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Standing Committee for the Scrutiny of Bills

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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 as to whether the bills, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a 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 correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

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

Publications

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

General information

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

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.

A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018

Purpose	This bill seeks to amend the *A New Tax System (Medicare Levy Surcharge–Fringe Benefits) Act 1999* to: • provide that the maximum voluntary excess level a policy can have to exempt the holder from the Medicare levy surcharge is set out in the *Private Health Insurance Act 2007*; and • remove grandfathering provisions in relation to certain health insurance policies
Portfolio	Health
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018

Purpose	This bill seeks to establish the Aboriginal and Torres Strait Islander Land and Sea Future Fund
Portfolio	Indigenous Affairs
Introduced	House of Representatives on 28 March 2018

Exemption from disallowance and sunsetting[1]

1.2 The bill seeks to establish the Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSFF). Under clause 30, the Future Fund Board would be responsible for making decisions with respect to ATSILSFF investments. Subclause 32(1) seeks to allow the responsible ministers to give the Future Fund Board written directions about the performance of its ATSILSFF investment functions. Such directions are to be known collectively as the ATSILSFF Investment Mandate.[2]

1.3 Subclause 32(8) states that the directions making up the ATSILSFF Investment Mandate would be legislative instruments. However, two notes following this subclause state that these directions would not be subject to the disallowance or sunsetting provisions set out in the *Legislation Act 2003*, as the Legislation (Exemptions and Other Matters) Regulation 2015 prescribes that directions by a minister are not subject to disallowance or sunsetting.[3]

1.4 The explanatory memorandum states that this approach 'enables the public and the Parliament to hold the Government accountable for the directions it issues to the Future Fund Board without impeding the Government's ability to manage its finances',[4] and is consistent with arrangements for other funds invested by the Future Fund Board.[5] However, the explanatory memorandum does not otherwise explain why it is appropriate for the directions making up the investment mandate to be exempt from disallowance and sunsetting requirements.

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1 Subclause 32(8). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

2 Subclause 32(3).

3 See paragraphs 44(2)(b) and 54(2)(b) of the *Legislation Act 2003* and sections 9 and 11 of the Legislation (Exemptions and Other Matters) Regulation 2015.

4 Explanatory memorandum, p. 18.

5 Explanatory memorandum, p. 17.

1.5 The committee notes that the explanatory memorandum states that the ATSILSFF Investment Mandate will enable the government to give 'strategic guidance' to the Future Fund Board and that it will reflect the government's 'policy intent' with regard to the investments of the ATSILSFF. The committee's consistent position is that significant concepts relating to a legislative scheme, including the provision of strategic guidance and the setting out of policy intent, should be included in primary legislation, or at least in legislative instruments subject to parliamentary disallowance, sunsetting and tabling, unless a sound justification for using non-disallowable delegated legislation is provided.

1.6 The committee requests the minister's advice as to why it is considered appropriate that ministerial directions making up the ATSILSFF Investment Mandate are not to be subject to the usual disallowance and sunsetting provisions under the *Legislation Act 2003*.

Parliamentary scrutiny—no requirement to table report[6]

1.7 Clause 55 would require the responsible ministers to cause a review of the operation of the Act to be undertaken before the tenth anniversary of the commencement of the section.

1.8 The explanatory memorandum states that this review is 'intended to provide the opportunity to consider whether the Act is providing the outcomes envisaged.'[7] However, the bill contains no requirement for the results of this review to be made public or tabled in Parliament, and this is not addressed in the explanatory memorandum.

1.9 In order to facilitate appropriate parliamentary scrutiny of the operation of this Act (and the ATSILSFF), the committee considers it may be appropriate for clause 55 of the bill to be amended to include a legislative requirement that the review be:

- **tabled in the Parliament within 15 sitting days after it is received by the responsible ministers; and**
- **published on the internet within 30 days after it is received by the responsible ministers.**

1.10 The committee requests the minister's response in relation to this matter.

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6 Clause 55. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

7 Explanatory memorandum, p. 27.

Aboriginal and Torres Strait Islander Land and Sea Future Fund (Consequential Amendments) Bill 2018

Purpose	This bill seeks to make consequential and minor technical amendments to enable the operation of the Aboriginal and Torres Strait Islander Land and Sea Future Fund
Portfolio	Indigenous Affairs
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Aboriginal and Torres Strait Islander Amendment (Indigenous Land Corporation) Bill 2018

Purpose	This bill seeks to amend the *Aboriginal and Torres Strait Islander Act 2005* to expand the remit of the Indigenous Land Corporation's functions
Portfolio	Indigenous Affairs
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Air Services Amendment Bill 2018

Purpose	This bill seeks to introduce protections for communities affected by aircraft noise by: • setting requirements for consultation and reporting on the part of Airservices Australia; • establishing an Aircraft Noise Ombudsman; and • establishing a Community Aviation Advocate.
Sponsor	Senator Janet Rice
Introduced	27 March 2018

Broad delegation of administrative powers[8]

1.11 Proposed section 73F of the bill provides that the Aircraft Noise Ombudsman (Ombudsman) may, by written instrument, delegate his or her functions and powers to an SES employee in the department, or an APS employee holding or performing the duties of an Executive Level 1 or 2 position in the department.

1.12 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case, the explanatory materials provide no information about why these powers are proposed to be delegated to departmental employees holding or performing the duties of Executive Level 1 or 2 positions.

1.13 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Aircraft Noise Ombudsman to delegate his or her functions and powers to departmental employees in Executive Level 1 or 2 positions.

8 Schedule 1, item 8, proposed section 73F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

Significant matters in delegated legislation[9]

1.14 Item 8 of Schedule 1 to the bill contains a number of provisions that seek to leave significant matters to be set out in the regulations, including:

- the immunity of the Ombudsman from civil proceedings;[10]
- the powers of the Ombudsman to require the production of information and documents related to his or her functions;[11]
- the conduct of hearings held as part of an inquiry by the Ombudsman, including in relation to notice of and procedure at hearings; notices to persons to provide information or documents relevant to an inquiry; summonses to attend hearings; allowances for witnesses appearing at hearings; and any other matters relevant to the conduct of hearings, the production of evidence at hearings or the appearance of witnesses at hearings;[12] and
- the powers of the Ombudsman to obtain information and documents from Airservices Australia, the Civil Aviation Safety Authority or the Department of Defence for the purpose of performing his or her functions; the disclosure of information or documents by the Ombudsman; the powers and functions of the Ombudsman in responding to requests from persons or communities affected by aircraft noise for assistance; and the review of decisions by the Ombudsman.[13]

1.15 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 explanatory memorandum contains no explanation as to why it is necessary to leave each of these matters to be set out in the regulations.[14]

1.16 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving a number of significant matters relating to the powers of the Aircraft Noise Ombudsman to delegated legislation.

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9 Schedule 1, item 8, proposed paragraph 73L(e) and proposed sections 73R, 73W and 73Z. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

10 Schedule 1, item 8, proposed paragraph 73L(e).

11 Schedule 1, item 8, proposed section 73R.

12 Schedule 1, item 8, proposed section 73W.

13 Schedule 1, item 8, proposed section 73Z.

14 Explanatory memorandum, pp. 3-4.

Australian Astronomical Observatory (Transition) Bill 2018

Purpose	This bill seeks to amend the *Australian Astronomical Observatory Act 2010* and repeal the *Australian Astronomical Observatory (Transitional Provisions) Act 2010* and include transitional provisions to: • transfer certain Commonwealth assets, liabilities, funds and other matters to third party designated entities; • permit certain matters to be exempt from stamp duty and other taxes; and • provide the minister with powers of delegation
Portfolio	Jobs and Innovation
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Australian Institute of Health and Welfare Amendment Bill 2018

Purpose	This bill seeks to amend the *Australian Institute of Health and Welfare Act 1987* to replace the current representative-based structure of the Australian Institute of Health and Welfare Board with membership consisting of a collective mix of skills from a range of different fields
Portfolio	Health
Introduced	House of Representatives on 28 March 2018

Broad delegation of administrative powers[15]

1.17 Proposed section 28 of the bill seeks to enable the Chief Executive Officer (CEO) of the Australian Institute of Health and Welfare (AIHW) to delegate any or all of the CEO's functions or powers under the *Australian Institute of Health and Welfare Act 1987* (AIHW Act) to:

- a member of the staff of the AIHW (which may be any APS-level employee);[16] or
- with the written approval of the Board of the AIHW—any other person or body.

1.18 Under proposed section 17A, the CEO would be responsible for the day-to-day administration of the AIHW. That section also seeks to confer on the CEO the power to do all things necessary or convenient to be done in connection with the CEO's duties, and to provide that all acts done in the name of, or on behalf of, the AIHW by the CEO shall be deemed to have been done by the AIHW. Proposed section 28 therefore appears to permit the delegation of a number of significant powers related to the administration of the AIHW to a very broad range of persons or bodies. Neither the bill nor the AIHW Act appears to limit the scope of the powers and functions that may be delegated. Further, the only restriction on the persons to whom powers and functions may be delegated is that the Board must give written approval to delegate powers and functions to persons other than AIHW staff.

1.19 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to

15 Schedule 1, item 25, proposed section 28. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

16 See section 19 of the *Australian Institute of Health and Welfare Act 1987*.

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

1.20 In this instance, the explanatory memorandum does not explain why it is necessary to provide the CEO with a broad power of delegation, including to persons or bodies outside of the Australian Public Service. It merely restates the operation and effect of the relevant provisions.

1.21 The committee requests the minister's detailed justification for permitting the CEO of the Australian Institute of Health and Welfare to delegate any or all of his or powers and functions to a member of staff of the institute or, with the permission of the Board, to any person or body.

1.22 The committee considers it may be appropriate to amend the bill to require that the CEO and/or the Board be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated, and requests the minister's advice in relation to this matter.

Biosecurity Legislation Amendment (Miscellaneous Measures) Bill 2018

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to introduce new information gathering powers and make a number of minor and technical amendments
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Commerce (Trade Descriptions) Amendment Bill 2018

Purpose	This bill seeks to amend the *Commerce (Trace Descriptions) Act 1905* to: • enable importers to make a claim about the origin of goods; and • enable the Commerce (Trade Descriptions) Regulations 2016 to be amended to incorporate information standards that are in force or existing from time to time
Portfolio	Law Enforcement and Cybersecurity
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Corporations Amendment (Asia Region Funds Passport) Bill 2018

Purpose	This bill seeks to provide a multilateral framework to allow eligible funds to be marketed across economies participating in the Asia Region Funds Passport with limited additional regulatory requirements
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

Reversal of the evidential burden of proof[17]

1.23 Proposed subsection 1213L(1) provides that a person who obtains a copy of a register of members of a foreign passport fund under section 1213K[18] must not use information obtained from a register of members of a notified foreign passport fund[19] to contact or send material to a member, or disclose information knowing that the information is likely to be used for that purpose. A breach of proposed subsection 1213L(1) is punishable by a pecuniary penalty of 60 penalty units. Proposed subsection 1213L(2) provides an exception (offence-specific defence) to that offence, providing that the offence does not apply if the use or disclosure is relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them, or the use or disclosure is approved by the operator of the relevant fund.

1.24 In addition, proposed subsection 1213M(1) creates an offence of strict liability, which applies where the operator of a foreign passport fund is required under the home economy for the fund to prepare a report in relation to the fund, and to make that report available to members of the fund in that home economy, without charge. The operator would commit the offence if the operator fails to give

17 Schedule 1, item 1, proposed subsection 1213L(2), and Schedule 1, item 1, proposed subsection 1213M(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

18 Proposed section 1213K provides for a right to obtain a copy of the register of members of a foreign passport fund, the manner in which the application must be made, and the manner and language in which the register must be provided.

19 Proposed Part 8A.4 relates to notified foreign passport funds. Pursuant to proposed section 1213C, a foreign passport fund becomes a 'notified foreign passport fund' if the operator lodges a notice with ASIC of intention to offer interests in the fund to persons within Australia and, within the consideration period for the notice (15 days from lodgement), ASIC has not rejected the notice or notified the operator that insufficient information has been provided.

Australian members of the fund a copy of the report and (if necessary) a summary in English of all or part of the report, in accordance with proposed section 1213M. Proposed subsection 1213M(6) provides an exception (offence-specific defence) to that offence, providing that the offence does not apply if the operator of the fund is required under another provision of the *Corporations Act 2001* (Corporations Act) to lodge the relevant report, or to give the report to Australian members of the fund.

1.25 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.

1.26 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. While in the instances outlined above 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.

1.27 The committee also notes that the *Guide to Framing Commonwealth Offences*[20] 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
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[21]

1.28 With respect to the reversal of the evidential burden of proof in proposed subsection 1213L(2), the explanatory memorandum states:

> The rationale for the defendant bearing the evidential burden of proof for all exceptions is that the information is peculiarly within the defendant's knowledge. In this case, the defendant is best placed to show that the material was relevant to the member's interests, or the fund had approved the person contacting the members.[22]

1.29 While the committee notes this explanation, it is not apparent that the matters in proposed subsection 1213L(2) are peculiarly within the knowledge of the defendant. In particular, whether the operator of a fund has approved the use or

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

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

22 Explanatory memorandum, p. 68.

disclosure of information in a register appears to be a matter of which the operator would be particularly apprised. The committee further notes that a defendant being 'best placed' to point to evidence in relation to a matter does not equate to the matter being peculiarly within the defendant's knowledge.

1.30 The explanatory memorandum provides no explanation for the reversal of the burden of proof in proposed subsection 1213M(6). Moreover, it is not apparent that the matters in that subsection (that is, whether the defendant is authorised or required under the Corporations Act to lodge the relevant report or to give that report to Australian members of the fund) would be peculiarly within the knowledge of the defendant. Rather, they appear to be factual matters which could be established by the prosecution through reasonable inquiries.

1.31 As the explanatory materials do not address, or do not adequately address, the issue, the committee requests the minister's detailed justification for the reversal of the evidential burden of proof in proposed subsections 1213L(2) and 1213M(6). The committee's consideration of the appropriateness of a provision that reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[23]

Strict liability offences carrying custodial penalties[24]

1.32 The bill seeks to create a number of strict liability offences, and to extend a number of existing strict liability offences to foreign passport funds. The majority of these offences attract a pecuniary penalty only. However, the following provisions also attract a custodial penalty:

- Item 91 seeks to insert proposed subsection 314A(9), which would apply strict liability to the following offences relating to the operator of a notified foreign passport fund:
    - failing to provide an Australian member of the fund with a copy of the annual financial report and associated auditor's report;
    - failing to provide a notice to each Australian member of the fund, notifying the member that they may elect to receive a hard copy or an electronic copy of the reports; and
    - failing to provide the reports in English or, if the member so elects, in an official language of the home economy of the fund;

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

24 Schedule 1, items 91, 98, 101 and 105. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

Each of the offences would attract a penalty of 10 penalty units, three months imprisonment, or both;

- Item 98 seeks to amend section 319(1A) of the Corporations Act to extend an existing strict liability offence to the operator of a notified foreign passport fund. The offence would apply where the operator fails to lodge relevant financial reports with the Australian Securities and Investments Commission (ASIC) under proposed subsection 319(1AA), and is punishable by 60 penalty units, 1 year's imprisonment, or both;
- Item 101 seeks to amend subsection 321(1A) of the Corporations Act to extend an existing strict liability offence to the operator of a notified foreign passport fund. The offence would apply where the operator fails to comply with a direction from ASIC to lodge financial reports and associated auditor's reports, and is punishable by 10 penalty units, three months' imprisonment, or both; and
- Item 105 seeks to amend subsection 322(2)(b) of the Corporations Act to extend an existing strict liability offence to the operator of a notified foreign passport fund. The offence would apply where a report lodged with ASIC by a notified foreign passport fund is subsequently amended, and the operator fails to lodge the amended report with ASIC within 14 days, or to give a copy of the amended report free of charge to any Australian member of the fund who requests it. The offence is punishable by 10 penalty units, 3 months' imprisonment, or both.

1.33 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[25]

1.34 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by a term of imprisonment and only punishable

25 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

by a fine of up to 60 penalty units for an individual.[26] In this instance, the bill proposes to create offences of strict liability subject to three months' imprisonment, and to expand existing strict liability offences subject to terms of imprisonment between three months and one year.

1.35 With respect to the offences that would be created by proposed section 314A, the explanatory memorandum states that the application of strict liability is appropriate in order to provide a strong deterrent for directors of operators of notified foreign passport funds against contravening the reporting requirements, and indicates that the offences are comparable to those that apply to directors of Australian companies.[27]

1.36 The explanatory memorandum does not provide a justification for extending existing strict liability offences attracting custodial penalties to notified foreign passport funds, beyond indicating that similar offences in the Corporations Act apply to Australian companies, registered schemes and reporting entities.[28] However, the statement of compatibility provides some further explanation in this respect, stating:

> Several of the strict liability offences that are extended to operators of notified foreign passport funds by the new law do not comply with the Guide because they either exceed the maximum recommended penalty suggested by the Guide or impose a term of imprisonment. Each of these offences is an existing offence that already applies in respect of conduct by a company, registered scheme or reporting entity. Extending these offences so that they apply to conduct by an operator of a notified foreign passport fund is…necessary because it is important that the deterrent effect in each circumstance is no less strong than it is for Australian companies, registered schemes and disclosing entities. For this reason equivalent penalties have been imposed for these offences.[29]

1.37 While noting this explanation, the committee reiterates its longstanding view that it is not considered appropriate to apply strict liability in circumstances where a custodial penalty may be imposed. Moreover, while the committee appreciates the importance of treating foreign passport funds and Australian companies, registered schemes and reporting entities equally, it does not consider consistency with existing offences sufficient to justify applying strict liability to offences attracting custodial penalties. In this regard, the committee considers it would be possible to achieve consistency by making all penalties (that is, those proposed to be imposed on foreign

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26 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

27 Explanatory memorandum, p. 63.

28 Explanatory memorandum, pp. 80-81.

29 Statement of compatibility, p. 157.

passport funds and those that already apply to Australian entities under the Corporations Act) consistent with the *Guide to Framing Commonwealth Offences*.

