposed sections 6, 7 and 7A. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

14 Explanatory memorandum, p. 2.

15 Proposed subsections 7A(1)–(2).

Fund, reserves have increased sharply'.¹⁶ The explanatory memorandum further notes that:

An appropriate reduction to the current administrative and base fees is needed to ensure the Fund remains within the target range of \$30 million to \$50 million recommended by the Australian Government Actuary and endorsed by the TPS Advisory Board. It is anticipated that this will be a one-off reduction to the Fund and the fee settings may not be updated every year.

Giving the Minister authority to proactively manage the Fund will maintain sufficient reserves to meet claims each year, commensurate with an increase in student enrolments. It also allows the Fund to remain viable in case any unforeseen events or major provider closures occur.¹⁷

1.14 Thus, in order to provide this flexibility, the bill proposes that the legislative instrument could set the administrative and base fee components of the TPS levy.¹⁸ In making such a legislative instrument, the Minister must have regard to the sustainability of the Fund, and may also have regard to any other matter he or she considers appropriate.¹⁹ The bill also sets an upper limit which the Minister cannot exceed in determining the administrative and base fee components through a legislative instrument.²⁰

1.15 One of the most fundamental functions of the Parliament is to levy taxation.²¹ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this case, the detailed explanation in the explanatory memorandum, the fact that a maximum cap is set in the primary legislation and amounts collected by the levy are credited to a Special Account (which limits the use of the funds to purposes specified in primary legislation) largely addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

1.16 While the committee welcomes the important limitations on the proposed ministerial power to alter the rate of the TPS levy, from a scrutiny perspective, the

16 Explanatory memorandum, p. 2.

17 Explanatory memorandum, p. 2.

18 Proposed subsections 7A(1)–(2).

19 Proposed subsections 7A(4)–(5).

20 Proposed subsection 7A(3).

21 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

committee considers that it may be appropriate for the bill to be amended to further increase parliamentary oversight by:

- requiring the positive approval of each House of the Parliament before a new determination under proposed subsection 7A comes into effect;²² or
- providing that the determinations do not come into effect until the relevant disallowance period has expired (while retaining the usual procedures in subsection 42(2) of the *Legislation Act 2003* so that any determinations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period).

1.17 The committee requests the Minister's response in relation to this matter.

²² See, for example, section 10B of the *Health Insurance Act 1973*.

International Monetary Agreements Amendment (New Arrangements to Borrow) Bill 2017

Purpose	This bill seeks to amend the <i>International Monetary Agreements Act 1947</i> to provide a standing appropriation and authority to borrow for payments to meet drawings by the International Monetary Fund under the decision to renew the New Arrangements to Borrow
Portfolio	Treasury
Introduced	House of Representatives on 10 August 2017
Scrutiny principle(s)	Standing Order 24(1)(a)(iv) and (v)

Standing appropriation²³

1.18 This bill seeks to amend the *International Monetary Agreements Act 1947* to continue in existence a standing appropriation for payments to meet drawings by the International Monetary Fund (IMF) under the decision to renew the New Arrangements to Borrow (NAB).²⁴

1.19 Due to the impact of standing appropriations on parliamentary oversight of government expenditure, the committee has consistently drawn Senators' attention to bills that establish, amend or continue in existence standing appropriations. For further details see chapter 3 relating to scrutiny of standing appropriations.

23 Schedule 1, items 1 and 2. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

24 The NAB is a multilateral borrowing agreement between the IMF and a number of its members that allows the IMF to borrow from those members, when supplementary resources are required to address an impairment of the international monetary system.

Product Emissions Standards Bill 2017

Purpose	This bill seeks to establish a national framework to address the adverse impacts of air pollution from certain products on human and environmental health
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017
Scrutiny principle(s)	Standing Order 24(1)(a)(i), (iv) and (v)

Significant matters in delegated legislation²⁵

1.20 The bill seeks to regulate emissions from certain products by setting national emissions standards. It seeks to do so by providing that rules (delegated legislation) may prescribe a product as an emissions-controlled product. The rules may also provide for an emissions-controlled product to be certified. The bill makes it an offence to import or supply an uncertified or unmarked emissions-controlled product.²⁶ The explanatory memorandum states that prescribing a product as an emissions-controlled product 'has the effect of triggering the key requirements in the Bill'²⁷ and certification, which is also left to the rules, 'is a key concept in the Bill, and underpins its operation, including the offence and civil penalty provisions'.²⁸

1.21 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the matters to be set out in the rules are central to the emissions standards framework being established. The explanatory memorandum states that 'it is anticipated' that the first emissions-controlled products to be prescribed will be non-road spark ignition engines and equipment.²⁹ However, the substantive clauses of the bill do not set out any basis as to what products will be prescribed as being emissions-controlled and required to be certified. It also provides no detail as to the process by which a product will be certified, the process by which certain products will be exempted and what decisions regarding the certification process will be subject to merits review. In addition, a broad power to disclose

25 Clauses 9, 10, 11, 20, 22, 43 and 51. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

26 Clauses 13-16.

27 Explanatory memorandum, p. 16.

28 Explanatory memorandum, p. 17.

29 Explanatory memorandum, p. 2.

information obtained under the Act is proposed to be granted to any 'agency, body or person' as prescribed by the rules.³⁰

1.22 Clause 51 sets out the power for the Minister to make the rules, and also provides that the rules may provide for charging fees for services and the review of decisions made under the bill. The explanatory memorandum explains why these matters are to be set out in the rules rather than the primary legislation:

Because the Bill establishes a framework which enables different classes of emissions-controlled products to be prescribed in the future and the details applying to future products would vary, it is necessary and appropriate for the rules rather than the Bill to prescribe what products are emissions-controlled products and the processes that relate to their certification (including the emissions standards that must be satisfied), the fees associated with the certification process and what decisions are subject to review.³¹

1.23 The committee appreciates that the detail of future products that may need to be classified as emissions-controlled products will vary over time and as such the specific classes of products to be subject to the new framework may be more appropriately prescribed in delegated legislation. However, it is not clear why there is no detail in the primary legislation as to the type of products that may be prescribed, the process for certification and exemptions from certification and the applicability of merits review for decisions made under this regulatory scheme.

1.24 The committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.³² In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.³³

1.25 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that

30 See paragraph 43(1)(b).

31 Explanatory memorandum, p. 43.

32 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

33 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp 6–24.

specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. While subclause 51(6) provides that consultation must be undertaken with the Information Commissioner before rules are made regarding the persons to whom information can be disclosed, no other specific consultation obligations are included in the bill. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.³⁴

1.26 The committee's view is that significant matters, such as the core elements of the new emissions standards framework, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave most of the elements of this new scheme to delegated legislation;**
- **if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations;**
- **why the bill only provides that the rules 'may' provide for the review of decisions under the Act, rather than the bill stating that decisions made regarding the certification of an emissions-controlled product, the granting of exemptions relating to those products, and the imposition of fees for service will be subject to merits review; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**

34 See sections 18 and 19 of the *Legislation Act 2003*.

Reversal of evidential burden of proof³⁵

1.27 Clause 33(1) proposes to make it an offence to engage in certain conduct. Subclause 33(2) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person engages in the conduct in accordance with a direction given to the person by the Minister. The offence carries a maximum penalty of 6 months imprisonment.