1.38 As the explanatory materials do not adequately address this issue, the committee requests the minister's more detailed justification for the application of strict liability to the offences created or extended by items 91, 98, 101, and 105, which attract penalties of between three months' and one years' imprisonment.

Broad delegation of legislative power[30]

1.39 A number of provisions in the bill give the power to ASIC or the regulations to provide that the Corporations legislation[31] applies in certain circumstances as if specified provisions were omitted, modified or varied, and to allow ASIC to exempt entities from all or specified provisions of the Corporations legislation.

1.40 Division 3 of proposed Part 8A.7 provides for the continued application of the Corporations legislation in certain circumstances. Within that Division:

- proposed section 1216K provides that ASIC may, by legislative instrument or notifiable instrument,[32] declare that the Corporations legislation continues to apply in relation to a fund that has been deregistered as an Australian passport fund or removed as a notified Australian passport fund, and to an entity in relation to such a fund, as if specified provisions were omitted, modified or varied;
- proposed section 1216L provides that regulations may provide that the Corporations legislation continues to apply in relation to a fund that has been deregistered as Australian passport funds or removed as a notified foreign passport fund, and to an entity in relation to such funds as if specified provisions were omitted, modified or varied.

1.41 Modification, variation, or omission may apply to all or specified provisions of the Corporations legislation, to all former passport funds and associated entities, to classes of funds or entities, and to individual funds or entities.

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30 Schedule 1, item 1, proposed sections 1216K, 1216L, 1217, 1217A and 1217B, and Schedule 2, items 114 and 115. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

31 Pursuant to section 9 of the Corporations Act, 'Corporations legislation' includes the Corporations Act, the *Australian Securities and Investment Commission Act 2011,* and certain rules of court made because of a provision of the Corporations Act. 'Corporations legislation' also includes the Passport Rules (see below).

32 Proposed subsection 1216K(3) provides that a declaration relating to all entities, a specified class of entities, all former passport funds or a specified class of such funds must be made by legislative instrument. Proposed subsection 1216K(4) provides that a declaration relating to a specified entity or specified former passport fund must be made by notifiable instrument.

1.42 Proposed Part 8A.8 seeks to give ASIC the power to exempt entities from provisions in proposed Chapter 8A and the Passport Rules,[33] and to modify such provisions as they apply to an entity. That Part also seeks to allow the regulations to exempt passport funds and associated entities from any and all provisions of the Corporations legislation, and to modify the Corporations legislation as it applies to such funds and entities. Within proposed Part 8A.8:

- proposed section 1217 seeks to allow ASIC, by legislative instrument or notifiable instrument,[34] to exempt an entity from a provision of proposed Chapter 8A, and to declare that the Chapter applies to an entity as if specified provisions were omitted, modified or varied;
- proposed section 1217A seeks to allow ASIC, by legislative instrument or notifiable instrument,[35] to exempt an entity from the provision of the Passport Rules, and to declare that the Passport Rules apply to an entity as if specified provisions were omitted, modified or varied; and
- proposed section 1217B seeks to allow the regulations to exempt passport funds and entities from all or specified provisions of the Corporations legislation, or provide that the Corporations legislation applies as if specified provisions were omitted, modified or varied.

1.43 The relevant exemptions, omissions, modifications and variations may apply to all or specified provisions of the Corporations legislation or the Passport Rules, and to all passport funds and associated entities, classes of funds or entities, and individual funds or entities.

1.44 Finally, items 114 and 115 seek to amend section 343 of the Corporations Act, to provide that the regulations may modify the operation of Chapter 2M (which relates to matters such as the preparation of financial reports and the keeping of records) in relation to a notified foreign passport fund.

1.45 The bill would therefore appear to allow delegated legislation (including regulations and other legislative and notifiable instruments) to modify both primary and delegated legislation, and to exempt certain passport funds and associated entities from all or specified provisions of primary and delegated legislation.

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33 Pursuant to proposed section 1211A, 'Passport Rules' means rules made by the minister under proposed section 1211, as in force from time to time.

34 Proposed subsection 1217(6) provides that an exemption or declaration relating to all entities, a specified class of entities, all passport funds or a specified class of funds must be made by legislative instrument. Proposed subsection 1217(7) provides that an exemption or declaration relating to a specified entity or fund must be made by notifiable instrument.

35 Proposed subsection 1217A(7) provides that an exemption or declaration relating to all entities, a specified class of entities, all passport funds or a specified class of funds must be made by legislative instrument. Proposed subsection 1217A(8) provides that a declaration relating to a specified entity or fund must be made by notifiable instrument.

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

1.47 The committee will also have concerns about provisions that enable delegated legislation to exempt persons or entities from the operation of primary legislation, or that modify or exempt persons or entities from the operation of other delegated legislation. These provisions have the effect of limiting, or in some cases removing, parliamentary scrutiny. Consequently, the committee will be concerned about provisions of this kind—particularly where they permit exemptions or modifications that apply to a broad range of entities or legislative provisions—and expects a justification for the use of such provisions to be included in the explanatory memorandum.

1.48 With respect to ASIC's power to continue and modify the application of the Corporations legislation (proposed section 1216K), the explanatory memorandum states:

> This power is designed to enable ASIC to deal flexibly with any issues that may require continuing regulatory oversight after an Australian passport fund has been deregistered or a notified passport fund has been denotified. In particular, the power is designed to enable ASIC to undertake continuing regulatory oversight in order to protect the interests of any members who became members after the fund became a passport fund. The MOC [Memorandum of Cooperation], which was agreed by all economies participating in the Asia Region Funds Passport regime, expressly recognises the potential need for deregistered funds to be subject to the same obligations applicable to registered funds…
>
> ASIC's exercise of this power is generally subject to the same scrutiny and oversight as other Henry VIII clauses in the Corporations Act, including merits review and disallowance by Parliament.[36]

1.49 The explanatory memorandum provides no justification for allowing the regulations to continue and to modify the application of the Corporations legislation, merely restating the operation and effect of the relevant provisions and noting that

36 Explanatory memorandum, p. 121.

the regulations will be subject to the standard rules that apply to legislative instruments under the *Legislation Act 2003*.[37]

1.50 With respect to ASIC's power to modify and to exempt entities from the operation of Chapter 8A, the explanatory memorandum states:

> The new exemption and modification powers allow ASIC to provide administrative relief in circumstances where the strict operation of the Corporations Act produces unintended or unforeseen results that are not consistent with the policy intention for the Passport, including the intention of the MOC. Issues may arise that were not contemplated at the time of drafting because the Passport is a new regime, the funds industry is undergoing rapid innovation, and many foreign passport funds are structured differently to MISs [managed investment schemes] or use arrangements that are not available in Australia. In this context, it is appropriate for ASIC to be able to provide relief where the issues to be addressed are too individual and specific to justify addressing them by legislative means.
>
> The exemption and modification powers in the new law are subject to the usual safeguards, including administrative review by the AAT, judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.[38]

1.51 The explanatory memorandum indicates that this explanation also applies to ASIC's power to modify and to exempt entities from the Passport Rules.[39]

1.52 With respect to the regulation-making power regarding exemptions from and modifications to the Corporations legislation (proposed section 1217B), the explanatory memorandum states:

> This power provides the flexibility required to deal with unintended consequences that may arise as the Passport is introduced. The modification powers provided under this section represent a necessary tool to deal with such circumstances to ensure that the laws as they relate to passport funds operate appropriately.
>
> These regulations will be disallowable, are subject to the sunsetting scheme and must be notified on the FRL.[40]

1.53 Finally, the explanatory memorandum provides the following explanation for extending the power to modify the operation of Chapter 2M of the Corporations Act to notified foreign passport funds:

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37 Explanatory memorandum, pp. 121-122.

38 Explanatory memorandum, pp. 117-118.

39 Explanatory memorandum, p. 118.

40 Explanatory memorandum, p. 120.

> This power provides the flexibility required to deal with the unintended consequences and extends the existing modification by regulations power in relation to companies, registered schemes and disclosing entities.
>
> These regulations will be disallowable, are subject to the sunsetting scheme and must be notified on the FRL.[41]

1.54 The committee appreciates that the proposed powers to modify and exempt entities from the operation of the Corporations legislation are intended to ensure the necessary flexibility to deal with unintended consequences associated with the implementation of the Asia Region Funds Passport, and to address issues that may require continuing oversight.

1.55 However, the committee does not generally consider administrative flexibility alone to be sufficient justification for broad delegations of legislative power (such as the power for delegated legislation to modify the operation of primary legislation, as proposed by the bill). The committee also remains concerned that the bill does not appear to provide for any limitation on ASIC's powers of modification and exemption, or on the ability for regulations to provide for modifications to, and exemptions from, the Corporations legislation. For example, the bill does not set out any conditions that must be satisfied before such powers are exercised.

1.56 Additionally, where the Parliament delegates its legislative power in relation to significant legislative schemes (including the power to modify and exempt entities from the operation of primary legislation), the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such requirements are currently set out in the bill.

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

- **the justification for why it is proposed to allow delegated legislation (regulations, and declarations and exemptions made by ASIC) to modify and exempt funds and entities from the operation of primary and delegated legislation;**
- **whether it would be appropriate to amend the bill to insert (at least high-level) guidance concerning the exercise of ASIC's powers, and the making of regulations, to modify and exempt funds and entities from the operation of primary and delegated legislation; and**

41 Explanatory memorandum, p. 120.

- **the type of consultation that it is envisaged will be conducted prior to the making of delegated legislation (that is, regulations, declarations and exemptions), and as to whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the bill, with compliance with those obligations a condition of relevant instruments' validity.**

Customs Amendment (Illicit Tobacco Offences) Bill 2018

Purpose	This bill seeks to amend the *Customs Act 1901* to: • create two new offences based on recklessness in respect of imported illicit tobacco; and • allow officers of Customs to investigate certain new illicit tobacco offences that are proposed to be contained in the *Taxation Administration Act 1953*
Portfolio	Law Enforcement and Cybersecurity
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Education and Other Legislation Amendment (VET Student Loan Debt Separation) Bill 2018

Purpose	This bill seeks to amend various Acts to enable the separation of VET student loans debts from other forms of Higher Education Loan Program debts The bill also seeks to amend the *VET Student Loans Act 2016* to allow the courses and loan caps determination to incorporate any matter by reference as in force from time to time
Portfolio	Education and Training
Introduced	House of Representatives on 28 March 2018

Absolute liability offences[42]

1.58 Proposed subsection 23ED(1) seeks to require a person who has an accumulated or undischarged Vocational Education and Training Student Loan (VETSL) debt[43] and who leaves Australia with the intention of remaining outside of Australia for at least 183 days (other than in circumstances specified in the rules), to give the Commissioner of Taxation (the Commissioner) a notice in an approved form. Proposed subsection 23ED(2) seeks to place the same requirement to provide a notice on a person who has been outside Australia for at least 183 days in any 12 month period (other than in circumstances specified in the rules) and who was not required to give a notice under subsection (1). Proposed subsection 23ED(3) would require a foreign resident who has an accumulated VETSL debt on 1 June immediately preceding an income year to give a notice relating to their income for the income year.

1.59 Proposed section 23FE seeks to apply Part III of the *Taxation Administration Act 1953* (TAA Act) in relation to a failure to comply with proposed section 23ED as if that section were a taxation law within the meaning of section 2 of the TAA Act. Pursuant to sections 8C and 8E of Part III of the TAA Act, a failure to give the Commissioner the notices specified in proposed section 23ED would therefore be an offence of absolute liability subject in the first instance to a maximum penalty of 20 penalty units. Where a person has been previously convicted of two or more relevant offences, a penalty not exceeding 50 penalty units or 12 month's imprisonment, or both, may be imposed.

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42 Schedule 1, item 20, proposed sections 23ED and 23FE. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

43 The bill defines 'VETSL debt' under Schedule 1, item 20, proposed section 23BA.

1.60 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When legislation states that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

1.61 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[44]

1.62 In this instance, the explanatory memorandum notes that proposed section 23FE seeks to apply Part III of the TAA to proposed section 23ED and that this provision is modelled on section 154-90 of the *Higher Education Support Act 2003*.[45] However, the explanatory memorandum neither explains nor justifies the fact that this will make a failure to comply with section 23ED an offence of absolute liability, potentially subject to a penalty of imprisonment for up to 12 months. The committee's consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law.

1.63 The committee requests the assistant minister's detailed justification, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*,[46] for applying an offence of absolute liability, subject to a maximum penalty of up to 12 months imprisonment, to a failure to comply with the requirements of proposed section 23ED.

1.64 If it is considered necessary to apply Part III of the *Taxation Administration Act 1953*, the committee also requests the minister's advice as to why it would not be appropriate to modify its operation so as to make a failure to comply with proposed section 23ED an offence of strict liability, rather than absolute liability, and subject only to a pecuniary, and not custodial, penalty.

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44 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22-25.

45 Explanatory memorandum, p. 33.

46 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

Fair Work Amendment (Better Work/Life Balance) Bill 2018

Purpose	This bill seeks to amend the *Fair Work Act 2009* to provide enforceable rights to request flexible working arrangements
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 26 March 2018

The committee has no comment on this bill.

Fair Work Amendment (Tackling Job Insecurity) Bill 2018

Purpose	This bill seeks to amend the *Fair Work Act 2009* to provide for a process for 'insecure' workers to move to ongoing employment on a part-time or full-time basis
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 26 March 2018

The committee has no comment on this bill.

Higher Education Support Amendment (National Regional Higher Education Strategy) Bill 2018

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to require the minister to prepare a national regional higher education strategy
Sponsor	Ms Cathy McGowan MP
Introduced	House of Representatives on 26 March 2018

The committee has no comment on this bill.

Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to migration, customs and passenger movement charges Schedule 1 seeks to provide that when an unsuccessful attempt is made to remove a non-citizen from Australia under section 198 of the *Migration Act 1958*, the non-citizen can lawfully return to Australia without needing to hold a visa and to provide that the person was continuously in the migration zone for the purposes of sections 48 and 48A of the *Migration Act 1958* Schedule 2 seeks to allow the Department to communicate with a person using online technologies Schedule 3 seeks to enable the Department to refund duty or drawback of duty in circumstances where a person has been paid a refund or drawback that they are not entitled to
Portfolio	Home Affairs
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to intellectual property Schedule 1 seeks to implement the Government's response to certain Productivity Commission recommendations by: • clarifying the circumstances in which the importation of genuine trademarked goods do not infringe a registered trade mark; • allowing an essentially derived variety declaration to be made on a new variety regardless of whether a Plant Breeder's Right application has been filed; • amending the period that must elapse before third parties can seek the removal of a trade mark registration on the basis that a trade mark has not been used; and • repealing section 76A of the *Patents Act 1990* Schedule 2 contains measures intended to: • streamline and align intellectual property rights processes; and • provide protection from unjustified threats of infringement by allowing the courts to award additional damages
Portfolio	Jobs and Innovation
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Interactive Gambling Amendment (Lottery Betting) Bill 2018

Purpose	This bill seeks to amend the *Interactive Gambling Act 2001* to prohibit the provision of lottery and keno betting services to Australians
Portfolio	Communications and the Arts
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Medicare Levy Amendment (Excess Levels for Private Health Insurance Policies) Bill 2018

Purpose	This bill seeks to amend the *Medicare Levy Act 1986* to: • provide that the maximum voluntary excess level a policy can have to exempt the holder from the Medicare levy surcharge is set out in the *Private Health Insurance Act 2007*; and • remove grandfathering provisions in relation to certain health insurance policies.
Portfolio	Health
Introduced	28 March 2018

The committee has no comment on this bill.

National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

Purpose	This bill seeks to amend the *National Consumer Credit Protection Act 2009* and the *Privacy Act 1988* to: • introduce a mandatory credit reporting regime; • expand ASIC's powers to enable monitoring compliance; and • impose additional requirements on where data held by a credit reporting body must be stored
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

Significant matters in delegated legislation

Privacy[47]

1.65 The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (2012 Act) amended the *Privacy Act 1988* (Privacy Act) to establish a framework under which credit providers and credit reporting bodies could collect, use and disclose a greater range of credit information. This framework came into effect on 12 March 2014.

1.66 Prior to the enactment of the framework established by the 2012 Act, the credit reporting system limited the information that could be collected, used and disclosed by credit providers and credit reporting bodies to 'negative information' about an individual. This included identity information, default history information and bankruptcy information. The 2012 Act expanded the information permitted to be collected, used and disclosed to include repayment information, as well as the type of credit a person has and the maximum amount of credit available to a person under a consumer credit agreement. The 2012 Act enabled credit providers to disclose this information to credit reporting bodies on a voluntary basis.

1.67 The present bill seeks to amend the Privacy Act and the *National Consumer Credit Protection Act 2009* (Credit Act) to mandate a comprehensive consumer credit reporting scheme. To implement this scheme, the bill seeks to designate large Authorised Deposit-taking Institutions (ADIs)[48] and certain other credit providers as

47 Schedule 1, item 4, proposed sections 133CN and 133CZA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

48 An ADI is likely to be considered 'large' if its total resident assets exceed $100 billion. See explanatory memorandum, p. 11.

'eligible licensees', and to require those licensees to supply credit information about all open accounts held with the licensee to credit reporting bodies. The information that must be provided ('mandatory credit information') includes the following:

- identification information, including name, date of birth and address;
- consumer credit liability information, including the name of the credit provider, type of consumer credit, and maximum amount of credit available;
- repayment history information, including whether or not an individual is obliged to make monthly payments in relation to a consumer credit agreement, and when those payments are due and payable;
- default information, including information about payments that are overdue, and steps taken to recover the overdue amounts;
- payment information including information about payments of overdue amounts that have been made by an individual; and
- new arrangement information, including information about variations to a consumer credit agreement.[49]

1.68 Eligible licensees would be required to provide mandatory credit information to eligible credit reporting bodies in two tranches—each comprising mandatory credit information about half the accounts held by the licensee. A failure to provide this information would be punishable by a civil penalty of 2,000 penalty units,[50] and would also be an offence attracting a penalty of 100 penalty units.[51]

1.69 The explanatory memorandum provides that the bill seeks to correct an information asymmetry between consumers and credit providers, and thereby to improve the management of personal and credit reporting information.[52] In this regard, the statement of compatibility further states:

> A more comprehensive credit reporting regime allows credit providers to better establish a consumer's credit worthiness and lead to a more competitive and efficient credit market. [This] benefits consumers by enabling…reliable individuals to seek more competitive rates when purchasing credit and enabling those with a historically poor credit rating to demonstrate their credit worthiness through future consistency and reliability.[53]

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49 See proposed section 133CP. For further detail on the type of information that must be provided, see sections 6, 6V, 6Q, 6T and 6S of the *Privacy Act 1988*.

50 See proposed section 133CR.

51 See proposed section 133CX.

52 Explanatory memorandum, pp. 6-7.

53 Statement of compatibility, pp. 42-43.

1.70 The committee acknowledges the importance of improving the administration of Australia's credit reporting regime. However, the committee is concerned that requiring the disclosure of mandatory credit information has the potential to unduly trespass on the privacy of individuals—particularly the customers of the large ADIs contemplated by the bill, as the information required to be disclosed includes a substantial amount of personal and financial information about individuals.

1.71 The explanatory memorandum provides that the mandatory credit reporting regime proposed by the bill does not alter existing provisions set out in the Privacy Act and the Privacy Code governing use and disclosure of credit information.[54] The explanatory memorandum further states that the Act and the Code will continue to:

- set out the permitted uses and disclosure of an individual's personal and credit information by credit providers and credit reporting bodies;
- impose requirements on credit providers and reporting bodies to ensure the accuracy and currency of information in the credit reporting system;
- impose a requirement on a credit reporting body to protect the information it collects from misuse and unauthorised access;
- impose a requirement on a credit reporting body to have a publically available policy on how it collects, holds, uses and discloses credit information as well as procedures in place to ensure that the obligations under the Privacy Act and Privacy Code are met; and
- impose timeframes on both credit providers and credit reporting bodies on how long credit information can be kept before it must be destroyed.[55]

1.72 The statement of compatibility also emphasises that the present bill does not propose to alter any protections in the Privacy Act, and sets out the safeguards introduced by the 2012 Act to protect individuals' credit information from improper use and disclosure.[56]

1.73 While noting these safeguards, the committee is concerned that the bill appears to leave a number of relatively substantial elements of the mandatory credit reporting scheme—which may have significant privacy implications—to delegated legislation. For example, the bill seeks to require 'eligible licensees' to supply credit information to 'eligible credit reporting bodies'. The terms 'eligible licensee' and 'eligible credit reporting body' are defined in proposed section 133CN as follows:

54 Explanatory memorandum, p. 9.

55 Explanatory memorandum, pp. 9-10.

56 Statement of compatibility, p. 43.

- a licensee will be an 'eligible licensee' if it is a large ADI or a body corporate of a kind prescribed by the regulations, and it is a credit provider;[57]
- a reporting body will be an 'eligible credit reporting body' for a licensee if:
  - on 2 November 2017, there was an agreement of the kind referred to in paragraph 20Q(2)(a) of the Privacy Act in force between the body and the licensee, and the licensee is an eligible licensee on 1 July 2018; or
  - the conditions, if any, prescribed by the regulations are met.[58]

1.74 The bill would therefore appear to leave significant elements of the mandatory credit reporting scheme (for example, the entities required to provide credit information and the entities to which credit information must be provided) to delegated legislation.

1.75 The committee is concerned that leaving part of the definition of 'eligible credit reporting body' to regulations has the potential to undermine existing protections in the Privacy Act. Currently, paragraph 20Q(2)(a) of the Privacy Act requires a credit reporting body to enter into agreements with credit providers that require the providers to protect credit reporting information[59] from misuse, interference and loss, and from unauthorised access, modification and disclosure. Section 20Q was inserted by the 2012 Act. In relation to that provision, the explanatory memorandum to the 2012 bill stated:

> The purpose of these specific obligations is to ensure that both credit reporting bodies and credit providers take proactive steps in establishing practices which maintain the security of credit information. Given that credit reporting bodies will play a central role in handling and managing credit information it is appropriate that they be charged with the responsibility to develop appropriate agreements.[60]

1.76 The explanatory memorandum to the present bill recognises the importance of agreements under paragraph 20Q(2)(a), stating that they ensure the credit provider has an established relationship with the credit reporting body, and has an agreement in place to ensure that information remains confidential and secure.[61]

1.77 However, under proposed section 133CN a licensee that becomes an 'eligible licensee' after 1 July 2018 must make its initial bulk supply of mandatory credit information to a credit reporting body that meets conditions prescribed by the

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57 See proposed subsection 133CN(1).

58 See proposed subsection 133CN(2).

59 Disclosed under Division 2 of that Act—which relates to credit reporting bodies.

60 Explanatory memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012, pp. 146-147.

61 Explanatory memorandum, p. 28.

regulations—rather than to a reporting body with which the licensee has an agreement under paragraph 20Q(2)(a) of the Privacy Act. While acknowledging that credit providers would be required to supply credit information on an ongoing basis to reporting bodies with whom they have a contract under paragraph 20Q(2)(a), the committee is concerned that the requirement to make the bulk supply of credit information to a body that meets conditions prescribed by regulations could weaken the protections conferred by the Privacy Act. The explanatory memorandum does not provide an explanation of the conditions that may be imposed under the regulations.

1.78 Additionally, proposed Division 3 provides that regulations may set out the circumstances in which a credit reporting body must share ('on-disclose') credit information received under the mandatory credit reporting scheme proposed by the bill. For example, proposed section 133CZA:

- prohibits a credit reporting body from disclosing protected information that is prescribed by the regulations, or is of a kind prescribed by the regulations, to a credit provider where certain conditions are met;[62] and
- requires a credit reporting body to disclose such protected information as the regulations require to be disclosed, or is of a kind prescribed by the regulations, to a credit provider where certain conditions are met.[63]

Breaches of those provisions would be punishable by a civil penalty of 2,000 penalty units, and may also attract a criminal penalty of 100 penalty units.[64]

1.79 With respect to those provisions, the statement of compatibility states that:

> These circumstances [that is, the circumstances in which information must, or must not, be shared] will be limited and not extend beyond those circumstances in the Privacy Act. Primarily this will be when a credit provider is seeking information about a customer's credit worthiness when considering a request for consumer credit.[65]

1.80 While noting this explanation, and the example of circumstances in which disclosure would be required or permitted, the committee remains concerned that the bill would leave a significant element of the mandatory credit reporting regime (that is, when information may be on-disclosed) to delegated legislation.

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62 See proposed subsection 133CZA(2). 'Protected information' is defined in proposed section 133CZA(1), and includes any information that the credit reporting body is supplied under Division 2 (which sets up the mandatory supply requirements), and any information derived from information supplied under Division 2.

63 See proposed subsection 133CZA(3).

64 See proposed section 133CZB.

65 Statement of compatibility, p. 44.

1.81 The committee's consistent view is that significant matters, such as key elements of a mandatory credit reporting scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the committee's concerns are heightened because the elements proposed to be left to delegated legislation (that is, the persons required to disclose credit information, the entities to whom that information must be disclosed, and the circumstances in which 'on-disclosure' is required and prohibited) may have significant implications for individuals' privacy. The explanatory memorandum does not provide a justification for why it is proposed to use delegated legislation in this way—merely outlining the operation and effect of the relevant provisions.

1.82 Further, where the Parliament delegates its legislative power in relation to significant legislative schemes, the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such consultation requirements are currently set out in the bill.

1.83 As the explanatory materials do not adequately address this matter, the committee requests the Treasurer's detailed justification for leaving key elements of the mandatory credit reporting scheme proposed by the bill—including matters that may have significant impacts on individuals' privacy—to delegated legislation.

1.84 The committee also requests the minister's advice as to the type of consultation that it is envisaged will be conducted prior to the making of regulations in relation to the proposed credit reporting scheme, and as to 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 regulations' validity.

Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Bill 2018

Purpose	This bill seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Act 2003* to: • impose a well investigation levy, an annual well levy and a well activity levy in relation to greenhouse gas wells; • revise certain provisions which impose a well activity levy; • revise certain provisions which impose a safety investigation levy and well investigation levy; and • remove certain spent provisions
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

Purpose	This bill seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) to: • transfer regulatory responsibility for offshore greenhouse gas wells and environmental management from the minister to the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA); • clarify the powers of NOPSEMA inspectors to determine whether regulated entities are compliant with their obligations under the Act and associated regulations; • ensure valid designation of certain areas as 'frontier areas' for the purposes of the Designated Frontier Area tax incentive; and • make minor technical amendments
Portfolio	Industry, Innovation and Science
Introduced	House of Representatives on 28 March 2018

Reversal of the legal burden of proof[66]

1.85 Section 584 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) currently provides that, in a prosecution for an offence in relation to a breach of a direction given by the responsible Commonwealth Minister[67] under certain provisions of the OPGGS Act, it is a defence if the defendant proved that they took all reasonable steps to comply with the direction. The defendant bears a legal burden of proof in relation to this matter. Item 40 of Schedule 1 to the bill seeks to amend section 584 to include directions given by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) and the Titles Administrator. This would have the effect of providing a defence to the offences of breaching a direction given under proposed sections 579A, 591B or 594A (to be inserted by this bill),[68] in relation to which the defendant bears a legal burden of proof.

66 Schedule 1, item 40 and Schedule 15, item 13, proposed clause 23. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

67 Pursuant to section 7 of the OPGGS Act, the 'responsible Commonwealth Minister' is the minister responsible for the administration of the Act, or another minister acting for or on behalf of that minister.

68 See Schedule 1, items 27, 45 and 50.

1.86 Additionally, clause 23 of proposed Schedule 2B provides that it is a defence to a prosecution for refusing or failing to do anything required by a well integrity law[69] if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time. The defendant bears a legal burden of proof in relation to that matter.

1.87 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 one or more elements of an offence interfere with this common law right. As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects a full justification each time the burden is reversed—with the rights of people affected being the paramount consideration.

1.88 The *Guide* further states that placing a legal burden of proof on a defendant should be kept to a minimum and, where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.[70]

1.89 In relation to the reversal of the legal burden of proof in item 40, the explanatory memorandum states that the burden has been reversed 'because the matter [that is, whether the defendant took reasonable steps to comply with a direction] is likely to be exclusively within the knowledge of the defendant…[particularly] given the remote nature of offshore greenhouse gas storage operations'.[71] For clause 23 of proposed Schedule 2B, the explanatory memorandum refers to paragraph 419, which provides a similar explanation (in relation to the evidential burden of proof—noted below).[72] In relation to the reversal of the legal burden of proof more generally, the statement of compatibility states:

> [The reversals of the legal burden of proof are] consistent with the Guide, which states that where the facts of a defence are peculiarly within the defendant's knowledge it may be appropriate for the burden of proof to be placed on the defendant.[73]

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69 'Well integrity law' is defined in clause 2 of proposed Schedule 2B, and includes Part 5 of the Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011, and the provisions of the OPGGS Act to the extent that the provisions relate to the integrity of wells.

70 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 51-52.

71 Explanatory memorandum, p. 33.

72 Explanatory memorandum, p. 98.

73 Statement of compatibility, pp. 11, 13.

1.90 It would appear to the committee that whether a defendant took all reasonable steps to comply with a direction, or whether it was not practicable for the defendant to comply with a well integrity law owing to an emergency, may be matters that are appropriate to include as offence-specific defences (as opposed to elements of the relevant offences)—and may justify reversing the *evidential* burden of proof.

1.91 However, it is not apparent why it is necessary to reverse the *legal* burden of proof in relation to those matters. It would appear that if the facts amounting to whether a defendant took all reasonable steps to comply with a direction, or whether it was not practicable to do a thing owing to an emergency, are peculiarly within the knowledge of the defendant, it would be sufficient to require the defendant to raise evidence in relation to those matters, and to require the prosecution, as usual, to disprove the matters beyond reasonable doubt.

1.92 The explanatory materials do not appear to provide a specific justification for the reversal of the *legal* burden. In this regard, the committee notes that, in relation to clause 23 of proposed Schedule 2B, the explanatory memorandum refers to paragraph 419, which provides a justification for reversing the *evidential* burden.

1.93 As the explanatory materials do not appear to adequately address this issue, the committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in the instances described above, including why it is not considered sufficient to reverse the evidential, rather than the legal, burden of proof.

Primary Industries Levies and Charges Collection Amendment Bill 2018

Purpose	This bill seeks to amend the *Primary Industries Levies and Charges Collection Act 1991* to: • allow the Secretary of the Department of Agriculture and Water Resources to determine certain acts which, when performed, would make a person liable to collect and report levies; and • support the operation of levy payer registers
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 28 March 2018

Significant matters in delegated legislation

Significant matters in non-statutory guidelines[74]

1.94 Section 7 of the *Primary Industries Levies and Charges Collection Act 1991* (the Act) makes a range of persons that perform certain acts related to the buying, selling, importing and exporting of agricultural produce liable to collect levies and charges. Proposed subsection 7A(1) seeks to allow the secretary to determine, by legislative instrument, additional acts that, when performed, would make a person liable to collect levies and charges. The effect of such a determination would be to expand the scope of activities in relation to which intermediaries[75] would be required to collect levies or charges.

1.95 Proposed subsections 7A(3) and (4) provide that the minister may, by written instrument, issue guidelines for the purposes section 7A, and that such guidelines are not legislative instruments. Proposed subsection 7A(2) provides that the secretary must have regard to any guidelines in force under subsection 7A(3) when exercising a power under subsection 7A(1).

1.96 The committee's view is that significant matters, such as the types of acts in relation to which a person will be liable to collect a levy or charge, 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 that 'leviable commodities are now being traded using platforms, such as online marketplaces, and

74 Schedule 1, item 5, proposed section 7A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

75 Section 4 of the Act defines an 'intermediary', in relation to a producer, as a person required under subsections 7(1), (2), (3) or (3A) to pay an amount on behalf of that producer.

the way the legislation defines intermediaries needs to be updated to accurately reflect modern business practices'[76] and that the proposed section will ensure 'that these acts can be covered by the legislative framework and ensure levies and charges can continue to be collected at the most efficient point in the supply chain.'[77]

1.97 However, beyond the general statement that the proposed amendments 'align with other powers already provided to the Secretary in the Act in relation to the administration and operation of the levy system',[78] the explanatory memorandum provides no justification for leaving the determination of additional acts to delegated legislation rather than setting these acts out in the bill itself. 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.

1.98 In addition, the committee notes that although the bill allows the minister to issue guidelines under subsection 7A(3), it does not positively require that they be issued. In the event that the minister does not issue such guidelines, the secretary's power to determine additional acts would not be subject to any guidance. The explanatory memorandum states that the guidelines will include 'considerations such as Australia's obligations as a member of the World Trade Organisation relating to importation and exportation',[79] but does not explain why the bill does not *require* that they be issued. The explanatory memorandum also does not explain why the guidelines will not be legislative instruments, as set out under subsection 7(4), and therefore not be subject to any form of parliamentary scrutiny.

1.99 Finally, where the Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that 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. Therefore, if the secretary is to be granted the power to determine additional acts by legislative instrument, the committee considers it would be appropriate for consideration to be given to including specific consultation requirements on the face of the bill.

1.100 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 regard, the committee requests the minister's detailed advice as to:

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76 Explanatory memorandum, p. 2.

77 Explanatory memorandum, p. 6.

78 Explanatory memorandum, p. 2.

79 Explanatory memorandum, p. 6.

- **why it is considered necessary and appropriate to leave to delegated legislation the determination of acts which, when performed, will make a person liable to collect a levy or charge;**
- **the type of consultation that it is envisaged will be conducted prior to the making of such a determination; 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).**

1.101 The committee also requests the minister's advice as to why the bill does not positively require the minister to issue guidelines with respect to the secretary's power to determine additional acts for which a person will be liable to collect a levy or charge, and why it is considered appropriate to state that these guidelines will not be legislative instruments (and therefore not subject to any parliamentary scrutiny).