1.28 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.29 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.

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

1.31 In this case, the explanatory memorandum states that reversal of the burden of proof is appropriate here 'as the manner of the person's conduct are within the knowledge of that person'.³⁶ In addition, the statement of compatibility states:

The reversal is justified in this instance, as the matter to be proved (namely that the person's conduct was in accordance with a direction give to the person by the Minister) is a matter that would be in the particular knowledge of the defendant. It is expected that it would not be unreasonably difficult for the defendant to discharge the evidentiary burden in this circumstance.³⁷

1.32 The committee notes that the *Guide to Framing Commonwealth Offences*³⁸ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and

35 Subclause 33(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

36 Explanatory memorandum, p. 35.

37 Statement of compatibility, p. 10.

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

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.³⁹

1.33 In this case, it is not apparent that whether a person engages in conduct in accordance with a direction given to the person by the Minister is one that is *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters. It would appear that whether the Minister has issued a direction for a person to engage in specified conduct would be a matter that the Minister (and therefore the prosecution) would be particularly apprised of. The committee considers that this matter appears to be one that would be more appropriate to be included as an element of the offence, rather than as a defence.

1.34 The committee requests the Minister's detailed justification as to the appropriateness of including the specified matter as an offence-specific defence. The committee suggests that it may be appropriate if clause 33(1) were amended to add an additional paragraph providing that a person will commit the offence if the Minister has not given a direction to the person to engage in that conduct (and the defence at subclause 33(2) were removed). The committee also requests the Minister's advice in relation to this matter.

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

Product Emissions Standards (Consequential Provisions) Bill 2017

Purpose	This bill seeks to amend the <i>Customs Act 1901</i> to clarify that goods imported or exported in contravention of the Product Emissions Standards legislation are not forfeited to the Crown under the Act
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017

The committee has no comment on this bill.

Product Emissions Standards (Consequential Provisions) Bill 2017

Purpose	This bill seeks to amend the <i>Customs Act 1901</i> to clarify that goods imported or exported in contravention of the Product Emissions Standards legislation are not forfeited to the Crown under the Act
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017

The committee has no comment on this bill.

Product Emissions Standards (Customs) Charges Bill 2017

Product Emissions Standards (Excise) Charges Bill 2017

Purpose	These bills seek to impose a charge on: <ul style="list-style-type: none"> the importation of products; and domestically manufactured products prescribed under the Product Emissions Standards legislation
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

Significant matters in delegated legislation⁴⁰

1.35 These bills seek to impose a charge on the importation and manufacture of 'emissions-controlled products'.⁴¹ Products may be prescribed as an 'emissions-controlled product' by rules (delegated legislation) made under clause 9 of the Product Emissions Standards Bill 2017. The amount of the charge imposed is to be prescribed in regulations (or worked out in accordance with a method prescribed in regulations).⁴²

1.36 The explanatory memorandum suggests that it is necessary to have flexibility in prescribing the amount of the charge in regulations as different charges may be prescribed for different emissions-controlled products. The explanatory memorandum also suggests that the charges 'would enable full cost recovery of the costs associated with regulating emissions-controlled products':

Consistent with Australian Government policy, the amount of any applicable charge for different types of emissions-controlled products will be determined on a case-by-case basis through a Cost Recovery Implementation Statement. The amount of the charge imposed would be

40 Clause 6 (in both the Customs and Excise bills). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

41 Clause 5 (in both the Customs and Excise bills).

42 Clause 6 (in both the Customs and Excise bills).

set at a level that is designed to recover no more than the estimated cost of regulating the type of emissions-controlled product.⁴³

1.37 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).⁴⁴ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee notes the statement in the explanatory memorandum that it is intended that the charges are to be imposed for the purposes of cost recovery. However, no guidance is provided on the face of the bills limiting the imposition of the charges in this way (for example, there is no provision limiting the charges to 'the estimated cost of regulating the type of emissions-controlled product'), nor are maximum charges specified.

1.38 The committee therefore requests the Minister's advice as to whether at least some level of guidance (for example, limiting the charges to 'the estimated cost of regulating the type of emissions-controlled product') or a maximum level of charge can be specifically included in each bill.

1.39 If no guidance is to be included on the face of the bill, the committee considers that it may be appropriate for the bill to be amended to increase parliamentary oversight by:

- **requiring the positive approval of each House of the Parliament before new regulations under clause 6 come into effect;⁴⁵ or**
- **providing that the regulations do not come into effect until the relevant disallowance period has expired (while retaining the usual procedures in subsection 42(2) of the *Legislation Act 2003* so that any regulations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period).**

1.40 The committee also requests the Minister's response in relation to this matter.

43 Explanatory memorandum, pp 46–47 and 48–49.

44 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

45 See, for example, section 10B of the *Health Insurance Act 1973*.

Social Security Amendment (Caring for People on Newstart) Bill 2017

Purpose	This bill seeks to amend the <i>Social Security Act 1991</i> to provide additional financial assistance to Newstart and Youth Allowance recipients
Sponsor	Senator Rachel Siewert
Introduced	Senate on 9 August 2017

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

Fair Work Amendment (Corrupting Benefits) Bill 2017⁴⁶

[Scrutiny Digests 4 & 5 of 2017]

1.41 In *Scrutiny Digest No. 4 of 2017* and *Scrutiny Digest No. 5 of 2017* the committee raised a number of scrutiny concerns in relation to this bill. A number of the amendments agreed to by the Senate address the committee's scrutiny concerns regarding the application of strict liability and the power for regulations to prescribe additional matters which would form part of an offence.

1.42 The committee welcomes the amendments made by the Senate removing the application of strict liability and the power for regulations to prescribe additional matters which would form part of an offence, although it notes that the amendments do not address all of the committee's scrutiny concerns regarding the breadth of the offence provision.

Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017⁴⁷

[Scrutiny Digests 5 & 6 of 2017]

1.43 The committee thanks the Assistant Minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.⁴⁸

46 On 9 August 2017 the Senate agreed to 8 Opposition (two as amended by further Government amendments) and five Liberal Democratic Party amendments, and the Minister for Employment (Senator Cash) tabled a supplementary explanatory memorandum. On 10 August 2017 the House of Representatives agreed to the Senate amendments and the bill was passed.

47 On 8 August 2017 in the House of Representatives the Assistant Minister for Cities and Digital Transformation (Mr Taylor) presented an addendum to the explanatory memorandum and the bill was read a third time.