Private Health Insurance Legislation Amendment Bill 2018

Purpose	This bill seeks to amend various Acts in relation to private health insurance to: • increase maximum excess levels for products providing an exemption from the Medicare levy surcharge; • allow for age-based premium discounts for hospital cover; • amend the powers of the Private Health Insurance Ombudsman; • allow private health insurers to cover travel and accommodation costs as part of a hospital product for people attending health services; • establish a legislative framework for the minister to assess and determine whether or not to include a private hospital in a class of hospitals eligible for second-tier default benefits; • amend the information provision for consumers; • allow insurers to terminate products as well as close them to new policy-holders; and • remove the use of benefit limitation periods in private health insurance policies
Portfolio	Health
Introduced	House of Representatives on 28 March 2018

Coercive powers[80]

1.102 The bill seeks to insert a new section 20SA in the *Ombudsman Act 1976* (the Act), which would provide the Private Health Insurance Ombudsman (PHIO) with the power to enter, at any reasonable time of the day:

- a place occupied by a private health insurer or private health insurance broker;
- a place occupied by a person predominantly for the purpose of performing services for, or on behalf of, a private health insurer or private health insurance broker; or

80 Schedule 3, item 1, proposed section 20SA and item 2, proposed section 20TA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- a place where documents or other records relating to a private health insurer, a private health insurance broker or the carrying on of health insurance business are kept.

1.103 New section 20SA also seeks to allow the PHIO, having entered a place referred to above, to inspect, take extracts from, or make copies of, documents or records to verify evidence provided in relation to a complaint. Proposed section 20TA seeks to provide the same powers to the PHIO when conducting an investigation commenced on his or her own initiative.[81]

1.104 Proposed section 20ZHA would require the PHIO to show his or her identity card prior to entering premises and 20ZHB would make it at an offence subject to a maximum penalty of 30 penalty units for a person who is the occupier of, or in charge of, a place mentioned in proposed sections 20SA or 20TA, not to provide the PHIO with reasonable facilities and assistance for the effective exercise of the entry and inspection powers.

1.105 The committee notes that the *Guide to Framing Commonwealth Offences* states that legislation should only authorise entry to premises by consent or under a warrant and that '[a]ny departure from this general rule requires compelling justification.'[82] The *Guide* also includes a list of the limited circumstances in which it may be appropriate to provide a power to enter premises without consent or a warrant.[83] Where a bill seeks to allow entry without consent or a warrant, the committee would therefore expect a detailed justification to be provided in the explanatory memorandum.

1.106 In this case, the statement of compatibility states only that the requirement to show an identity card prior to entry 'provides for the transparent utilisation of the PHIO's inspection powers and mitigates arbitrariness and risk of abuse', and that the PHIO will be bound by the requirements of the *Privacy Act 1988* when inspecting documents.[84] The explanatory materials do not otherwise provide a justification for the proposed powers to enter premises and inspect documents without consent or a warrant.

1.107 The committee therefore seeks the minister's advice as to why it is considered necessary to allow the Private Health Insurance Ombudsman to enter premises and inspect documents without consent or a warrant.

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81 Explanatory memorandum, p. 44.

82 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 76.

83 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 85-86.

84 Explanatory memorandum, p. 37.

Reversal of evidential burden of proof[85]

1.108 Proposed section 20ZIA would require the PHIO to issue an identity card to each person who exercises powers of entry and inspection under proposed sections 20SA and 20TA (discussed above at paragraphs 1.102 to 1.107). Proposed subsection 20ZIA(4) seeks to make it an offence of strict liability for a person who ceases to be a member of staff, or a person to whom the PHIO has delegated powers under proposed section 20SA or 20TA, to fail to return their identity card to the PHIO within 14 days of so ceasing. Proposed subsection 20ZIA(5) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the identity card was lost or destroyed. The offence carries a maximum penalty of 1 penalty unit.

1.109 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.

1.110 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.

1.111 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. However, the reversal of the evidential burden of proof in proposed section 20ZIA has not been addressed in the explanatory materials.[86]

1.112 As the explanatory materials do not address this issue, the committee considers that it may be appropriate for the explanatory memorandum to be amended to include a justification for the reversal of the evidential burden of proof in proposed section 20ZIA that explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[87]

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85 Schedule 3, item 5. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

86 Explanatory memorandum, p. 45.

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

Broad delegation of administrative powers[88]

1.113 Item 6 of Schedule 3 seeks to amend subsection 34(2C) of the Act, which sets out the powers of the PHIO to delegate his or her powers and functions. The Act currently provides that the PHIO may delegate any or all of his or her powers or functions, other than those related to reporting to the minister on the outcome of investigations,[89] to members of staff mentioned under section 31. Section 31 states that staff required for the purposes of the Act will be engaged under the *Public Service Act 1999*. The proposed amendment would therefore allow the PHIO to delegate any or all of his or her powers to 'a person', rather than to an Australian Public Service (APS) employee at any level.

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

1.115 In this case, the explanatory memorandum states that the proposed expansion of the range of persons to whom the PHIO may delegate his or her powers is intended to provide the PHIO with the 'flexibility to delegate powers to suitable qualified officers' in cases where they do not come within the scope of persons described at section 31 of the Act—that is, APS employees at any level. The explanatory memorandum also states that this amendment would ensure 'consistency with the other subject matter specific roles held by the Commonwealth Ombudsman'.[90]

1.116 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to 'a person'. The committee also notes that the explanatory memorandum contains no guidance as to the specific circumstances in which it is envisaged it may be necessary to delegate powers or functions to persons outside the APS, nor any guidance as to what accountability mechanisms will be put in place with respect to such persons.

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88 Schedule 3, item 6. The committee draws Senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

89 See sections 20R and 20V of the Act.

90 Explanatory memorandum, p. 45.

1.117 The committee also notes that, given the proposed amendment to the PHIO's delegation powers, the proposed new powers of entry and inspection, discussed above at paragraph 1.102 to 1.107, would be delegable to any person, including persons outside the APS. The committee notes that the *Guide to Framing Commonwealth Offences* states that 'Legislation conferring coercive powers should require that these powers only be exercised by an appropriately qualified person or class of persons'.[91]

1.118 The committee would therefore also expect a detailed justification to be provided in the explanatory memorandum where it is proposed to allow the delegation of entry and inspection powers to 'a person', including information on the attributes or qualifications persons exercising such powers will be required to possess. However, the explanatory materials do not address these issues.

1.119 The committee therefore requests the minister's advice as to:

- **why it is considered necessary to allow for the delegation of the PHIO's functions or powers, including powers of entry and inspection, to any person, including persons outside the APS; and**
- **the appropriateness of amending the bill to require that the PHIO be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.**

91 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 73-74.

Public Sector Superannuation Legislation Amendment Bill 2018

Purpose	This bill seeks to amend various Acts in relation to superannuation to: • ensure that in all circumstances the calculation of any lump sum superannuation guarantee safety-net benefit meets the minimum Superannuation Guarantee requirements under the *Parliamentary Contributory Superannuation Act 1948*; • allow members of the Judges' Pensions Scheme the option to request that they be paid a lump sum amount from the scheme; • amend the eligibility for reversionary superannuation benefits payable to or in respect of children; • reduce the Commonwealth Superannuation Corporation Board from 11 to 9 directors; and • make minor amendments and corrections
Portfolio	Finance
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Social Services Legislation Amendment (Payments for Carers) Bill 2018

Purpose	This bill seeks to amend the *Social Security Act 1991* to introduce an income test for Carer Allowance and the Carer Allowance Health Care Card
Portfolio	Social Services
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Statute Update (Autumn 2018) Bill 2018

Purpose	This bill seeks to correct technical errors in Acts as a result of drafting and clerical mistakes and to: • update references in various Acts; • make consequential amendments to the *Acts and Instruments (Framework Reform) Act 2015;* • remove references to the Crown in right of Norfolk Island; and • repeal spent and obsolete provisions and Acts
Portfolio	Attorney-General
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Student Loans (Overseas Debtors Repayment Levy) Amendment Bill 2018

Purpose	This bill seeks to amend the *Student Loans (Overseas Debtors Repayment Levy) Act 2015* to impose a levy on a defined group of overseas debtors
Portfolio	Education and Training
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

Purpose	This bill seeks to amend various Acts relating to taxation, superannuation, competition and consumers Schedules 1 to 6 seek to: • allow the Commissioner to issue directions to pay unpaid superannuation guarantee and undertake superannuation guarantee education courses where employers fail to comply; • allow the Commissioner to disclose more information about superannuation guarantee non-compliance to affected employees; • extend Single Touch Payroll reporting to all employers; • enable regular reporting by superannuation funds; and • implement data matching in relation to welfare payments Schedule 7 seeks to enable the sharing and verification of tax file numbers Schedule 8 seeks to make a number of miscellaneous amendments and technical changes to various Acts Schedule 9 seeks to add three specifically-listed deductible gift recipients
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

Strict liability offences[92]

1.120 Part 1 of Schedule 1 seeks to amend the *Taxation Administration Act 1953* (TAA) to allow the Commissioner of Taxation (Commissioner) to issue directions to employers to pay the Superannuation Guarantee Charge to employees who have not received their full entitlement. Proposed subsection 265-95(2) makes failure to follow a direction to pay the charge and discharge the liability an offence of strict liability, subject to a penalty of 50 penalty units or imprisonment for 12 months, or both.

92 Schedule 1, item 1, proposed subsection 265-95(2) and Schedule 5, item 14, proposed subsection 255-120(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.121 The explanatory memorandum explains that the proposed offences are 'consistent with the existing offences that apply to other failures to comply with taxation obligations.'[93] Further, the explanatory memorandum argues the proposed offences are drafted so that the Commissioner would only issue directions in relation to serious contraventions of the obligation to pay the superannuation guarantee amount, and by 'employers whose actions are consistent with an ongoing and intentional disregard of those obligations.'[94]

1.122 In addition, in Schedule 5, proposed section 255-120 seeks to create a new strict liability offence for failure to comply with a Federal Court order requiring an entity to comply with a requirement to give security under section 255-100 of the TAA. This offence is also subject to a penalty of 50 penalty units or imprisonment for 12 months, or both.

1.123 The explanatory memorandum argues the penalty 'ensures that appropriate consequences apply to entities that refuse to comply with an order that has been made against them by the Court. The amount of the penalty and the application of strict liability is the same as the offence for refusing to comply with other Court orders and the associated penalty that are already imposed under sections 8G and 8H. Applying the same consequences in respect of security deposits ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.'[95]

1.124 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[96]

1.125 The *Guide to Framing Commonwealth Offences* also states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units

93 Explanatory memorandum, pp. 12-13.

94 Explanatory memorandum, p. 13.

95 Explanatory memorandum, p. 83.

96 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

for an individual.[97] In this instance, the bill proposes applying strict liability to offences that are subject to up to 12 months imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.126 **The committee requests a detailed justification from the minister for the proposed strict liability offences, particularly the imposition of up to 12 months imprisonment, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.**[98]

Absolute liability offences[99]

1.127 Part 2 of Schedule 1 seeks to create a framework under which the Commissioner may issue 'education directions' to a person the Commissioner reasonably believes has failed to comply with certain taxation obligations.[100] Item 3 of Schedule 1 seeks to include a failure to comply with an education direction in accordance with proposed subsection 384-15(3)[101] in the list of circumstances in which a person commits an offence under section 8C of the TAA. Pursuant to sections 8C and 8E of the TAA, a failure to comply with an education direction would therefore be an offence of absolute liability subject in the first instance to a maximum penalty of 20 penalty units. Where a person has been previously convicted of two or more relevant offences, a penalty not exceeding 50 penalty units or 12 month's imprisonment, or both, may be imposed.

1.128 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When legislation states that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the

97 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

98 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

99 Schedule 1, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

100 These apply to failures to comply with obligations arising from the payment of the superannuation guarantee charge payable under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) or related estimates of the charge that are payable under the TAA, or other obligations under the SGAA or the TAA as it relates to the SGAA. See explanatory memorandum, p. 21.

101 Schedule 1, item 4.

defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

1.129 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for including a failure to comply with an education direction as one that is subject to an offence of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[102]

1.130 In this instance, the explanatory memorandum states that extending the existing absolute liability offence under section 8C and the tiered penalties under section 8E of the TAA is 'appropriate as it maintains consistency with the other failures that are already covered by section 8C', and a failure to comply with an education direction is 'directly comparable to the existing requirements to notify the Commissioner of particular matters or attend before the Commissioner or another person.'[103]

1.131 However, the explanatory memorandum does not explain what are the legitimate grounds for penalising persons lacking fault in this instance, nor why it is appropriate to subject a failure to comply with a direction to an offence of absolute liability as opposed to strict liability (which would allow a defence of honest and reasonable mistake of fact to be raised). The explanatory memorandum also does not explain why it is considered appropriate to apply a penalty of up to 12 months imprisonment to an offence of absolute liability, rather than the 10 penalty units suggested in the *Guide to Framing Commonwealth Offences*.[104] The committee's consistent scrutiny position is that a proposed provision is not adequately justified merely by the fact that it is intended to apply, mirror or be consistent with provisions of an existing law.

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102 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22-25.

103 Explanatory memorandum, pp. 25-26, 119-120.

104 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

1.132 The committee requests the minister's detailed justification, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*,[105] for making a failure to comply with an education direction an offence of absolute liability, subject to a maximum penalty of up to 12 months imprisonment.

Reversal of evidential burden of proof[106]

1.19 Subsection 8K(1) of the TAA makes it an offence for a person to make a statement to a taxation officer that is false or misleading in a material particular, and subsection 8K(1B) makes it an offence for a person to make a statement to a taxation officer that omits any matter or thing and the statement is misleading in a material particular because of this omission. Subsection 8N(1) also makes it an offence for a person to make a statement to a taxation officer that is false or misleading in a material particular or omits any matter or thing without which the statement is misleading in a material particular, and the person is reckless as to whether the statement is false or misleading in a material particular.

1.133 Proposed subsection 8K(2B) provides an exception (offence specific defence) to the offences under subsections 8K(1) and (1B), stating that the offences do not apply if the original statement is a member information statement made under section 390-5 of the TAA, the person who made the original statement makes a further statement correcting the original statement in each of the respects in which it is false or misleading in a material particular, and the further statement was made within the grace period determined by the Commissioner under proposed section 390-7[107] and is in an approved form. Proposed subsection 8N(3) provides an identical exception in relation to the offence set out under section 8N.

1.134 The offences under subsections 8K(1) and (1B) carry a maximum penalty of 20 penalty units in the first instance, and 40 penalty units where a person has previously been convicted of a relevant offence.[108] The offence under subsection 8N(1) carries a maximum penalty of 30 penalty units in the first instance, and a penalty not exceeding 50 penalty units or 12 month's imprisonment, or both, where the person has previously been convicted of a relevant offence.[109]

105 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

106 Schedule 4, items 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

107 Schedule 4, item 5.

108 TAA, section 8M.

109 TAA, section 8R.

1.135 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.

1.136 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.

1.22 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. The reversals of the evidential burden of proof in proposed subsections 8K(2B) and 8N(3) have not been addressed in the explanatory materials.

1.23 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[110]

Charges in delegated legislation[111]

1.137 Item 3 of Schedule 8 seeks to repeal and replace subsections 43-10(7) and (8) of the *Fuel Tax Act 2006* relating to the determination of the rate of road user charge. Proposed subsection (7) provides that the amount of road user charge for a taxable fuel is to be worked out using the rate determined under subsection (8) that applies to taxable fuel. Proposed subsection (8) seeks to allow the Transport Minister to determine, by legislative instrument, a rate of road user charge for taxable fuels for which duty is payable at a rate per litre of fuel, a rate per kilogram of fuel, or a rate expressed in a unit of measurement other than litres or kilograms.

1.138 The explanatory memorandum states that the proposed amendments are intended to 'streamline the process of applying the [Road User Charge (RUC)] to fuels sold in kilograms and provide ongoing structural flexibility for the Transport Minister to determine rates for the RUC in litres, kilograms and other units of measurement of

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

111 Schedule 8, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

fuel.'[112] The committee notes that the proposed amendments would have the effect of continuing the Transport Minister's current power to determine, by legislative instrument, the rate of road user charge[113] while providing greater flexibility with respect to determining rates for fuels sold in different units of measurement.

1.139 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[114] 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 that the *Fuel Tax Act 2006* imposes a public consultation requirement on the Transport Minister prior to determining an increased rate of road user charge,[115] and that proposed new subsection 43-10(12)[116] would prevent the road user charge from being increased more than once in a financial year for each class of taxable fuel. However, no guidance is provided on the face of the bill as to the method of calculating the road user charge rate, nor are maximum charges specified. Where charges are to be determined by legislative instrument, the committee considers that, at a minimum, some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

1.140 The committee requests the minister's advice as to why there are no limits on the road user charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

No-invalidity clause[117]

1.141 Proposed section 353-25 provides that the Commissioner may give an offshore information notice requesting a person give any information or produce any documents the Commissioner reasonably believes is offshore information and is

112 Explanatory memorandum, p. 99.

113 Noting that currently section 43-10(7) of the *Fuel Tax Act 2006* provides that the amount of road user charge for taxable fuel is 21 cents for each litre of fuel, unless the Transport Minister has determined a different rate via a legislative instrument.

114 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'.

115 *Fuel Tax Act 2006*, subsection 43-10(9).

116 Schedule 8, item 5.

117 Schedule 8, item 19, proposed subsection 353-30(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

relevant to the assessment of any tax administered by the Commissioner. Proposed subsection 353-30 sets out that there are evidentiary consequences for a failure to comply with this request, such that the offshore information or contents of offshore documents or copies will not be admissible in evidence in proceedings under Part IVC of the TAA on a review or appeal relating to a tax-related liability. Proposed subsection 353-30(4) provides that if, before any hearing of a proceeding on such an appeal or review, the Commissioner forms the view that the applicant has refused or failed to comply with a request in an offshore information notice and the Commissioner is unlikely to give consent that the information be made admissible, the Commissioner must, by notice in writing, inform the applicant that the Commissioner has formed those views. However, a failure to so notify an applicant does not affect the validity of the Commissioner's decision not to consent to the admissibility of the evidence. A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause.