48 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, 14 June 2017, pp 140–143.

No comments

1.44 The committee has no comments on amendments made or explanatory material relating to the following bill:

- Australian Education Amendment Bill 2017⁴⁹

49 On 21 June 2017 the Senate agreed to four Government amendments, one Government request for an amendment and the Minister for Education and Training (Senator Birmingham) tabled a supplementary explanatory memorandum. On 22 June 2017 the Senate agreed to four Government amendments (one as amended by the Australian Greens) and 15 Government requests for amendments. On the same day the House of Representatives made the Senate's requested amendments, agreed to the Senate amendments and the bill was passed.

Chapter 2

Commentary on ministerial responses

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

Australian Education Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Australian Education Act 2013</i> (the Act) to: <ul style="list-style-type: none"> • implement a new funding arrangements for schools; • make a number of consequential and technical amendments to the Act; and • amend the <i>Australian Education Regulation 2013</i>
Portfolio	Education and Training
Introduced	House of Representatives on 11 May 2017
Bill status	Received the Royal Assent on 27 June 2017
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv) and (v)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 10 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹

Broad delegation of legislative power²

Initial scrutiny – extract

2.3 Proposed section 35A sets out the Commonwealth share of funding for government and non-government schools. However, it states that this share of funding may be amended by the regulations. This could therefore mean that the default funding share which is set out in the bill could be amended by delegated

1 See correspondence relating to *Scrutiny Digest No. 9 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

2 Schedule 1, item 16, proposed section 35A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference

legislation. However, the share of funding payable by the Commonwealth appears to be central to the policy changes proposed to be made by this bill.

2.4 The committee's view is that significant matters should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum justifies this delegation of legislative power by explaining that the 'regulation-making power is designed to ensure that sufficient flexibility is built into the Act for future government decisions on schools funding, while maintaining appropriate and sufficient Parliamentary oversight'.³

2.5 The modification of the share of funding payable by the Commonwealth to government and non-government schools could, depending on the size of the change to the Commonwealth share, be a major change to the policy intent of the bill. While any regulations would be subject to disallowance, the committee's preference from a scrutiny perspective would be that a limit be set on the adjustments to the funding share that could be made via regulations.

2.6 The committee therefore suggests that it may be appropriate for the bill to be amended to set a limit on the extent to which the share of Commonwealth funding for government and non-government schools can be modified by the regulations, and seeks the Minister's response in relation to this matter.

Minister's response

2.7 The Minister advised:

The Committee notes the Bill inserts a new section 35A into the *Australian Education Act 2013* (the Act) that sets the 'Commonwealth share' for government (20 per cent) and non-government schools (80 per cent), but that this can also be set by regulation. The Committee suggests a limit on the extent Commonwealth share can be set by regulation.

Although the Act provides for transition to the Commonwealth share over a six or 10 year period, the Act is intended to cover Commonwealth funding for schools into the future. The Act will be subject to ongoing reviews (see, for example, section 128), ensuring the Act continues to operate as intended, aligns with Government policy and reflects both national and bilateral agreements with states and territories on school funding. The ability to set Commonwealth share by regulation allows more efficient response to any circumstances that may arise requiring a modified share percentage.

It is not possible at this time to predict the nature of any limits that could appropriately be imposed on setting Commonwealth share by regulation.

3 Explanatory memorandum, p. 19.

As noted in the Explanatory Memorandum to the Bill and by the Committee, regulations setting Commonwealth share will be subject to parliamentary scrutiny and disallowance. This process will allow the Senate to vigorously debate any change, and a variety of stakeholders to contribute to any discussion and have their interests represented.

I consider this process represents sufficient practical and political oversight of the power to set Commonwealth share by regulation.

Committee comment

2.8 The committee thanks the Minister for this response. The committee notes the Minister's advice that the ability to set the Commonwealth share of funding for government and non-government schools by regulation allows more efficient responses to any circumstances that may arise requiring a modified share percentage. The committee also notes the Minister's advice that it is not possible at this time to predict the nature of any limits that could appropriately be imposed on setting Commonwealth share by regulation (partly due to the fact that school funding arrangements will reflect both national and bilateral agreements with the States and Territories).

2.9 While the committee notes this advice, it remains unclear to the committee why it would not be possible to formulate even broad limits on this power to set the Commonwealth share by regulation (noting that if circumstances changed significantly it would be appropriate to bring forward an amending bill to ensure appropriate parliamentary scrutiny of the response to significantly changed circumstances).

2.10 However, noting that any regulations will be subject to parliamentary scrutiny and disallowance, and the fact that the bill has already passed both Houses of Parliament, the committee makes no further comment on this matter, other than to draw this issue to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Significant matters in delegated legislation⁴

Initial scrutiny – extract

2.11 Proposed section 69B provides for the establishment of transition adjustment funding for transition schools. Proposed subsection 69B(1) will enable the Minister to determine an amount of transition adjustment funding for a transition school for a transition year if the Minister is satisfied prescribed circumstances apply in relation to the school for that year.

4 Schedule 1, item 40, proposed section 69B. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

2.12 In relation to parliamentary oversight of transition adjustment funding, the explanatory memorandum states that funding will be appropriated under annual appropriation Acts, and regulations (made under section 130 of the *Australian Education Act 2013*) can include:

- the eligibility criteria or preconditions for transition adjustment funding (the 'prescribed circumstances' for subclause 69B(1));
- matters that the Minister may or must take into account in making a funding determination under subclause 69B(1);
- the amount of funding that may be paid for a transition school for a transition year (whether a fixed amount, a capped amount, or an amount worked out by formula) (see subclauses 69B(2) and (3)); and
- the total amount of transition adjustment funding available for a transition year (which could be a fixed amount, a capped amount, or an amount worked out by formula (see subclause 69B(4)).⁵

2.13 Subclause 69B(5) provides that a funding determination under subclause 69B(1) is not a legislative instrument and therefore these transition adjustment funding determinations will not be subject to parliamentary disallowance. The explanatory memorandum states subclause 69B(5) is included to assist readers, as any determination under subclause 69B(1) is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*.

2.14 In order to ensure that legislative power is delegated to the executive appropriately, the committee's scrutiny view is that significant matters, such as provisions relating to transition funding for schools, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.15 Given that transition adjustment funding determinations will not be subject to parliamentary disallowance, the committee requests the Minister's advice as to:

- why all of the details of the new transitional adjustment funding scheme are left to be worked out in delegated rather than primary legislation;
- whether at least some high-level eligibility criteria or preconditions for transition adjustment funding can be set out on the face of the bill (rather than the eligibility criteria and preconditions being left entirely to regulations);
- whether circumstances (i.e. eligibility criteria or preconditions for transition adjustment funding) must be prescribed in the regulations in order for the Minister to be able to validly exercise his or her power to make a transition adjustment funding determination under proposed subclause 69B(1) (i.e. if no circumstances are prescribed is the Minister able to exercise an

5 Explanatory memorandum, p. 23.

- unfettered power to make a non-disallowable transition adjustment funding determination); and
- the appropriateness of amending proposed subsection 69B(2) of the bill to:
 - provide that the regulations *must* (rather than may) prescribe a method for working out transitional adjustment funding amounts; and/or
 - provide that the regulations *must* (rather than may) prescribe a maximum amount that is payable for a school for a year under a transition adjustment funding determination or prescribe a method for working out that maximum amount.

Minister's response

2.16 The Minister advised:

The Committee notes the Bill inserts a new section 69B into the Act, empowering the Minister to determine an amount of transition adjustment funding for a transitioning school for a transition year. The Committee asks for my advice on a number of issues regarding transition adjustment funding.

The Explanatory Memorandum sets out the purpose of the new section 69B at pages 18-19: to assist schools under financial hardship due to transitioning to the Commonwealth share and its approved authority is unable to distribute recurrent funding to rectify any hardship. Pages 23-24 also highlight how parliamentary oversight is achieved.

The terms of new section 69B replicate the existing section 69A 'Funding in prescribed circumstances'. However, section 69B is more limited in scope as it only applies to transitioning schools for transition years. The practice for drafting regulations for section 69B will also be the same as section 69A.

Currently, the *Australian Education Regulation 2013* (the Regulation) sets out prescribed circumstances under which determinations of funding under section 69A can be made. This includes formulas for calculating maximum amounts payable, limits on amounts for schools or limits on total amounts in given years. Regulations made under section 69B will also include relevant financial limits.

The Explanatory Memorandum outlines the high level eligibility for section 69B funding (as above). It is important that legislative framework does not unduly limit the capacity of the Australian Government to respond effectively to potential hardship that may arise for schools. I also note that criteria for transition adjustment funding were subject to considerable discussion between the Government and stakeholders during the Bill's passage, and remain subject to ongoing discussions.

It will not be possible for the Minister to make determinations of financial assistance under section 69B without prescribed circumstances in

regulations, and this determination cannot be contrary to such regulations. In this way, prescribed circumstances for funding under s 69B will be subject to parliamentary scrutiny and disallowance. Further, as the Explanatory Memorandum notes, section 69B funding is appropriated under annual appropriation Acts, subject to parliamentary oversight.

Committee comment

2.17 The committee thanks the Minister for this response. The committee notes the Minister's advice that it will not be possible for the Minister to make determinations of financial assistance under section 69B without prescribed circumstances in regulations (and that these prescribed circumstances will be subject to parliamentary scrutiny and disallowance). The committee also notes the Minister's advice that the terms of new section 69B replicate the existing section 69A 'Funding in prescribed circumstances'; that it is important that the legislative framework does not unduly limit the capacity of the government to respond effectively to potential hardship that may arise for schools; and that the criteria for transition adjustment funding were subject to considerable discussion between the government and stakeholders during the bill's passage, and remain subject to ongoing discussions.

2.18 The committee notes that the fact that a provision replicates existing provisions or that the relevant criteria is still subject to ongoing discussions with stakeholders will not generally address the committee's scrutiny concerns in relation to leaving significant matters to delegated legislation. However, the fact that it will not be possible for the Minister to make determinations of financial assistance under section 69B without prescribed circumstances in regulations, go some way to addressing the committee's scrutiny concerns.

2.19 The committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

2.20 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Parliamentary scrutiny—section 96 grants to the States⁶

Initial scrutiny – extract

2.21 Proposed sections 22 and 22A seek to impose new policy and funding requirements on States and Territories, as conditions of financial assistance provided to them under the *Australian Education Act 2013*. Specifically, these provisions

6 Schedule 1, items 59 and 60, proposed section 22 and 22A. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(v) of the committee's terms of reference.

provide that a payment of financial assistance will be subject to the following conditions:

- that the State or Territory implements national policy initiatives for school education agreed by the Ministerial Council from time to time;⁷
- that the State or Territory implements national policy initiatives for school education prescribed by regulations;⁸
- that the State or Territory is party to a national agreement relating to school education reform;⁹
- that the State or Territory is party to an agreement with the Commonwealth relating to implementation by the State or Territory of school education reform;¹⁰
- that the State or Territory complies with the two agreements mentioned above;¹¹ and
- that the State or Territory maintains funding levels for school education in accordance with the regulations.¹²

2.22 The committee makes no comment in relation the conditions of financial assistance prescribed by the regulations, as this will ensure that those conditions are subject to some level of parliamentary scrutiny and disallowance.

2.23 However, in relation to the conditions of financial assistance set out in agreements between the Commonwealth and State executive governments, the committee notes that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution. If these provisions are agreed to and the Parliament is therefore delegating this power to the Executive in this instance, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory.

2.24 Noting this, and the fact that the conditions of financial assistance will be of significance to setting the policy framework of the bill, the committee suggests it may be appropriate for the bill to be amended to include at least some high-level policy initiatives and school education reform priorities which States and Territories

7 Proposed paragraph 22(1)(a).

8 Proposed paragraph 22(1)(b).

9 Proposed paragraph 22(2)(a).

10 Proposed paragraph 22(2)(b).

11 Proposed paragraph 22(2)(c).

12 Proposed section 22A.

will be required to implement in order to receive payments of financial assistance. The committee seeks the Minister's response in relation to this matter.

2.25 The committee also suggests that it may be appropriate for the bill to be amended to include a legislative requirement that any relevant agreements with the States and Territories about these grants of financial assistance are (a) tabled in the Parliament within 15 sitting days after being made, and (b) published on the internet within 30 days after being made. The committee also requests the Minister's response in relation to this matter.

Minister's response

2.26 The Minister advised:

Sections 22 and 22A of the amended Act impose requirements on states and territories as conditions of financial assistance payable by the Commonwealth under the Act. The Committee seeks my advice on if section 22 of the Bill could be amended to include high level policy initiatives and school education reform priorities. The Committee also requests my advice on its suggestion to table in parliament and publish on the internet the national and bilateral agreements mentioned in amended section 22.

I note current section 22 of the Act only requires states and territories to 'implement national policy initiatives for school education in accordance with the regulations'. The Regulation specifies these policy initiatives at its section 10. By contrast, the amended paragraph 22(1)(a) requires states and territories to implement national policy initiatives 'agreed by the Ministerial Council from time to time'. The policy initiatives, reform program and projects agreed by the Ministerial Council are published on the Council's website at www.educationcouncil.edu.au. Further, referencing Ministerial Council agreements allows the legislation to remain current as new initiatives are endorsed, responding to the priorities of the Council.