1.142 The committee notes that whether or not the Commissioner consents to the relevant evidence being admissible in Part IVC proceedings may have important consequences for the conduct of those proceedings. Proposed subsection 353-30(4), in requiring the Commissioner to inform the person that consent to adduce that withheld information is not likely to be given, may thus be seen as facilitating a fair hearing in the Part IVC proceedings, given the effect that not consenting to the admissibility of the evidence may have on their ability to present their case.

1.143 The default position in the law is that non-compliance with requirements designed to facilitate a fair hearing will result in the invalidity of the decision. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of legal or administrative review to provide a remedy for administrative errors. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no explanation for the inclusion of the no-invalidity clause.

1.144 The committee therefore seeks the minister's advice as to why the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal, will not affect the validity of the decision, particularly in light of the potential effect on a taxpayer's opportunity to present their case.

Treasury Laws Amendment (ASIC Governance) Bill 2018

Purpose	This bill seeks to amend the *Australian Securities and Investments Commission Act 2001* to enable the Governor-General to appoint a second Deputy Chairperson of the Australian Securities and Investments Commission, and to make a consequential amendment to the *Foreign Evidence Act 1994*.
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Treasury Laws Amendment (Enhancing ASIC's Capabilities) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to competition in the financial system Schedule 1 seeks to require ASIC to consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system Schedule 2 seeks to allow ASIC to employ staff outside of the *Public Service Act 1999*
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018

Purpose	This bill seeks to amend the *Australian Securities and Investments Commission Act 2001* and the *Competition and Consumer Act 2010* Schedule 1 seeks to ease evidentiary requirements for private litigants through expanded 'follow on' provisions Schedule 2 seeks to extend the unconscionable conduct protections to publicly listed companies Schedule 3 seeks to amend the definition of 'unsolicited services' to allow the protections of false billing provisions to apply to false bills for services not provided Schedule 4 seeks to clarify that unsolicited consumer agreements may be entered into in a public place Schedule 5 seeks to increase price transparency by requiring that additional fees or charges associated with pre-selected options be included in the headline price Schedule 6 seeks to allow the ACCC to obtain information concerning product safety Schedule 7 seeks to enable regulators to use existing investigative powers to assess whether or not a term of a standard form contract is unfair Schedule 8 seeks to allow third parties to give effect to a community service order where the trader in breach is not qualified or trusted to do so Schedule 9 seeks to clarify the scope of consumer guarantees where goods are transported or stored Schedule 10 seeks to ensure that the terminology used in the consumer protection provisions is consistent with similar provisions Schedule 11 seeks to clarify that all Australian Consumer Law related consumer protections that already apply to financial services also apply to financial products
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

Privilege against self-incrimination[118]

1.145 Item 1 of Schedule 6 to the bill proposes to replace existing subsections 133D(1) and (2) of the *Competition and Consumer Act 2010* (Competition Act). The new subsections would provide that the Commonwealth minister[119] or an inspector may give a disclosure notice to a person (the 'notice recipient') if the person giving the notice has reason to believe that the person is capable of giving information, producing documents or giving evidence in relation to the safety of consumer goods or product-related services. A disclosure notice is a written notice requiring the recipient to give such information or evidence, or to produce such documents, as are specified in the notice. This may include a requirement to appear before a person to give the relevant information or evidence, or to produce the relevant documents.[120]

1.146 The substantive effect of these amendments will be to expand the classes of persons to whom a disclosure notice can be given to include third parties. Existing subsections 133D(1) and (2) only permit the issue of disclosure notices to the suppliers of consumer goods and product-related services.

1.147 Subsection 133E(1) of the Competition Act provides that a person is not excused from giving information or evidence, or producing a document, pursuant to a disclosure notice on the grounds that to do so might tend to incriminate the person or expose them to a penalty. This provision therefore overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material that may tend to incriminate himself or herself.[121] The amendments proposed by the bill would expand the classes of persons who may be affected by the existing abrogation of the privilege.

1.148 The committee recognises that there may be certain circumstances in which the privilege against self-incrimination may be overridden. However, abrogating this privilege represents a serious loss of personal liberty. Consequently, in considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

1.149 In this instance, the statement of compatibility provides some explanation of why it is necessary to abrogate the privilege against self-incrimination, stating:

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118 Schedule 6, item 1 The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

119 'Commonwealth minister' refers to the minister responsible for administering the *Competition and Consumer Act 2010*.

120 See subsection 133D(3) of the *Competition and Consumer Act 2010*.

121 See *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

> Engaging the right against self-incrimination in this way is necessary and justified as the public benefit in removing the liberty outweighs the loss to the individual. It is not always possible or appropriate for the ACCC to obtain this information from other parties voluntarily, particularly where they may be subject to legal or confidential restrictions. Being able to obtain this information in a timely manner enables the regulator to complete safety investigations earlier and ensure consumers are alerted sooner.[122]

1.150 The committee also notes that a 'use' immunity is provided in subsection 133E(2) of the Competition Act, which provides that information or evidence given, or a document produced, pursuant to a disclosure notice cannot be used as evidence against an individual in any proceedings instituted by the individual, or in any criminal proceedings other than proceedings for an offence against section 133F or 133G. Sections 133F and 133G relate to compliance with disclosure notices and the provision of false or misleading information. The 'use' immunity in subsection 133E(2) of the Competition Act is also acknowledged in the explanatory materials.[123]

1.151 However, neither the Competition Act nor the bill includes a 'derivative use' immunity. This means that information obtained as an indirect consequence of the giving of information or evidence, or the production of a document, pursuant to a disclosure notice, may still be admissible in evidence against the person to whom the notice is given. Moreover, the explanatory materials do not explain why a 'derivative use' immunity is not included in the existing provisions and why it is therefore appropriate, in the absence of such an immunity, to expand the classes of persons who may be affected by the existing abrogation of the privilege.

1.152 The committee requests the assistant minister's more detailed justification for the expansion of the classes of persons who may be affected by the abrogation of the privilege against self-incrimination, and in particular the appropriateness of not providing a derivative use immunity, by reference to the matters outlined in the *Guide to Framing Commonwealth Offences.*[124]

122 Statement of compatibility, p. 24.

123 Explanatory memorandum, p. 14; statement of compatibility, p, 24.

124 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 94-99.

Treasury Laws Amendment (OECD Multilateral Instrument) Bill 2018

Purpose	This bill seeks to amend the *International Tax Agreements Act 1953* to give the OECD Multilateral Convention force of law in Australia
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018

Purpose	This bill seeks to amend various Acts in relation to taxation Schedule 1 seeks to ensure that the multinational anti-avoidance law applies to artificial or contrived arrangements involving trusts and partnerships entered into by multinational entities to avoid the taxation of business profits in Australia Schedule 2 seeks to include additional conditions that must be met for the small business capital gains tax concessions to capital gains to apply Schedule 3 seeks to provide for venture capital tax concessions to be available for investments in 'fintech' businesses Schedule 4 seeks to provide a tax exemption for payments made under the Defence Force Ombudsman Scheme
Portfolio	Treasury
Introduced	House of Representatives on 28 March 2018

Retrospective application[125]

1.153 Schedule 2 of the bill seeks to amend the *Income Tax Assessment Act 1997* to include additional conditions that must be satisfied in order for small business capital gains tax (CGT) concessions to apply. The explanatory memorandum states that the changes will result in CGT concessions only applying to assets used, held ready for use or that are an interest in a small business.[126]

1.154 The application provision in Schedule 2 provides for the amendments to commence in relation to CGT events on or after 1 July 2017, which results in the amendments applying retrospectively. The explanatory memorandum notes the retrospective application is, 'consistent with the Budget announcement [made] by the Government on 9 May 2017 to ensure small business CGT concessions are only available in relation to assets used in a small business and ownership interests in small business.'[127]

125 Schedule 2, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

126 Explanatory memorandum, p. 13.

127 Explanatory memorandum, p. 23.

1.155 The explanatory memorandum argues that, while it may disadvantage some taxpayers, as an integrity measure the retrospective application is 'necessary to minimise the scope for entities to inappropriately access the small business CGT concessions in the period after the measure was announced but before legislation is enacted.'[128]

1.156 The committee reiterates its long-standing scrutiny concern that provisions that back-date commencement to the date of the announcement of the bill (i.e. 'legislation by press release') challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively).

1.157 In the context of tax law, reliance on ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

1.158 However, in outlining scrutiny issues around this matter previously, the committee has been prepared to accept that some amendments may have some retrospective effect when the legislation is introduced if this has been limited to the introduction of a bill within six calendar months after the date of that announcement. In fact, where taxation amendments are not brought before the Parliament within 6 months of being announced the bill risks having the commencement date amended by resolution of the Senate (see Senate Resolution No. 44). In this instance it has been 11 months since the Budget announcement

1.159 The committee therefore requests the Treasurer's more detailed advice as to how many individuals will be detrimentally affected by the retrospective application of the legislation, and the extent of their detriment.

No-invalidity clause[129]

1.160 Schedule 3 of the bill seeks to amend the *Income Tax Assessment Act 1997* (ITAA) to implement reforms of tax incentives for venture capital investors and their investments in financial technology or 'fintech'.[130] The changes are intended to clarify that certain 'fintech' activities are not ineligible activities for the purpose of venture capital tax concessions.[131]

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128 Explanatory memorandum, p. 23.

129 Schedule 3, item 3, proposed subsection 118-432(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

130 Explanatory memorandum, p. 25.

131 Explanatory memorandum, p. 27.

1.161 Proposed subsection 118-432(2) provides that Innovation and Science Australia may, on receipt of an application, make a written decision finding that a specified activity is a substantially novel application of technology (or refuse to make such a finding). This is known as a 'private finding'. A refusal to make a private finding will be subject to internal and Administrative Appeals Tribunal (AAT) review in the same way as other administrative decisions relating to venture capital tax concessions.[132]

1.162 Proposed subsection 118-432(5) provides that Innovation and Science Australia must notify the applicant in writing of any decision about an application for a private finding; however, proposed subsection 118-432(6) provides that failure to so notify an applicant does not affect the validity of the finding (or refusal to make a finding).[133]

1.163 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of administrative review to provide a remedy for administrative errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum.

1.164 In this instance, the explanatory memorandum does not include a justification for including the no-invalidity clause in proposed subsection 118-432(6).

1.165 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to include a no-invalidity clause in proposed subsection 118-432(6). The committee also requests advice about how, in practice, an applicant will be able to seek internal and AAT review of a refusal to make a finding under proposed subsection 118-432(2) in circumstances where Innovation and Science Australia does not notify the applicant of that refusal.

132 Schedule 3, item 5; explanatory memorandum, p. 33.

133 Proposed subsection 118-432(6).

Underwater Cultural Heritage Bill 2018

Purpose	This bill seeks to provide for the protection and conservation of Australia's underwater cultural heritage
Portfolio	Environment and Energy
Introduced	House of Representatives on 28 March 2018

Significant matters in delegated legislation

Broad discretionary power[134]

1.166 Part 2 of the bill relates to what may constitute 'protected underwater cultural heritage' for the purposes of the bill. Clauses 17, 18 and 19 give the minister broad powers to declare certain articles to be protected underwater cultural heritage. In doing so, the minister must have regard to any criteria that are in force under clause 22.[135]

1.167 Clause 22 of the bill provides that the Underwater Cultural Heritage Rules may prescribe criteria to assist in assessing the heritage significance of particular items that may be protected under the bill. The explanatory memorandum states that it is intended for the rules to prescribe criteria which are drawn from the Australia ICOMOS 1979 *Burra Charter*; an international agreement that established the basis for heritage significance criteria in Australia.[136] In addition, subclauses 23(4) and 25(3) provide that the minister must have regard to the matters (if any) specified in the Underwater Cultural Heritage Rules in deciding whether to grant or vary a permit relating to protected underwater cultural heritage. The explanatory memorandum states that the rules may contain guidance on matters such as how the diversity of permit purposes should be dealt with, how to assess what might constitute an adverse impact and whether an adverse impact should be allowed in certain circumstances.[137]

1.168 The committee's view is that significant matters, such as criteria relating to assessing whether an item is of heritage significance or whether to grant or vary a permit, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this case, the explanatory memorandum does not provide information as to why these criteria are not included in the bill.

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134 Clauses 22, 23 and 25. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

135 Subclause 22(2).

136 Explanatory memorandum, p. 24.

137 Explanatory memorandum, p. 26.

1.169 The committee also notes that clause 22 provides that the rules *may* prescribe criteria to which the minister must have regard when declaring articles to be protected, or provisionally protected, rather than requiring that the rules *must* prescribe such criteria. As such, if rules are not made prescribing assessment criteria, this would leave the minister with broad discretionary powers, unguided by any legislative criteria, to declare what underwater cultural heritage articles are to be protected. In addition, as noted above, subclauses 23(4) and 25(3) provide that the minister must have regard to the matters, if any, specified in the rules in deciding whether to grant or vary a permit relating to protected underwater cultural heritage. If the rules do not specify any such matters, there would be no legislative criteria on which the minister would base his or her decision to grant or vary a permit. The explanatory memorandum does not address this issue.

1.170 The committee therefore requests the minister's advice as to:

- **why at least high-level criteria relating to the assessment of heritage significance and the granting of permits relating to protected underwater cultural heritage cannot be included in the primary legislation; and**
- **why there is no positive requirement that the rules *must* prescribe criteria relating to assessing heritage significance and specify matters relating to the granting or variation of permits.**

Strict liability offences[138]

1.171 Clauses 27 to 39 seek to create various offences for activities relating to protected underwater cultural heritage. Each clause applies strict liability to the offence and carries a penalty of 60 penalty units.

1.172 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict

138 Clauses 27 to 39. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[139]

1.173 In this case, the explanatory memorandum states that strict liability has been applied to the offences in the bill to ensure the integrity of the regulatory regime, and is to be used in circumstances where there is public interest in ensuring that regulatory schemes are observed and where it can reasonably be expected that individuals who may be affected by the scheme are aware of their duties and obligations.

1.174 The *Guide to Framing Commonwealth Offences*[140] states that applying strict liability may be justified where all of a number of criteria apply, including that there are legitimate grounds for penalising persons lacking fault.

1.175 The committee notes that while the explanatory memorandum explains that the use of strict liability will ensure the integrity of the regulatory regime being established in the bill, it does not explain what the legitimate grounds are for penalising persons lacking fault in respect of each of the offences relating to protected underwater cultural heritage. This is of particular relevance to the proposed offences that do not relate to the use of permits (for example the offence of engaging in prohibited conduct in a protected zone)[141], that may result in a person who has not been put on notice being held liable without any requirement to prove fault.

1.176 The committee requests a detailed justification from the minister for each proposed strict liability offence in clauses 27 to 39 of the bill, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[142]

Reversal of evidential burden of proof[143]

1.177 As noted above, clauses 29 to 32 and 34 to 36[144] create various offences for activities relating to protected underwater cultural heritage. Exceptions to the

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139 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

140 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

141 See clause 29.

142 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 23.

143 Clauses 29 to 32 and 34 to 36. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

144 See subclauses 29(2), 30(3), 31(2) and (3), 32(2), 34(2), 35(2) and 36(2). The committee notes that there are other offence-specific defences in the bill, but the committee makes no comment in relation to these.

offences (offence specific defences) are provided in the relevant clauses, stating that the offence does not apply if the relevant conduct occurred in accordance with a permit granted under clause 23, or in relation to subclause 31(3), if the person is the Commonwealth, a State or a Territory or an authority of them. The offences in clauses 29 to 31 and 35 carry a maximum penalty of imprisonment for 5 years or 300 penalty units, or both; and the offences in clauses 32, 34 and 36 carry a maximum penalty of imprisonment for 2 years or 120 penalty units, or both.

1.178 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.

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

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

1.181 The statement of compatibility states that the matters to be proved in making out the offence specific defences in the bill are matters that would be in the particular knowledge of the defendant. However, the committee notes that the *Guide to Framing Commonwealth Offences*[145] 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
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[146]

1.182 In this case, it is not apparent that matters such as whether conduct occurred in accordance with a permit, are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

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

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

1.183 As the explanatory materials do not directly address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in these instances. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[147]

Broad scope of offence provision[148]

1.184 Clause 40 seeks to make it an offence to fail to notify the minister within 21 days if a person finds an article of underwater cultural heritage, that appears to be of an archaeological character, in Australian waters. 'Underwater cultural heritage' is defined as being any trace of human existence that has a cultural, historical or archaeological character and is located under water.[149] The offence carries a maximum penalty of 120 penalty units (and a civil penalty of 120 penalty units).

1.185 There is no guidance in the bill or the explanatory memorandum as to what factors would contribute to an item appearing to be 'of an archaeological character'. It is unclear to the committee how a person who finds an article in the water would be put on notice about the requirements of clause 40, and how such a person would determine whether the article is one of underwater cultural heritage and 'appears to be of an archaeological character'.

1.186 The committee requests the minister's advice as to how a person who finds an article in Australian waters will know whether that article is one of 'underwater cultural heritage' that 'appears to be of an archaeological character'. Further the committee requests the minister's advice as to how the general public will be notified of their obligations under clause 40 to notify the minister within 21 days if they find such an article.

Broad delegation of administrative power[150]

1.187 Clauses 41 and 42 trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions and offences proposed in the bill. Subclauses 41(4) and 42(3) provide that an authorised

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

148 Clause 40. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

149 Clause 15.

150 Clauses 41 and 42. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

person may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

1.188 The committee therefore requests the minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.

Forfeiture[151]

1.189 Clause 47 provides that if a person is convicted of an offence against the Act or is found to have contravened a civil penalty provision of the Act, a court may order the forfeiture to the Commonwealth of any vessels, equipment or articles used or otherwise involved in the commission of the offence or the contravention of the civil penalty provision. Subclause 47(3) provides that any vessel, equipment or article forfeited may be sold or otherwise dealt with as the minister thinks fit.