I note the Minister must consult the Ministerial Council prior to making regulations prescribing additional national policy initiatives for amended Act paragraph 22(1)(b), and have regard to any relevant Council decisions (see amended Act subsection 130(5)). These regulations will be subject to parliamentary scrutiny and disallowance.

In accordance with usual practice, agreements between the Commonwealth and states and territories for school education reform will be published on the Council on Federal Finance Relations website at www.federalfinancialrelations.gov.au. The Regulation will prescribe those agreements and I expect will note the website where they can be found. The agreements will therefore be publicly available.

I note that the Bill was amended before passing regarding states and territories maintaining funding levels. The amended Act section 22A now

describes requirements around state-territory contributions, rather than simply in accordance with the regulations.

Committee comment

2.27 The committee thanks the Minister for this response. The committee notes the Minister's advice that States and Territories will be required to implement national policy initiatives 'agreed by the Ministerial Council from time to time' and that these policy initiatives, reform program and projects agreed by the Ministerial Council are published on the Council's website. The Minister also advised that referencing Ministerial Council agreements allows the legislation to remain current as new initiatives are endorsed, responding to the priorities of the Council. The committee also notes the Minister's advice that consultation must be undertaken with the Ministerial Council prior to making regulations prescribing additional national policy initiatives. Finally, the committee notes the Minister's advice in relation to amendments made to the bill which prescribe conditions around State and Territory contributions on the face of the bill, rather than leaving these requirements to be set out in the regulations.

2.28 In relation to the tabling and publishing of agreements, the committee notes the Minister's advice that agreements between the Commonwealth and States and Territories for school education reform will be published on the Council on Federal Finance Relations website. In addition, the Minister advised that the regulations will prescribe those agreements and it is expected that they will also note the website where they can be found.

2.29 While the committee welcomes this approach, which should ensure that the agreements are publicly available, the committee notes that there is no legislative requirement for this to occur. Furthermore, the process of tabling documents in Parliament alerts Senators to their existence and provides opportunities for debate that are not available where documents are only published online.

2.30 The committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

2.31 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Broad delegation of administrative power¹³

Initial scrutiny – extract

2.32 Item 173 proposes to amend subsection 129(3) of the *Australian Education Act 2013* to provide the Secretary with the power to delegate his or her powers under the Act to 'any APS employee'. Currently, the Secretary is restricted to delegating his or her powers to SES employees in the Department.

2.33 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 officers or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

2.34 The explanatory memorandum justifies this change by reference to two matters. First, the Minister's powers may be delegated to any APS employee, while the Secretary can only delegate to SES employees. Secondly, it is said that there are a number of powers held by the Secretary which are of a routine administrative nature and it is appropriate they be exercisable by officers below the level of SES employees. For these reasons it is concluded that the 'capacity of the Secretary to delegate his or her powers under the Act and Regulation is being aligned with the capacity of the Minister to delegate his or her powers'.¹⁴

2.35 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level. The consistency of approach between the Minister's powers of delegation and the Secretary's powers does not appear to be a sufficient justification for broadening the Secretary's powers to delegate.

2.36 The committee requests the Minister's further advice as to why it is considered necessary to allow for the delegation of any or all of the Secretary's functions or powers in these provisions and the appropriateness of amending the bill 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 (for example, providing that only powers of a routine administrative nature may be delegated to non-SES employees).

13 Schedule 1, item 173, proposed subsection 129(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

14 Explanatory memorandum, p. 35.

Minister's response

2.37 The Minister advised:

The Committee notes that the Bill amends subsection 129(3) of the Act to enable the Secretary of the Department of Education and Training to delegate their powers under the Act to 'any APS employee'. The current Act only allows Secretary delegation to SES employees in the department.

The Secretary has a number of powers under the Act and Regulation that are of a routine administrative nature.

For example, and to provide additional context, the Secretary may allow a period longer than 30 days for lodgement of an application for internal review (subparagraph 120(2)(c)(ii) of the Act); allow a period longer than seven days after a census day for lodgement of a census return (paragraph 46(5)(b) of the Regulation); determine the form and manner of census returns (paragraph 46(3)(b) of the Regulation); arrange the use of computer programs to assist with decision-making under the Act (section 124 of the Act); and specify categories of information for the purposes of census returns (paragraph 50(1)(b) of the Regulation).

I consider that it is appropriate that these kinds of powers be exercisable by officers of the department below the level of SES employee. This further ensures that the Secretary will be able to delegate their powers to be exercisable by the same level of employee as the Minister currently can.

I note also that the delegation powers of both the Minister and the Secretary under the Act are limited to APS employees of the department.

Committee comment

2.38 The committee thanks the Minister for this response. The committee notes the Minister's advice that the Secretary has a number of powers that are of a routine administrative nature and therefore it is considered appropriate that these kinds of powers be exercisable by officers of the department below the level of SES employee.

2.39 The committee takes this opportunity to reiterate that it has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

2.40 The committee notes that it would be possible to provide legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated (for example, by providing that only powers of a routine administrative nature may be delegated to non-SES employees).

2.41 In light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on this matter.

Commercial Broadcasting (Tax) Bill 2017

Purpose	This bill seeks to introduce a tax for transmitter licences issued under section 102 of the <i>Radiocommunications Act 1992</i> that are associated with commercial broadcasting licences issued under Part 4 of the <i>Broadcasting Services Act 1992</i>
Portfolio	Communications and the Arts
Introduced	House of Representatives on 15 June 2017
Bill status	Before Senate
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

2.42 The committee dealt with this bill in *Scrutiny Digest No. 7 of 2017*. The Minister responded to the committee's comments in a letter dated 9 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹⁵

Significant matters in delegated legislation¹⁶

2.43 This bill seeks to introduce a tax for certain transmitter licences. The bill is complementary to provisions of the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 which, among other things, seeks to repeal existing broadcasting licence fees and datacasting charges as well as establish collection and assessment arrangements for the proposed new transmitter licence tax.

2.44 Under the bill, the Minister may, by legislative instrument, determine the amount of tax for each individual transmitter (the 'individual transmitter amount');¹⁷ however, this amount must not exceed the cap amounts specified in the bill.¹⁸ The capped amount applies as a default if no determination is in force.¹⁹

2.45 In addition, the Minister may also make legislative instruments that:

15 See correspondence relating to *Scrutiny Digest No. 9 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

16 Clauses 8, 11 and 14. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

17 Clause 8.

18 Clause 9.

19 Paragraph 8(1)(b).

- determine a specified time is the 'termination time' for the purposes of this bill (no further tax would be imposed after the 'termination time');²⁰ and
- make provision for rebates of the whole or part of an amount of tax payable by a person.²¹

2.46 One of the most fundamental functions of the Parliament is to levy taxation.²² The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this case, the fact that a cap on the amount of tax is set in the primary legislation partly addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

2.47 In relation to specifying a 'termination time', the explanatory memorandum states that 'it is expected that if the Minister were to make such a determination in the future, it would be after five years of its operation, in order to transition the commercial broadcasters to a spectrum usage charging regime'.²³ There is, however, no provision in the bill limiting the making of a determination specifying a 'termination time' in this way.