1.190 Forfeiture of proceeds and instruments of Commonwealth indictable offences is generally dealt with under the *Proceeds of Crime Act 2002* (POCA). The *Guide to Framing Commonwealth Offences* notes that it may sometimes be necessary to include additional forfeiture provisions in other legislation, but that where these additional provisions are needed, the powers and safeguards in those provisions should be consistent with the POCA, including provisions to safeguard the interests of innocent third parties.[152]

1.191 It does not appear from the face of the bill, or the explanatory material, that clause 47 incorporates any of the safeguards set out in the POCA to safeguard the interests of innocent third parties, or to ensure appropriate judicial oversight of forfeiture orders.

151 Clause 47. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

152 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

1.192 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why the proposed forfeiture provision does not incorporate safeguards consistent with the *Proceeds of Crime Act 2002* to protect the interests of innocent third parties. The committee's consideration of the appropriateness of a new forfeiture provision is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[153]

Incorporation of external material into the law[154]

1.193 Clause 61 provides that the minister may make the Underwater Cultural Heritage Rules. Subclause 61(4) provides that the rules may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides no explanation as to what type of instruments or documents may need to be applied, adopted or incorporated in a reporting standard and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

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

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

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

153 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 45–47.

154 Clause 61. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.196 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[155] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.197 Noting the above comments, the committee requests the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 61(4), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the rules are first made.

155 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

Underwater Cultural Heritage (Consequential and Transitional Provisions) Bill 2018

Purpose	This bill seeks to make various consequential and transitional amendments arising from the Underwater Cultural Heritage Bill 2018
Portfolio	Environment and Energy
Introduced	House of Representatives on 28 March 2018

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

Migration Amendment (Regulation of Migration Agents) Bill 2017
[Digest 8 & 10/17]

1.198 On 27 March 2018 the House of Representatives agreed to 32 government amendments, the Assistant Minister for Home Affairs presented a supplementary explanatory memorandum, and the bill was read a third time.

1.199 Amendment 11 replaces item 22 with a new item, which would add new subsections 312(4) and (5) into the bill. Proposed subsection 312(4) seeks to require a registered migration agent to notify the Migration Agents Registration Authority (MARA), in writing, within 28 days after he or she becomes either a restricted legal practitioner or an unrestricted legal practitioner. Failure to notify MARA in accordance with that subsection would be an offence punishable by 100 penalty units. Proposed subsection 312(5) seeks to make that offence one of strict liability.

1.200 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a provision states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the supplementary explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[156] In this instance, the supplementary explanatory memorandum provides no justification for the imposition of strict liability, merely stating the operation and effect of the relevant provision.

1.201 The committee further notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[157] In this case, the amendment proposes to impose a penalty of 100 penalty units.

1.202 The committee draws its scrutiny concerns regarding proposed subsections 312(4) and (5) to the attention of senators, and leaves to the Senate

156 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

157 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

as a whole the appropriateness of applying strict liability to an offence subject to a maximum penalty of 100 penalty units.

Security of Critical Infrastructure Bill 2017
[Digest 1 & 3/18]

1.203 On 28 March 2018 the Senate agreed to 20 government amendments, the Minister for Communications (Senator Fifield) tabled an addendum to the explanatory memorandum and a supplementary explanatory memorandum and the bill was read a third time.

1.204 The committee thanks the minister for tabling the addendum to the explanatory memorandum which includes key information previously requested by the committee.

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

- Civil Law and Justice Legislation Amendment Bill 2017;[158]
- Higher Education Support Legislation Amendment (Student Loan Sustainability) Bill 2018; [159] and
- Security of Critical Infrastructure (Consequential and Transitional Provisions) Bill 2017;[160] and
- Treasury Laws Amendment (2017 Measures No. 5) Bill 2017.[161]

158 On 28 March 2018 the Minister for International Development and the Pacific (Senator Fierravanti-Wells) tabled an addendum to the explanatory memorandum.

159 On 27 March 2018 the House of Representatives agreed to 16 government amendments, the Assistant Minister for Vocational Education and Skills (Mrs K L Andrews) presented a correction to the explanatory memorandum and a supplementary explanatory memorandum, and the bill was read a third time.

160 On 28 March 2018 the Senate the Minister for Communications (Senator Fifield) tabled an a supplementary explanatory memorandum and the bill was read a third time.

161 On 28 March 2018 the Senate agreed to one government amendment and on 8 May 2018 the supplementary explanatory memorandum was tabled.

Chapter 2

Commentary on ministerial responses

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

Bankruptcy Amendment (Debt Agreement Reform) Bill 2018

Purpose	This bill seeks to amend the *Bankruptcy Act 1966* to reform Australia's debt agreement system
Portfolio	Attorney-General
Introduced	House of Representatives on 14 February 2018
Bill status	Before the Senate

2.2 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2018*. The Acting Attorney-General responded to the committee's comments in a letter dated 19 April 2018. 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]

Significant matters in delegated legislation[2]

2.3 Division 2 of Part IX of the *Bankruptcy Act 1966* (Bankruptcy Act) sets out the process for giving a debt agreement proposal[3] to the Official Receiver[4] for processing. Within that Division, subsection 185C(4) sets out the circumstances in which a debtor *cannot* give a debt agreement proposal to the Official Receiver. Item 20 of the bill proposes to insert a new paragraph 185C(4)(e), which provides

1 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

2 Schedule 1, item 21, proposed subsection 185C(4B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

3 Pursuant to subsection 185C(1), a 'debt agreement proposal' is a written proposal for a debt agreement. Section 185C sets out the requirements for a debt agreement proposal.

4 The 'Official Receiver' is a statutory appointee who acts as a trustee in bankruptcy for debtors in certain circumstances. Official Receivers are appointed by the minister under section 16 of the Bankruptcy Act.

that a debtor cannot give a debt agreement to the Official Receiver if the total of the payments under the agreement would exceed the debtor's yearly after tax income by a certain percentage. Item 21 proposes to insert a new paragraph 185C(4B), which provides that the minister can determine this percentage by legislative instrument.

2.4 Proposed paragraph 185C(4)(e) and proposed subsection 185C(4B) would therefore appear to allow the minister to determine significant elements of the debt agreements framework in the Bankruptcy Act (that is, who may not submit a debt agreement to the Official Receiver) by delegated legislation.

2.5 The committee's longstanding view is that significant matters, such as eligibility requirements for entering into a debt agreement, 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:

> Currently paragraph 185C(2D) of the Bankruptcy Act contains the only restriction on the size or frequency of a debtor's proposed payments under a debt agreement. It specifies that a debt agreement administrator should certify that the debtor is likely to be able to discharge the obligations created by the agreement as and when they fall due. While this certification provides a safeguard against the submission and adoption of unsustainable payment schedules, it does not always prevent debt agreements that could cause the debtor undue financial hardship. For example, a debtor could propose to devote a significant proportion of their after tax income to debt agreement payments. The payment schedule could be sustainable but the debtor could suffer undue financial stress in discharging the obligations.
>
> Item 20 inserts a new paragraph 185C(4)(e), which provides that a debtor cannot give the Official Receiver a debt agreement proposal if the total payments under the agreement exceed the debtor's income by a certain percentage. Item 21 provides that the Minister can determine this percentage by legislative instrument under new subsection 185C(4B).[5]

2.6 The committee appreciates that the intention of proposed paragraph 185C(4)(e) and proposed subsection 185C(4B) is to provide additional safeguards within the debt administration framework, to prevent debtors' exposure to additional financial hardship. However, the committee notes that the explanatory memorandum does not explain why it is necessary to allow the minister to determine eligibility requirements for entering into a debt agreement by delegated legislation, nor does it provide any examples of the circumstances in which it is envisaged that this power would be exercised.

2.7 The committee also notes that the bill does not set a minimum threshold on the percentage that the minister may determine under proposed subsection

5 Explanatory memorandum, p. 15.

185C(4B), or any other guidance as to how the power in that subsection should be exercised. The committee is concerned that, without a minimum threshold, proposed subsection 185C(4B) could permit the minister to set a percentage that would enable debtors to enter into a debt agreements without the capacity to meet agreed repayments. This could substantially undermine the safeguards that proposed paragraph 185C(4)(e) seeks to establish.

2.8 The committee seeks the Attorney-General's detailed advice as to:

- why it is considered necessary and appropriate to allow the minister to determine certain eligibility requirements for entering into debt agreements by delegated legislation; and
- the appropriateness of amending the bill to set a minimum threshold on the percentage that the minister may determine under proposed subsection 185C(4B).

Acting Attorney-General's response

2.9 The Acting Attorney-General advised:

> Proposed paragraph 185C(4)(e) of the Bill introduces a requirement for debt agreement proposals to satisfy a payment to income ratio, to be determined by the Minister by legislative instrument under proposed subsection 185C(4B). Proposed subsection 185M(1E) introduces this same requirement for proposals to vary a debt agreement.
>
> The proposed payment to income ratio is intended to prevent the establishment and continued operation of debt agreements with the most excessive debt repayment schedules. The ratio would supplement existing measures in the *Bankruptcy Act 1966* (the Act) which currently function to prevent most debt agreements with unaffordable debt repayment schedules. Paragraph 185C(2D)(c) of the Act, for example, requires a debt agreement administrator to certify that the debtor can discharge their obligations under the agreement. Unlike the proposed payment to income ratio, paragraph 185C(2D)(c) requires the administrator to assess the debtor's individual financial circumstances on a case-by-case basis.
>
> However, should these existing safeguards fail, for example due to administrator malfeasance, the ratio will operate to prevent the most excessive debt repayment schedules which have the potential to cause significant harm to debtors. The power to determine the ratio will not significantly alter the eligibility requirements for entering into a debt agreement, as it will only be exercised in a manner that captures these outliers. The explanatory memorandum will be amended to clarify this objective.
>
> Noting the above, it is therefore appropriate to maintain the flexibility of setting the ratio's percentage by legislative instrument. The percentage may need to be amended quickly in light of the fluctuating nature of the financial market, and in consideration of the significant harm that may be

> experienced by debtors if the percentage is or becomes unsuited to market conditions. This percentage will be developed in consultation with key industry stakeholders.
>
> I further advise that it would be inappropriate to amend the Bill to set a minimum threshold on the percentage that the Minister may determine. As the payment to income ratio will only safeguard against the most excessive debt repayment schedules, and will not significantly alter the eligibility requirements for entering into a debt agreement, it is not necessary for the Bill to set a minimum threshold.

Committee comment

2.10 The committee thanks the Acting Attorney-General for this response. The committee notes the advice that the payment to income ratio in proposed paragraph 185C(4)(e) and proposed subsection 185M(1E) is intended to prevent the establishment and continued operation of debt agreements with the most excessive debt repayment schedules. The committee also notes the Acting Attorney General's advice that this ratio would supplement existing measures in the *Bankruptcy Act 1966* (Bankruptcy Act) which currently functions to prevent most debt agreements with unaffordable debt repayment schedules. The committee notes the example provided by the Acting Attorney General in this regard.

2.11 The committee further notes the Acting Attorney-General's advice that, should the existing safeguards in the Bankruptcy Act fail, the proposed payment to income ratio will operate to prevent the most excessive debt repayment schedules which have the potential to cause significant harm to debtors. The committee also notes the advice that the power to determine the ratio (or a percentage for this ratio) will not significantly alter the eligibility requirements for entering into a debt agreement, as it will only be exercised in a manner that captures those outliers (that is, debt agreements with the most excessive repayment schedules). The committee welcomes the Acting Attorney General's advice that the explanatory memorandum will be updated to clarify this objective.

2.12 The committee further notes the Acting Attorney-General's advice that, owing to the matters outlined above and in the interests of maintaining flexibility, it is appropriate for the minister to set the percentage of the proposed payment to income ratio by legislative instrument. The committee also notes the Acting Attorney General's advice that the percentage may need to be amended quickly in light of the fluctuating nature of the financial market, and in consideration of the significant harm that may be experienced by debtors if the percentage is or becomes unsuited to market conditions. The committee notes the Acting Attorney General's advice that the percentage will be developed in consultation with key industry stakeholders.

2.13 Finally, the committee notes the Acting Attorney General's advice that it would be inappropriate to amend the bill to set a minimum threshold on the percentage that the minister may determine by legislative instrument. The committee notes the advice that, as the payment to income ratio will only safeguard

against the most excessive debt repayment schedules, and will not significantly alter the eligibility requirements for entering into a debt agreement, it is not necessary for the bill to set a minimum threshold.

2.14 The committee welcomes the undertaking to amend the explanatory memorandum to clarify the operation and intent of the proposed payment to income ratio, and the minister's power to set a percentage for that ratio.

2.15 The committee requests that the additional information provided by the Acting Attorney-General 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*). In particular, the committee would appreciate the inclusion of the information regarding:

- **why it is appropriate to set the percentage of the payment to income ratio by legislative instrument; and**
- **why it is inappropriate to set a minimum threshold on the percentage that the minister may impose.**

2.16 In light of the detailed information provided by the Acting Attorney General, the committee otherwise makes no further comment on this matter.

Custodial penalties of less than six months[6]

2.17 Proposed subsection 185EC(6) seeks to make it an offence for the proposed administrator in relation to a debt agreement proposal to give, or to agree or offer to give, valuable consideration to an affected creditor,[7] with a view to securing the creditor's acceptance or non-acceptance of the proposal. Proposed subsections 185MC(6) and 186PC(6) similarly seek to make it an offence for the administrator of a debt agreement to give, or agree to give, valuable consideration to an affected creditor, with a view to securing the creditor's acceptance or non-acceptance of a proposal to vary or terminate the agreement. It is proposed that each of the offences would be punishable by a term of imprisonment of three months.

2.18 The committee notes that the *Guide to Framing Commonwealth Offences* provides that if imprisonment is chosen as a penalty for a Commonwealth offence, a term of at least six months should be applied. This is because imprisonment should

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6 Schedule 1, item 41, proposed subsection 185EC(6), Schedule 2, item 12, proposed subsection 185MC(6) and Schedule 2, item 16, proposed subsection 185PC(6) The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

7 Pursuant to section 185 of the *Bankruptcy Act 1966*, 'affected creditor' means a creditor who is a party to a debt agreement (in relation to a proposal to vary or terminate debt agreements) or would be a party to a proposed debt agreement (in relation to a debt agreement proposal).

be reserved for serious offences.[8] The *Guide* further provides that if a longer term of imprisonment (that is, a term of imprisonment of six months or more) would never be justified, a fine should be used.[9]

2.19 Where a bill proposes to impose a custodial penalty of less than six months for a Commonwealth offence, the committee would therefore expect a detailed justification to be provided in the explanatory memorandum. In this instance, the explanatory memorandum states that '[t]his punishment is appropriate to deter fraudulent conduct in the financial sector which can have severe consequences for both affected creditors and debtors.'[10] This would suggest the offence is relatively serious, yet imposing a custodial penalty of three months suggests a fine might be more appropriate. The committee notes that under section 4B of the *Crimes Act 1914*, one month imprisonment equates to a pecuniary penalty of five penalty units.

2.20 Additionally, the committee would expect that penalties involving terms of imprisonment should be justified by reference to similar penalties for similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that the liberty of a person is not unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for…offences of a similar kind or of a similar seriousness. This should include a consideration of…comparable offences in Commonwealth legislation'.[11] In this instance, the explanatory memorandum does not make reference to penalties for comparable offences in Commonwealth legislation.

2.21 The committee seeks the Attorney-General's more detailed justification for setting a custodial penalty of three months' imprisonment in relation to the offences in proposed subsections 185EC(6), 185MC(6) and 186PC(6) instead of a pecuniary penalty. The committee's consideration of the appropriateness of the proposed penalty would be assisted if the justification explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[12]

Acting Attorney-General's response

2.22 The Acting Attorney-General advised:

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8 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 41.

9 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 41

10 Explanatory memorandum, pp 21, 28, 30. See also statement of compatibility, p. 7.

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

12 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 41

> The proposed new subsections make it an offence for a debt agreement administrator to give or offer to give a creditor valuable consideration with a view to securing the creditor's acceptance of a proposal to establish, vary or terminate a debt agreement.
>
> These provisions are intended to deter serious financial misconduct. By establishing or prolonging debt agreements, debt agreement administrators stand to earn substantial financial gain. However, entering into unaffordable debt agreements can have serious financial consequences for both debtors and creditors. Debtors, in particular, can potentially endure severe financial hardship by entering into agreements with unreasonable rates of return.
>
> Debt agreement administrators, acting as agents for financially vulnerable debtors, occupy important positions of trust. Inducing creditors to accept an unaffordable debt agreement, often at significant detriment to the debtor, represents an egregious breach of that trust.
>
> I therefore submit that an imprisonment penalty for this type of offence is warranted. A maximum penalty of a term of imprisonment would provide a more effective deterrent to the commission of the offence, and better reflects the seriousness of the offence than a pecuniary penalty. An imprisonment penalty is in line with penalties for similar offences within the *Corporations Act 2001,* such as section 595 relating to the offence of giving or offering of an inducement to be appointed as a liquidator of a company.
>
> However, I acknowledge the current penalty of three months' imprisonment does not comply with the *Guide to Framing Commonwealth Offences* (the Guide). I thank the Committee for bringing this matter to the Attorney-General's attention.
>
> The Attorney-General will seek to amend new subsections 185EC(6), 185MC(6) and 185PC(6) to ensure compliance with the Guide by increasing the maximum penalty to six months' imprisonment.