2.48 In relation to the provision of rebates by the Minister, the explanatory memorandum states that 'it is expected that the rebates could be applied, where there is a strong policy rationale, to specified classes of transmitters or persons, or different periods'.²⁴ Again, there is no provision in the bill to guide the exercise of the Minister's power to determine rebates (for example, there are no relevant policy considerations in the bill which must be taken into account prior to making these instruments).

2.49 Noting the determinations made under clauses 8, 11 and 14 delegate to the executive significant legislative power in relation to taxation, from a scrutiny perspective, the committee considers that it may be appropriate for these clauses to be amended to require the positive approval of each House of the Parliament before a new determination comes into effect.²⁵

20 Clause 11.

21 Clause 14.

22 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

23 Explanatory memorandum, p. 16.

24 Explanatory memorandum, p. 18.

25 See, for example, section 10B of the *Health Insurance Act 1973*.

2.50 In relation to clauses 11 and 14, the committee suggests it may, as an alternative, be appropriate to amend these clauses to provide further guidance in relation to the exercise of these powers on the face of bill (see paragraphs [2.47]–[2.48] above).

2.51 The committee requests the Minister's response in relation to this matter.

Minister's response

2.52 The Minister advised:

I wish to assure the Committee that the overriding objective underpinning the design of the proposed new ministerial power under proposed clause 8(2) of the Bill to determine individual transmitter amounts has been to maximise parliamentary scrutiny whilst maintaining a sufficient degree of flexibility. While the Bill would enable the ministerial determination to set out different rates, he or she must do so for different classes of transmitter, licence or licence-holder and the delegated power to set the rate of the tax is constrained by subclause 8(6) and clause 9, which impose a legislatively-prescribed 'cap' on the rates.

...

Finally, I note section 14 of the Bill provides for the Minister to make rules for the provision of rebates for whole or part of an amount of tax payable by a person. This is a common provision providing for rebates for tax amounts, and is subject to the usual disallowance procedure set out in section 42 of the Legislation Act.

Committee comment

2.53 The committee thanks the Minister for this response. The committee notes the Minister's advice that the overriding objective underpinning the design of the proposed new ministerial power to determine individual transmitter amounts has been to maximise parliamentary scrutiny while maintaining a sufficient degree of flexibility.

2.54 The committee welcomes this approach, particularly the cap on the individual transmitter amount in clause 9 of the bill. However, the committee takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.²⁶ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.

26 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

2.55 Therefore, from a scrutiny perspective, the committee remains of the view that it may be appropriate for clauses 8, 11 and 14 to be amended to require the positive approval of each House of the Parliament before a new determination comes into effect.²⁷

2.56 In relation to clauses 11 and 14, the committee remains of the scrutiny view that it may be appropriate to amend these clauses to provide further guidance in relation to the exercise of these powers on the face of bill (see paragraphs [2.47]–[2.48] above)

2.57 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of amending the bill to increase parliamentary scrutiny of ministerial determinations setting the rate of a tax.

2.58 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Modified disallowance procedures²⁸

2.59 In relation to ministerial determinations of the 'individual transmitter amount' made under clause 8, the bill proposes to modify the usual commencement and disallowance procedures for these determinations in two ways.²⁹

2.60 First, subclause 13(4) improves parliamentary oversight of these instruments by ensuring that they do not come into effect until 15 sitting days after the disallowance period has expired. The committee welcomes this modified commencement procedure.

2.61 However, subclause 13(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* to require the Parliament to positively pass a resolution disallowing a determination within the 15 sitting day disallowance period in order for the disallowance to be effective.³⁰ Normally, subsection 42(2) of the *Legislation Act* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the

27 See, for example, section 10B of the *Health Insurance Act 1973*.

28 Clauses 8 and 13. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

29 The usual commencement and disallowance procedures are contained in sections 12 and 42 of the *Legislation Act 2003*, respectively.

30 Subsection 13(5) also states that section 42 of the *Legislation Act* does not apply to the determination.

purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.³¹

2.62 Under the modified disallowance procedure proposed in subclause 13(2), if a disallowance motion is lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument will take effect. In practice, as the executive has significant control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days.

2.63 Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument will be taken *not* to have been disallowed and would therefore be able to come into effect.

Minister's response

2.64 The Minister advised:

I also note that clause 13 of the Bill provides for a modified disallowance procedure in respect of a Ministerial determination setting the tax amounts for individual transmitters. This modified disallowance procedure provides enhanced Parliamentary scrutiny over any such Ministerial determination than would be available under the usual disallowance procedure in section 42 of the *Legislation Act 2003* (Legislation Act). Under the usual disallowance procedure, a legislative instrument will take effect from when it is made and commences, and if disallowed, will only cease to have effect from the time of disallowance. Under the modified procedure in the Bill, a ministerial determination can only commence and take effect once the disallowance period has passed and the Parliament has had sufficient time to scrutinise the determination.

Committee comment

2.65 The committee thanks the Minister for this response. The committee notes the Minister's advice that the modified disallowance procedure in respect of a

31 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

ministerial determination setting the tax amounts for individual transmitters means that such determinations can only commence and take effect once the disallowance period has passed. In its initial comments the committee welcomed this approach, noting that it will improve parliamentary oversight by ensuring that the ministerial determinations do not come into effect until 15 sitting days after the disallowance period has expired.

2.66 However, the committee also noted that clause 13 seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* so that if a disallowance motion is lodged, but not brought on for debate before the end of the disallowance period, the relevant instrument will remain in force by default.³² As a result, in practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is available to consider the disallowance motion within disallowance period. In such cases, the determination would prevail regardless of the attempt to disallow it. The proposed procedure would therefore undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days.

2.67 The committee considers that, from a scrutiny perspective, it would be appropriate for the disallowance procedures for these ministerial determinations to be amended to ensure that the usual procedure applies so that the determinations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period. The committee notes that this should be in addition to the procedure as currently drafted which provides that the determinations do not come into effect until the relevant disallowance period has expired.

2.68 The committee notes that the suggested amendment in relation to clause 8 outlined at paragraph [2.55] above would address the committee's scrutiny concerns in this regard.

32 Normally, subsection 42(2) of the *Legislation Act* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. Odgers' *Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' Odgers' further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation': Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

2.69 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing aspects of the usual disallowance procedure in relation to these instruments.