Committee comment

2.23 The committee thanks the Acting Attorney-General for this response. The committee notes the Acting Attorney-General's advice that the penalties imposed by proposed subsections 185EC(6), 185MC(6) and 185PC(6) are intended to deter serious financial misconduct from which debt agreement administrators may earn substantial financial gain. The committee also notes the advice that entering into unaffordable debt agreements can have serious financial consequences for both debtors and creditors, and that debtors in particular may endure severe financial hardship by entering into agreements with unreasonable rates of return. The committee further notes the Acting Attorney-General's advice that debt agreement administrators occupy important positions of trust in relation to both debtors and creditors, and that inducing creditors to accept an unaffordable debt agreement—often at significant detriment to the debtor—is an egregious breach of that trust.

2.24 The committee further notes the Acting Attorney-General's view that, owing to the matters outlined above, an imprisonment penalty for the offences in proposed subsections 185EC(6), 185MC(6) and 185PC(6) is warranted. The committee also notes the Acting Attorney-General's view that a custodial penalty would provide a more effective deterrent to the commission of the offences in those provisions, and better reflects the seriousness of the offences, than a pecuniary penalty. The committee notes the Acting Attorney General's advice that a custodial penalty is in line with penalties for similar offences in the *Corporations Act 2001* (Corporations Act). The committee also notes the example provided by the Acting Attorney General of a provision in that Act (section 595) carrying a similar penalty.

2.25 Finally, the committee notes the Acting Attorney-General's acknowledgment that current penalties in proposed subsections 185EC(6), 185MC(6) and 185PC(6) do not comply with the *Guide to Framing Commonwealth Offences*, and the Acting Attorney-General's advice that the Attorney-General will seek to amend those provisions to ensure compliance with the Guide by increasing the maximum penalty to six months' imprisonment. While noting the Acting Attorney-General's advice, the committee is concerned about the proposal to increase the penalties in proposed subsections 185EC(6), 185MC(6) and 185PC(6) to six months' imprisonment. The committee considers that where pecuniary penalties may appropriately be substituted for short terms of imprisonment doing so will minimise the risk of undue trespass on personal liberties. It is for this reason that where a term of imprisonment for less than 3 months is proposed, the committee seeks a detailed justification. However, the committee does not consider that it will be an adequate response to such an inquiry to raise the custodial period to 6 months imprisonment. In line with the committee's general expectations, a response must justify any custodial penalty by reference to similar offences in Commonwealth legislation.

2.26 In this instance, the committee notes that breaches of section 595 of the Corporations Act (provided as an example in the minister's response) attract a penalty of three months' imprisonment, 50 penalty units, or both. It is unclear to the committee why the offences in proposed subsections 185EC(6), 185MC(6) and 185PC(6)—which would appear to punish similar conduct—should attract a longer term of imprisonment. For this reason, the committee does not consider that the proposal to increase the term of imprisonment has been adequately justified.

2.27 The committee requests that the key information provided by the Acting Attorney-General 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*).

2.28 The committee draws its scrutiny concerns regarding the offences in proposed subsections 185EC(6), 185MC(6) and 185PC(6) to the attention of senators, and leaves to the Senate as a whole the appropriateness of:

- **setting a custodial penalty of three months' imprisonment in relation to the offences in proposed subsections 185EC(6), 185MC(6) and 186PC(6) instead of a pecuniary penalty; and**
- **any proposed amendment, as outlined in the minister's response, to increase the maximum penalty for those offences to six months' imprisonment.**

Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Bill 2018

Purpose	This bill seeks to amend the *Crimes Act 1914* to create exceptions to provisions that would prevent the disclosure of spent, quashed and pardoned convictions for persons who work or seek to work with people with disability in the NDIS
Portfolio	Social Services
Introduced	House of Representatives on 15 February 2018
Bill status	Before the Senate

2.29 The committee dealt with this bill in *Scrutiny Digest No. 1 of 2018*. The minister responded to the committee's comments in a letter dated 19 April 2018. 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.[13]

Privacy[14]

2.30 Divisions 2 and 3 of Part VIIC of the *Crimes Act 1914* (Crimes Act) establish protections relating to the disclosure and use of criminal history information. Under those divisions, a person is not required to disclose criminal history information about a conviction that is spent, pardoned or quashed, and may positively state that they were not convicted of or charged with the offence to which the conviction relates. Those divisions also make it unlawful for a person to disclose information regarding the spent, pardoned or quashed convictions of another person without that person's consent, and prevent persons and agencies from taking information relating to spent, pardoned or quashed convictions into account.

2.31 Proposed Subdivision AA seeks to create exceptions to Divisions 2 and 3 of Part VIIC of the Crimes Act. Proposed section 85ZZGH provides that the object of that subdivision is to protect persons with disabilities from harm by:

> permitting criminal history information to be disclosed and taken into account in assessing whether a person who works, or seeks to work, with a person with disability poses a risk to such a person.

13 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

14 Schedule 1, item 2, proposed sections 85ZZGI, 85ZZGJ and 85ZZGK. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2.32 Within proposed Subdivision AA, proposed sections 85ZZGI, 85ZZGJ and 85ZZGK provide that Divisions 2 and 3 of Part VIIC of the Crimes Act do not apply to the disclosure of information to or by, or to the taking into account of information by, prescribed persons or bodies. The proposed sections limit the circumstances in which information may be disclosed or taken into account to where:

- the relevant person or body is required or permitted under a prescribed Commonwealth, State or Territory law to obtain and deal with information about persons who work or seek to work with persons with disabilities;[15] and
- the disclosure or taking into account is for the purpose of obtaining and dealing with the information in accordance with, or as required by, a Commonwealth, State law or Territory law.

2.33 The effect of proposed sections 85ZZGI, 85ZZGJ and 85ZZGK is to enable information relating to spent, pardoned or quashed convictions to be exchanged with and taken into account by prescribed persons and bodies, for the purposes of determining whether a person is suitable to work with people with disability in the National Disability Insurance Scheme (NDIS). This forms part of a broader NDIS worker screening policy.

2.34 Proposed section 85ZZGL seeks to establish a safeguard on the disclosure and taking into account of information, providing that, before the minister prescribes a person or body for the purposes of 85ZZGI, 85ZZGJ and 85ZZGK, the minister must be satisfied that the person or body is required or permitted by law to obtain and deal with information about persons who work, or seek to work, with a person with disability; complies with applicable privacy, human rights and records management legislation and with the principles of natural justice; and that the person or body has in place an appropriate risk assessment framework.

2.35 The statement of compatibility explains that the exceptions in proposed sections 85ZZGI, 85ZZGJ and 85ZZGK are necessary as existing screening processes do not always capture matters relevant to a person's suitability as a disability worker,[16] and the bill will enable screening units to 'make a more accurate and informed assessment of the risk that a person may pose to people with disability in the NDIS.'[17] The statement of compatibility further states that:

> [t]he Bill provides access to…detailed criminal history information to state-based worker screening units to enable a thorough risk-based worker

15 'Person with disability' is defined in proposed section 85ZZGM, and includes a person who is a participant in the National Disability Insurance Scheme, a person who is receiving support or services under that scheme, or a person who is receiving support or services of a kind prescribed by the regulations for the purposes of that section.

16 Statement of compatibility, p. 9.

17 Statement of compatibility, p. 9.

> screening assessment proportionate to determining the potential risk of harm to people with disability receiving services under the NDIS. Further, the permission to access such information will be obtained from a worker applying for a worker screening check as part of the application process.[18]

2.36 The committee acknowledges the importance of protecting persons with disabilities from violence, abuse, exploitation and neglect. The committee also notes the safeguards provided by the bill to ensure the suitability of prescribed persons and bodies, and to seek to ensure that a person's criminal history information is not used for an improper purpose. However, the committee remains concerned that the exceptions proposed by the bill may unduly trespass on rights and liberties, in particular, the right to privacy. The committee notes that spent convictions regimes (such as the regime in Part VIIC of the Crimes Act) are designed to ensure that persons who have been convicted of offences do not have to suffer the consequences of those offences for the rest of their lives,[19] and to improve prospects for offenders' rehabilitation by facilitating their transition into mainstream society. As the Australian Law Reform Commission states:

> An old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator as to how the former offender will behave in the future. In such circumstances reliance on the old conviction will result in serious prejudice to the offender which will outweigh to a great degree its value as an indicator of future behaviour.[20]

2.37 The exceptions proposed by the bill would allow prescribed persons and bodies to disclose, and to take into account, a person's entire criminal history, including minor convictions resulting in a fine (for example shoplifting), and not just criminal history relating to serious offences (for example, violence or sexual assault) or offences that would otherwise be directly relevant to a person's suitability as a disability worker.

2.38 While noting the safeguards in the bill regarding the persons and bodies that may be prescribed, and the purposes for which criminal history may be disclosed or taken into account, the committee is concerned that the exceptions proposed by the bill could lead to the disclosure and the taking into account of a person's entire criminal history, rather than only serious offences or offences that are directly relevant to a person's suitability as a disability worker, which could result in substantial prejudice to certain persons working in, or seeking work, in the disability sector. The committee finds it difficult to reconcile such an outcome with the

18 Statement of compatibility, p. 12.

19 Law Reform Commission of Western Australia, *Project No. 80: The Problem of Old Convictions*, Report (1986), p. 31.

20 Australian Law Reform Commission, *Spent Convictions*, Report No. 37 (1997), pp. xi-xii.

statement that 'it is critical that NDIS worker screening does not unreasonably exclude offenders from working in the disability sector.'[21]

2.39 In light of these matters, it is not apparent to the committee that the exceptions proposed by the bill would be necessary and appropriate in order to protect people with disability. The committee notes that the explanatory memorandum does not explain why it is necessary or appropriate to require the disclosure of all of a person's criminal history (including, for example, convictions that happened in a person's youth) regardless of the nature of the offence.

2.40 It is also unclear to the committee why it is necessary and appropriate to apply the exceptions proposed by the bill in circumstances where a person has been pardoned for a wrongful conviction, or where a conviction has been quashed. For example, a person may be wrongfully convicted owing to deficiencies in available forensic science, and may be factually and legally innocent of the offence with which they were charged. In those circumstances, it is not apparent that the person's criminal history is an appropriate indicator of their suitability as a disability worker.

2.41 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to allow the disclosure and the taking into account of a person's entire criminal history, including:

- minor offences, and offences that may not be relevant to a person's suitability as a disability worker; and
- wrongful convictions for which a person has been pardoned, and convictions that have been quashed.

Minister's response

2.42 The minister advised:

> I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to address the issues raised by the Committee. In particular, the Committee sought more detailed advice as to why it is considered necessary and appropriate to allow the disclosure and the taking into account of a person's entire criminal history, including:
>
> - minor offences, and offences that may not be relevant to a person's suitability as a disability worker; and
> - wrongful convictions for which a person has been pardoned, and convictions that have been quashed.
>
> I welcome the opportunity to respond to the Committee's comments and provide the following advice.
>
> *Reasons for including minor offences and their relevance to suitability*

21 Statement of compatibility, p. 11.

The Committee has acknowledged the importance of protecting persons with disabilities from violence, abuse, exploitation and neglect. People with disability are some of the most vulnerable within the Australian community. It is not only sexual or violent offences that the worker screening regime seeks to mitigate against. Individuals employed within the NDIS are in a position of trust and in many cases will have access to the person with disability's personal belongings, finances and medication. Minor offences may be relevant to a person's integrity and general trustworthiness. On that basis, it is appropriate to have awareness of the circumstances of surrounding even minor offences.

It should be recognised that the fact that an individual may have a criminal conviction for a minor offence which occurred a long time ago forms only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit. It will not necessarily prohibit that person from gaining employment with a provider within the NDIS.

Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.

State and territory worker screening units will be required to undertake a rigorous process to determine the relevance of a particular event to whether an applicant for an NDIS Worker Screening Check poses a risk to people with disability. In particular, worker screening units are required to consider:

- the nature, gravity and circumstances of the event and how it is contributes to a pattern of behaviour that may be relevant to disability-related work;
- the length of time that has passed since the event occurred;
- the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
- the person's criminal, misconduct and disciplinary, or other relevant history, including whether there is a pattern of concerning behaviour;
- the person's conduct since the event; and
- all other relevant circumstances in respect of their offending, misconduct or other relevant history, including attitudes towards offence or misconduct, and the impact on their eligibility to be engaged in disability-related work.

Safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of

behaviour over a lifetime that would indicate potential future risk to people with disability. The more complete the information about patterns of behaviour, the more accurate the assessment of risk. Even offences that are minor, not violent or sexual in nature, are not directly related to disability employment or happened some time ago, contribute to an assessment of risk.

Limiting the categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit and could undermine the value of an NDIS worker screening outcome as a source of information for people with disability and for employers. Inaccurate risk assessments may also be unfair to workers themselves.

I note that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history. People with disability deserve the same level of protection.

Reasons for including pardoned and quashed convictions

The Committee also raises the issue of access to information on spent, quashed and pardoned convictions. Research supports criminal history, including spent, quashed or pardoned convictions, as a key indicator of past patterns of behaviour.

Ensuring that state and territory worker screening units are provided with a complete picture of an individual's criminal history information will ensure that the risk assessment process is as accurate and well-informed as possible. This will not be known until the specific circumstances surrounding the pardoned or quashed conviction are considered by the worker screening unit, which is why they need access to such information as proposed in the Bill.

However, there may be other circumstances where an individual has had a conviction quashed on other grounds, often on appeal to a superior court, which will not necessarily be indicative that they are legally or factually innocent of the offence.

Including quashed and pardoned convictions provides a more complete picture of a person's history and contributes to a more accurate risk assessment. An accurate assessment benefits both people with disability and the worker being screened. Again, such an assessment would be rigorous and consider the circumstances surrounding this history to determine its relevance to the overall risk assessment.

This is why the Working with Children Check currently undertakes a review of spent, quashed and pardoned convictions.

Committee comment

2.43 The committee thanks the minister for this response. With respect to the reasons for permitting the disclosure and the taking into account of minor offences, and the relevance of those offences to a person's suitability as a disability worker, the committee notes the minister's advice that individuals employed within the NDIS are in a position of trust, and in many cases will have access to a person with disability's personal belongings, finances and medication. The committee also notes the advice that minor offences may be relevant to a person's integrity and general trustworthiness, and on this basis it is considered appropriate to allow awareness of the circumstances surrounding even minor offences.

2.44 The committee further notes the minister's advice that criminal convictions for minor offences occurring in the more distant past form only one part of the analysis and risk assessment undertaken by a state or territory worker screening unit, and that such convictions will not necessarily prohibit a person from gaining employment with a provider within the NDIS. The committee also notes the advice that, the more complete the information about patterns of behaviour is, the more accurate is the assessment of risk.

2.45 The committee also notes the minister's advice that limiting categories of offences that can be disclosed to worker screening units would create a risk that relevant information is not available to inform a decision by a worker screening unit, and could undermine the value of NDIS worker screening outcomes as sources of information for people with disability and employers.

2.46 With respect to the inclusion of pardoned and quashed convictions, the committee notes the minister's advice that research supports criminal history, including spent, quashed or pardoned convictions, as key indicators of past patterns of behaviour. In this regard, the committee notes the minister's advice that providing state and territory worker screening units with a complete picture of an individual's criminal history information will ensure that the risk assessment process is as accurate and well-informed as possible. The committee also notes the minister's advice that this will not be known until the specific circumstances surrounding the relevant pardoned or quashed conviction are considered—which is why screening units need access to such information as proposed in the bill.

2.47 The committee also notes the minister's advice that there may be circumstances where an individual has had a conviction quashed on grounds—for example, on appeal to a superior court—which may not be indicative that the individual is 'legally or factually innocent of the relevant offence'.

2.48 The committee also notes the advice that including spent or quashed convictions provides a more complete picture of a person's history, and contributes to a more accurate risk assessment and such an assessment would be rigorous and would consider all relevant circumstances.

2.49 The committee further notes the minister's advice that safeguards will be in place through a nationally consistent, risk-based approach that will provide state and territory worker screening units with a framework for considering a person's criminal history and patterns of behaviour over a lifetime that indicate potential future risk to people with disability. The committee further notes the minister's advice that worker screening units will be required to consider a number of specific factors, such as the nature and gravity of the offence, when it occurred, the vulnerability of the victim and the person's conduct since the event.

2.50 Finally, the committee notes the minister's advice that Working with Children Checks already operate in all jurisdictions with access to, and assessment of, full criminal history, including spent, pardoned and quashed convictions, and the minister's view that people with disability deserve the same level of protection.

2.51 The committee appreciates that persons with disability are some of the most vulnerable in the community, and that a thorough, risk-based approach to worker screening is necessary and appropriate to ensure such persons are protected from harm. However, it remains unclear to the committee that it is necessary to permit the disclosure and the taking into account of a person's *entire* criminal history, including spent convictions for minor offences that may have little or no relevance to a person's suitability for employment with an NDIS provider.

2.52 In this regard, the committee reiterates its earlier concerns that older convictions, followed by a period of good behaviour, may have little if any value as an indicator of future conduct, and that reliance on such convictions may result in serious prejudice to the relevant offender.[22] Similarly, while acknowledging that a quashed or pardoned conviction may not *always* indicate legal or factual innocence, this does not appear to be sufficient justification for permitting the disclosure and the taking into account of these convictions in all circumstances.