2.70 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Defence Legislation Amendment (2017 Measures No. 1) Bill 2017

Purpose	<p>This bill seeks to amend several Acts relating to defence to:</p> <ul style="list-style-type: none"> • allow a positive test for prohibited substances to be disregarded under certain circumstances; • simplify termination provisions to align with the new Defence Regulation 2016; • ensure greater protections for all Reservists in relation to their employment and education; • include the transfer of hydrographic, meteorological and oceanographic functions from the Royal Australian Navy to the Australian Geospatial-Intelligence Organisation; • align a small number of provisions in the <i>Australian Defence Force Cover Act 2015</i> with other military superannuation schemes and provide clarity in definitions
Portfolio	Defence
Introduced	House of Representatives on 29 March 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.71 The committee dealt with this bill in *Scrutiny Digest No. 7 of 2017*. The Minister responded to the committee's initial comments in a letter dated 26 July 2017. The committee sought further information and the Minister responded in a letter dated 8 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.³³

2.72 The committee dealt with this bill in *Scrutiny Digest No. 7 of 2017*. The Minister responded to the committee's comments in a letter dated 26 July 2017. The committee sought further information in the *Scrutiny Digest of 2017* and the Minister responded in a letter dated 2 May 2017.

33 See correspondence relating to *Scrutiny Digest No. 9 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

Significant matters in delegated legislation³⁴

Initial scrutiny – extract

2.73 Proposed section 72B specifies that the regulations may provide processes for making and investigating complaints about alleged contraventions of the *Defence Reserve Service (Protection) Act 2001* (the Act) and mediating disputes between persons whose interests are affected by the Act. The Office of Reserve Service Protection, which is currently responsible for receiving, mediating and investigating complaints is already established under the Defence Reserve Service (Protection) Regulations 2001 (the DRS (Protection) Regulations). The current DRS (Protection) Regulations already provide for obtaining documents and information from employers and others, among other things.

2.74 It appears that the intent of proposed section 72B is to ensure that there is clear legislative authority to make the DRS (Protection) Regulations. This is demonstrated by the application provisions in subitem 72(4) which are designed to ensure that 'complaints made or actions taken under the regulations prior to commencement...are taken to be complaints made or actions taken under the regulations made for the purposes of new subparagraph 72B(1)(a)'.³⁵

2.75 Importantly, item 71 also seeks to amend subsection 81(2) of the Act to allow the regulations to prescribe penalties of up to 50 penalty units and civil penalties of up to 60 penalty units for offences against and contraventions of the regulations. Currently, the maximum penalty is 10 penalty units. The explanatory memorandum notes that current offences in the DRS (Protection) Regulations include failure to provide information to the Director of the Office of Reserve Service Protection and that a higher penalty is required because a failure to provide information can significantly hamper the enforcement of the Act.³⁶

2.76 The committee's view is that significant matters, such as complaints and mediation processes (compliance with which can be enforced through offence and civil penalty provisions), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.77 In this case, no explanation is given as to why it is appropriate to provide for the complaints and mediation scheme in delegated legislation other than there are currently regulations in place covering these matters (which may not be supported by an effective authorising provision). The committee notes that rather than amending the Act to provide clear legislative authority to make the DRS (Protection) Regulations, it would instead be possible to remake the relevant provisions of the

34 Schedule 2, items 65, proposed section 72B of the *Defence Reserve Service (Protection) Act 2001*.

35 Explanatory memorandum, p. 31.

36 Explanatory memorandum, p. 31.

DRS (Protection) Regulations in the primary legislation. This would ensure that the complaints and mediation scheme is subject to the full range of parliamentary scrutiny inherent in bringing proposed changes to the scheme in the form of an amending bill.

2.78 In light of the above comments, the committee requests the Minister's advice as to why it is appropriate for the complaints and mediation scheme relating to the defence reserve service to be specified in delegated legislation rather than in primary legislation.

Minister's first response

2.79 The Minister advised:

I understand the Committee is seeking advice as to why it is appropriate for the complaints and mediation scheme relating to the defence reserve service to be specified in delegated legislation rather than in primary legislation. The complaints and mediation scheme relating to defence reserve service is currently specified in the *Defence Reserve Service (Protection) Regulations 2001* (the Regulations), which are made under the *Defence Reserve Service (Protection) Act 2001* (the Act). This has been the case since 2001.

The intent of the proposed measures in the Bill, which would amend the Act if passed, is to implement outstanding recommendations from a 2007 review of the Act, as well as some minor consequential matters.

The review gave no consideration to moving the complaints and mediation scheme into the principal legislation, so this was not considered when the Bill was drafted. Further, there has been no consultation with affected stakeholders, including potentially employer groups, for this type of change. The complaints and mediation scheme has, for the most part, been operating effectively since its inception in 2001.

The review made quite limited recommendations about the complaint and mediation scheme, which is why the proposed amendments relating to that scheme are limited to:

- introducing a new regulation-making power to remove any doubt about the validity of regulations about the scheme; and
- to enhance the penalties that can be imposed for offences against the regulations.

Defence will review the complaints and mediation scheme being moved from the regulations into the principal legislation following implementation of the Bill and prior to the Regulations sunset date of 1 October 2019.

Committee first comment

2.80 The committee thanks the Minister for this response. The committee notes the Minister's advice that the complaints and mediation scheme relating to defence

reserve service has been specified in the Defence Reserve Service (Protection) Regulations 2001 (the Regulations) since 2001, and that the intent of the bill is to implement outstanding recommendations from a 2007 review of the *Defence Reserve Service (Protection) Act 2001*. The Minister advised that the review gave no consideration to moving the complaints and mediation scheme into the principal legislation, so this was not considered when the bill was drafted. However, the Minister indicated that Defence will review the complaints and mediation scheme being moved from the regulations into the principal legislation following implementation of the bill and prior to the Regulations sunseting on 1 October 2019.

2.81 As noted above, the committee's view is that significant matters, such as complaints and mediation processes (compliance with which can be enforced through offence and civil penalty provisions), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Providing for the complaints and mediation scheme in primary legislation would ensure that the scheme is subject to the full range of parliamentary scrutiny inherent in bringing proposed changes to the scheme in the form of an amending bill.

2.82 The committee welcomes the Minister's undertaking to review moving the complaints and mediation scheme from the regulations into the principal legislation prior to the regulations sunseting on 1 October 2019. However, the committee notes that there is no legislative requirement for a pre-sunset review to consider whether to move the provisions of the sunseting delegated legislation into primary legislation.

2.83 The committee therefore suggests that it may be appropriate for the bill to be amended to include a legislative requirement to conduct a review into the desirability of, and potential options for, moving the complaints and mediation scheme from the regulations into the principal legislation prior to the sunseting of the Regulations on 1 October 2019 (with any document or report arising from the review to be tabled in both Houses of Parliament).³⁷ The committee requests the Minister's response in relation to this matter.

Minister's further response

2.84 The Minister advised:

The Committee is seeking my response to its suggestion that the current Bill before Parliament be amended to include a legislative requirement to

37 In this regard, the committee notes that the *Guide to Managing Sunsetting of Legislative Instruments* states that, for any major pre-sunset review, it is good practice to table the review document in Parliament (see Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments*, December 2016, p. 13, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-december-2016.pdf>).

conduct a review into the desirability of, and potential options for, moving the complaints and mediation scheme from the *Defence Reserve Service (Protection) Regulations 2001* (the Regulations) to the *Defence Reserve Service (Protection) Act 2001* (the Act).

I fully understand the Committee's concerns regarding the continued inclusion of significant matters such as complaints and mediation processes in the Regulations, rather than the Act.

I have asked the Department of Defence to immediately take steps to prepare a legislation bid for the Autumn 2018 sitting period for this measure to be included in the Government's legislation programme. This proposed bid will seek to move the complaints and mediation scheme from the Regulations into the Act, as suggested by the Committee. This will be a separate process from the usual sunseting review process, and is likely to occur well before the sunseting date of the Regulations on 1 October 2019.

Further delay is undesirable from a policy perspective, given the protective purpose of the measure for Reserve members, as well as the other measures in the Bill. I believe my above undertaking sufficiently acknowledges and should alleviate the Committee's concerns regarding the complaints and mediation scheme, without making amendment to the current Bill.

Committee further comment

2.85 The committee thanks the Minister for this response. The committee welcomes the Minister's advice that he fully understands the committee's concerns regarding the continued inclusion of significant matters, such as complaints and mediation processes, in the regulations, rather than the Act. In particular, the committee welcomes the Minister's undertaking in relation to preparing a legislation bid for the Autumn 2018 sitting period for a bill which will seek to move the complaints and mediation scheme from the regulations into the Act, as suggested by the committee. The committee notes the Minister's advice that this will be a separate process from the usual sunseting review process, and is likely to occur well before the sunseting date of the regulations on 1 October 2019. The committee further notes the Minister's advice that this approach is desirable given the protective purpose of the measures in the current bill.

2.86 The committee thanks the Minister for undertaking to seek to move the complaints and mediation process into the primary legislation, and looks forward to scrutinising the bill implementing this measure in the future. The committee considers that the Minister's undertaking addresses the committee's scrutiny concerns and therefore makes no further comment on this matter, other than to draw this general matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Public Governance and Resources Legislation Amendment Bill (No. 1) 2017

Purpose	<p>This bill seeks to amend various Acts in relation to the governance, performance and accountability of, and the use and management of resources by, the Commonwealth, Commonwealth entities and Commonwealth companies to:</p> <ul style="list-style-type: none"> • prescribe listed entities for the purposes of the <i>Public Governance, Performance and Accountability Act 2013</i> (the PGPA Act) within entities' enabling legislation; • repeal provisions covering issues now provided for by the PGPA Act, such as disclosure of interests and annual reporting requirements; and • update references in legislation from the <i>Financial Management and Accountability Act 1997</i> and the <i>Commonwealth Authorities and Companies Act 1997</i> to the PGPA Act <p>The bill also makes minor amendments to legislation consequential to the sale of Medibank Private Limited in 2014</p>
Portfolio	Finance
Introduced	House of Representatives on 22 June 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (iv)

2.87 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Minister responded to the committee's comments in a letter dated 14 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.³⁸

38 See correspondence relating to *Scrutiny Digest No. 9 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

Retrospective application³⁹

Initial scrutiny – extract

2.88 Schedule 4 to the bill contains transitional and application provisions. Item 4 provides that despite subsections 12(2) and (3) of the *Legislation Act 2003* (which restricts the retrospective application of legislative instruments), legislative instruments that amend another legislative instrument as a consequence of amendments or repeals made by the bill may be expressed to have taken effect from a date before the amending instrument is registered.⁴⁰

2.89 The committee has a long-standing scrutiny concern about provisions which facilitate the retrospective application of the law, as such provisions challenge a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.90 Generally, where proposed legislation facilitates the retrospective application of the law the committee expects the explanatory materials should set out the reasons why retrospectivity is required, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this case, the explanatory materials merely repeat the effect of the provision without providing any detail as to why it is necessary to authorise the making of retrospective legislative instruments.

2.91 The committee therefore requests the Minister's advice as to why it is considered necessary to authorise the making of retrospective legislative instruments in this instance, including examples of circumstances where such a power may be used, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

Minister's response

2.92 The Minister advised:

In *Scrutiny Digest No. 8 of 2017*, the Committee sought my advice as to why it is considered necessary to authorise the making of retrospective legislative instruments in this instance, including examples of circumstances where such a power may be used, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

39 Schedule 4, item 4. The committee draws Senators' attention to this provision pursuant to principles 1(a)(i) and (iv) of the committee's terms of reference.

40 Explanatory memorandum, p. 20.

Item 4 of Schedule 4 to the Bill is a facilitative provision that reflects good law making and its intent to support the seamless application of the law.

It is considered necessary in this instance to ensure that, where a need is recognised, any legislative instrument, including amendments to a legislative instrument that is consequential on the enactment of the Bill, may commence on a day before the legislative instrument is registered, including the date of the commencement of the Bill.

For example, I am currently in the process of drafting a legislative instrument that would repeal the National Competition Council, the Australian Building and Construction Commission and the Australian Transaction Reports and Analysis Centre from Schedule 1 to the *Public Governance, Performance and Accountability Rule 2014*. The instrument would rely on item 4 of Schedule 4 in taking effect from a date before it is registered, that is at the commencement of Bill. This would support the seamless application of the law.

The inclusion of item 4 of Schedule 4 to the Bill reflects past practice of including similar provisions within *Public Governance, Performance and Accountability Act 2013* related legislation. For example, the following two Acts include similar provisions:

- Item 5 of Schedule 14 to the Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Act 2014; and
- Item 1 of Schedule 7 to the Public Governance and Resources Legislation Amendment Act (No. 1) 2015.

No amendments have been made in reliance on either of the two above provisions as a consequence of the enactment of those Acts.

In light of the administrative nature of the amendments in the Bill and their relevance only to Commonwealth entities, any amendment to a legislative instrument made as a consequence to the enactment of the Bill is unlikely to result in any adverse effects on any individual other than the Commonwealth.

I trust this information supports the Committee in finalising its consideration of the Bill.

Committee comment

2.93 The committee thanks the Minister for this response. The committee notes the Minister's advice that the amendments in the bill are administrative in nature, are relevant only to Commonwealth entities and therefore any amendment to a legislative instrument made as a consequence to the enactment of the bill is unlikely to result in any adverse effects on any individual.

2.94 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document 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*).

2.95 In light of the detailed information provided, the committee makes no further comment on this matter.

Chapter 3

Scrutiny of standing appropriations

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.¹ 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.²

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

- Nil

Senator Helen Polley
Chair

1 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*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