2.53 With respect to the safeguards outlined in the minister's response, the committee notes that these safeguards do not appear in the bill, and it is unclear from the minister's response whether the safeguards are matters of policy, or whether they are or will be set out in primary or delegated legislation. In this regard, the committee notes that policies alone are often less effective safeguards than statutory provisions—particularly given that policies and procedures may be varied or removed at any time, and are rarely subject to parliamentary scrutiny. The committee is also concerned that the minister's response does not set out any mechanisms by which a decision by a NDIS worker screening unit regarding a person's suitability as a disability support worker may be reviewed. In this regard, the

22 See Australian Law Reform Commission, *Spent Convictions*, Report No. 37 (1997), pp. xi-xii.

committee notes that Working with Children Check decisions may be reviewed by administrative appeals tribunals.[23]

2.54 Finally, while acknowledging that the Working with Children scheme already permits the disclosure and the taking into account of a person's entire criminal history, the committee emphasises that consistency with an existing regime is not, on its own, sufficient to justify potentially significant intrusions into individuals' privacy. In this regard, the committee notes that it previously raised concerns with respect to permitting the disclosure and the taking into account of a person's criminal history in the context of performing Working with Children Checks.[24]

2.55 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*).

2.56 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of permitting the disclosure and taking into account of a person's entire criminal history, including convictions for minor offences and convictions that have been spent, pardoned or quashed, in the context of worker screening for the National Disability Insurance Scheme.

23 See, for example, Victorian Government Department of Justice and Regulation, *Working with Children Check: Failing the Check*, available at http://www.workingwithchildren.vic.gov.au/home/applications/application+assessment/failing+the+check/; NSW Civil and Administrative Tribunal, *Working with Children Checks,* available at http://www.ncat.nsw.gov.au/Pages/administrative_equal_opp/aed_your_matter/aeod_working-with-children/aeod_working-with-children.aspx.

24 See Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 11 of 2009*, pp. 5-7; *Twelfth Report of 2009*, pp. 512-516.

Identity-matching Services Bill 2018

Purpose	This bill seeks to provide legal authority for the Department of Home Affairs to collect, use and disclose identification information in order to operate the technical systems that will facilitate the identity-matching services envisaged by the Intergovernmental Agreement on Identity Matching Services, and agreed to by COAG in October 2017
Portfolio	Home Affairs
Introduced	House of Representatives on 7 February 2018
Bill status	Before the House of Representatives

2.57 The committee dealt with this bill in *Scrutiny Digest No. 2 of 2018*. The minister responded to the committee's comments in a letter dated 4 April 2018. 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.[25]

Privacy[26]

Initial scrutiny – extract

2.58 The bill seeks to facilitate the exchange of identity information between the Commonwealth and state and territory governments and certain other agencies in accordance with an intergovernmental agreement entered into in October 2017. The type of identity information that may be shared includes a person's name (current and former); address (current and former); place and date of birth; current or former sex, gender identity or intersex status; any information contained in a driver's licence, passport or visa and a facial image of the person.[27]

2.59 The bill seeks to provide that the secretary of the Home Affairs department may develop, operate and maintain an interoperability hub.[28] The explanatory memorandum explains that this hub will facilitate data-sharing between agencies on a query and response basis without storing any personal information (with passport, visa and citizenship images continuing to be held by the Commonwealth agencies

25 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

26 Various. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

27 Clause 5.

28 Clause 14.

that issue the documents).[29] The bill also seeks to provide that the Home Affairs secretary may develop, operate and maintain a National Driver Licence Facial Recognition Solution (NDLFRS), which the explanatory memorandum states will consist of 'a federated database of identification information contained in government identification documents (initially driver licences) issued by state and territory authorities' and a facial recognition system for biometric comparison of facial images against those held in the database.[30] This would appear to authorise the creation of a database that does store personal information. In addition, the bill provides that the Home Affairs department may collect, use or disclose identification information about an individual if that collection occurs via the interoperability hub or the NDLFRS and is for a specified purpose.[31] Identification information may be collected or disclosed for the following purposes:[32]

- providing or developing an identity-matching service for identity and community protection activities, being an activity for:
  - preventing and detecting identity fraud;
  - preventing, detecting, investigating or prosecuting a federal, state or territory offence or starting or conducting proceedings for proceeds of crime;
  - investigating or gathering intelligence relevant to national security;
  - checking the background of a person with access to an asset, facility or person associated with government or protecting a person with a legally assumed identity or under witness protection;
  - promoting community safety, including identifying a person suffering or at risk of suffering physical harm (including missing or deceased persons or those affected by disaster) and a person reasonably believed to be involved in a significant risk to public health or safety;
  - promoting road safety, including the integrity of driver licensing systems; and
  - verifying the identity of an individual;[33]
- developing, operating or maintaining the NDLFRS; or
- protecting the identities of persons who have legally assumed identities or are under witness protection.

29 Explanatory memorandum, p. 2.

30 Explanatory memorandum, p. 2.

31 Clauses 17 and 18.

32 Subclause 17(2).

33 See definition of 'identity or community protection activity' at clause 6.

2.60 An identity-matching service is defined as including a number of listed services, including:

- the Face Identification Service (FIS): for use by law enforcement, national security and corruption agencies to identify unknown individuals from a facial image, or detect persons using multiple identities;[34]
- the Facial Recognition Analysis Utility Service (FRAUS): for use by state and territory agencies (including local government authorities and non-government entities that meet certain conditions) to compare facial images to test the accuracy and quality of their data;[35]
- the Face Verification Service (FVS): for use by state and territory agencies (including local government authorities and non-government entities that meet certain conditions) to verify a person's claimed or suspected identity;[36]
- the Identity Data Sharing Service (IDSS): for use by Commonwealth, state and territory agencies to share identification information from one entity to another through the interoperability hub;[37]
- the One Person One Licence Service (OPOLS); for use by state and territory authorities to compare facial images and other biographical information held in the NDLFRS;[38] and
- a service prescribed by the rules that involves the collection, use and disclosure of identification information and involves the interoperability hub or the NDLFRS. Rules can only be made to authorise a request from a local government authority or non-government entity if it is reasonably necessary to verify the individual's identity and the individual has given consent for this.[39]

2.61 These provisions would give a broad power for the Home Affairs department to collect, use and disclose personal information for a wide range of purposes to a wide range of government agencies (and some local government authorities and private entities). The committee notes its terms of reference include considering whether provisions of a bill would unduly trespass on personal rights and liberties.[40] This bill has clear implications for the privacy of the millions of individuals whose

34 Clause 8. See the statement of compatibility, p. 49.

35 Clause 9 and statement of compatibility, p. 52.

36 Clause 10 and statement of compatibility, p. 45.

37 Clause 11 and explanatory memorandum, p. 26.

38 Clause 12 and explanatory memorandum, p. 27.

39 Clause 7 (in particular paragraph (1)(f) and subclauses (2) and (3)).

40 Senate Standing Order 24(1)(a)(i).

facial images and other biographical information will be available for collection, use and disclosure. The committee's view is that when provisions of a bill trespass on privacy the explanatory materials accompanying the bill should contain a clear explanation justifying this interference. In this instance, the statement of compatibility has provided a detailed analysis of the privacy implications of the bill.

2.62 While the committee considers there are a number of safeguards in the bill to help to protect privacy, the committee remains concerned that the bill may unduly trespass on personal rights and liberties in that it seeks to enable the sharing of an extensive amount of personal information for a broad range of purposes to a broad range of agencies (including private sector agencies), in particular that:

- information can be shared for preventing, detecting, investigating or prosecuting any federal, state or territory offence, for road safety or for identity verification more broadly. This could allow state and territory agencies to share and seek to match facial images and other biographical information for persons suspected of involvement in very minor offences, such as jaywalking, or for verifying the identity of an individual for any purpose; and
- one-to-many face matching, which involves comparing a facial image against multiple facial images, can involve the collection, use and disclosure of information about individuals who may not be the subject of the request (but who may look similar to the subject of the request), meaning such persons may become caught up in an investigation despite having no link to the investigation.[41]

2.63 The committee is also concerned that while the explanatory materials state that a number of privacy safeguards will apply in relation to the sharing of personal identification information, many of these stated safeguards are not contained in the bill:

- the statement of compatibility notes that under the intergovernmental agreement there are a range of steps that the entities seeking access to the services will need to comply with.[42] However, these requirements are not set out in the bill. There is also no information in the bill as to what the agency which receives the personal information does with that information following receipt. The statement of compatibility notes that the bill has been developed on the basis that 'other agencies or organisations participating in the identity-matching services must have their own legal authority to do so, and must comply with legislated privacy protections that apply to them';[43]

41 See statement of compatibility, p. 49.

42 Statement of compatibility, p. 43.

43 Statement of compatibility, p. 44.

- the statement of compatibility states that the design of the FIS will limit the amount of identification information released about an individual, stating:

> It will do this by first returning a limited gallery of possible facial matches against the facial image submitted in the request, without providing any other identification information about the individuals. The user will then need to nominate a smaller shortlist of the particular facial matches for further investigation, and will only then have access to any biographic information about those individuals.[44]

  However, the statement of capability notes that these requirements are contained in the intergovernmental agreement, but not in the bill;

- while the explanatory memorandum states that 'any private sector usage of the FVS will only return a "match or no match" response, without returning images or biographic information about the person'[45] this will be achieved under 'access policies and data sharing agreements supporting the implementation of the Bill'[46] rather than any legislative criteria; and

- the explanatory materials provide that there will be policy and administrative safeguards in place in addition to the obligations in the bill, noting that 'requirements for privacy impact assessments before agencies access the services and compliance audits will also help to ensure the use of the FVS remains proportionate to the need, and prevent any misuse of identification information'.[47] However, these will not be legislative requirements.

2.64 The committee seeks the minister's advice as to whether all or any of the intended policy and administrative safeguards identified in the explanatory materials can be included as legal requirements in the bill or, at a minimum, that there be a requirement in the bill that such safeguards be implemented by agencies seeking to access identification information.

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44 Statement of compatibility, p. 52.

45 Explanatory memorandum, p. 25.

46 Explanatory memorandum, p. 25.

47 Statement of compatibility, p. 48.

Minister's response

2.65 The minister advised:

Privacy safeguards in policy and administrative arrangements

The Committee has sought my advice as to whether all or any of the intended policy and administrative safeguards identified in the explanatory materials can be included as legal requirements in the Bill or, at a minimum, that there be a requirement in the Bill that such safeguards be implemented by agencies seeking to access identification information.

The identity-matching services referred to in the Bill are supported by a broad system of controls and arrangements that govern the provision and use of the services. This includes the *Intergovernmental Agreement on Identity Matching Services* (the IGA) signed by the Prime Minister and first ministers of each of the states and territories in October 2017, and the formal data-sharing agreements between the Department of Home Affairs (the Department) and each of the participating agencies.

The Bill is just one aspect of these arrangements, and forms part of a broader network of legislation, both Commonwealth and state/territory, that will govern the sharing of identification information through the services. The Bill is primarily intended to provide the Department with the legal authority to operate the interoperability hub through which the majority of the services are transmitted, and to host of the National Driver Licence Facial Recognition Solution (NDLFRS), which will make state and territory driver licences available through the services.

The Committee has noted that the Bill does not set out what an agency which receives information through the services does with the information following its receipt. The Bill does not seek to, nor does it, authorise other agencies to share information through the services. Each agency's use of information it receives through the services will be governed by its own legal authority to collect, use and disclose the information for particular purposes, including any legislated protections that apply to the agency under Commonwealth, state or territory privacy legislation.

By taking this approach, the Bill avoids providing a blanket authorisation for all information-sharing that occurs through the services. Where an agency seeks to obtain information from another agency through the services, both the requesting agency and data-holding agency will need to have a legal basis to share information with the other. This is no different to current data-sharing arrangements. Much of the information-sharing that will occur through the services is already taking place based on existing legal authorities and using existing systems. The Bill will simply enable the Department to develop and operate the technical systems needed to offer agencies the tools to conduct their information-sharing in a more secure, accountable and auditable way.

> The Government considers that the protections already contained in the Bill, and the obligations imposed by the IGA, provide a strong degree of protection for the information transmitted through the identity-matching services. The Bill is appropriately focused on providing authorisations that are required by the Department in order to operate the systems supporting the services, and place appropriate safeguards around the operation of those systems by the Department. Any expansion of this scope to regulate users of the services, or otherwise impose obligations on other entities will add significant complexity to the Bill and may be inconsistent with, or unnecessarily duplicate, other Commonwealth, state and territory legislation that already regulates the handling of information by the various users of the services.

Committee comment

2.66 The committee thanks the minister for this response. The committee notes the minister's advice that the identity-matching services in the bill are supported by a broad system of controls and arrangements, including the Intergovernmental Agreement on Identity Matching Services (IGA) and formal data-sharing agreements between the Department of Home Affairs and participating agencies. The committee also notes the minister's advice that the bill forms part of a broader network of both Commonwealth and state and territory legislation that will govern the sharing of information and is primarily intended to provide the legal authority for the Department to operate the interoperability hub and host the NDLFRS. The committee also notes the advice that the bill does not authorise other agencies to share information through the services and each agency's use of information it receives 'will be governed by its own legal authority to collect, use and disclose the information for particular purposes'. The committee also notes the advice that the government considers that the protections in the bill and the obligations in the IGA provide a strong degree of protection for the information transmitted through the identity-matching services, and any expansion of the scope to regulate or impose obligations on users or entities will add significant complexity to the bill and may be inconsistent or duplicative of existing information handling laws.

2.67 The committee reiterates that this bill has clear implications for the privacy of the millions of individuals whose facial images and other biographical information will be available for collection, use and disclosure. The committee reiterates its concern that the bill may unduly trespass on personal rights and liberties in that it seeks to enable the sharing of an extensive amount of personal information for a broad range of purposes to a broad range of agencies (including private sector agencies). The committee remains concerned that while the explanatory materials and the minister's response states that a number of privacy safeguards will apply in relation to the sharing of personal identification information, many of these stated safeguards are not contained in the bill, and rely on assurances that there are appropriate safeguards in processes that are outside the Commonwealth Parliament's control. The committee considers that the bill should provide, at a

minimum, that agencies seeking to access identification information are bound by and satisfy certain minimum privacy safeguards.

2.68 The committee considers that the bill may unduly trespass on personal rights and liberties and draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of establishing a scheme to allow for the collection, use and disclosure of an extensive amount of personal information for a broad range of purposes to a broad range of agencies and entities, without adequate safeguards being contained in the bill.

Consultation prior to making delegated legislation[48]

2.69 The bill seeks to facilitate the exchange of identity information between the Commonwealth and state and territory governments. Clause 5 sets out a definition of 'identification information' which includes any information that is prescribed by the rules and relates to the individual (subject to subclause 5(2) which sets out the type of information which is not identification information). Subclause 5(4) provides that before making rules prescribing such information the minister must, in addition to being satisfied that the information is reasonably necessary to identify the person and assist in the activities set out in the bill, consult the Human Rights Commissioner and the Information Commissioner. In addition, clause 7 sets out the definition of an 'identity-matching service', which includes certain services prescribed by the rules. Subclause 7(5) also provides that before making such rules the minister must consult the Human Rights Commissioner and the Information Commissioner.

2.70 Where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill, and so welcomes the inclusion of this specific requirement to consult. However, the committee also considers that it would be appropriate for the bill to provide that compliance with these obligations is a condition of the validity of the legislative instrument. The committee also notes that, given the significant privacy implications of defining what constitutes 'identification information', it may be appropriate that the minister provide reasons if rules are made that are inconsistent with any advice provided by the Human Rights Commissioner or Information Commissioner, to ensure the expertise of such commissioners has been given appropriate weight in the decision making process.

2.71 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

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48 Subclauses 5(4) and 7(5) and clause 30. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

committee's *First Report of 2015*.[49] 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.[50]

2.72 The committee seeks the minister's advice as to the appropriateness of amending the bill to provide:

- that the minister must, after consulting the Human Rights Commissioner and the Information Commissioner, have regard to any submissions made by those commissioners prior to making any rules; and
- if the minister makes rules that are inconsistent with the advice provided by the commissioners, that the minister provide reasons explaining why the rules depart from that advice.

2.73 The committee also requests the minister's advice as to why it is appropriate to include these matters in rules rather than regulations.

Minister's response

2.74 The minister advised:

> *Consideration of submissions by Human Rights Commissioner and Information Commissioner when making rules*
>
> The Committee has also sought my advice as to the appropriateness of amending the Bill to provide that the Minister must, after consulting the Human Rights Commissioner and the Information Commissioner, have regard to any submissions made by those commissioners prior to making any rules; and, if the Minister makes rules that are inconsistent with the advice provided by the commissioners, that the Minister provide reasons explaining why the rules depart from that advice.
>
> The requirements already contained in the Bill to consult with the Human Rights Commissioner and the Information Commissioner when making rules are important accountability measures that will ensure that human rights and privacy issues are appropriately considered. The additional requirements recommended by the Committee would be an appropriate addition to these measures that will further enhance their efficacy. I

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

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

accept the Committee's proposal in this regard, and will propose government amendments to this effect.

The appropriateness of rules rather than regulations

The Committee has also sought my advice as to why it is appropriate to include additional types of identification information or new identity-matching services in rules rather than regulations.

I am advised that the use of rules rather than regulations is consistent with the Office of Parliamentary Counsel's *Drafting Direction No. 3.8 - Subordinate Legislation.* Paragraph 2 of that Drafting Direction states that:

> "OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so".

Consistent with paragraph 16 of the Drafting Direction, the approach of including new identification information or identity-matching services in rules rather than regulations has a number of advantages including:

- it facilitates the use of a single type of legislative instrument when needed for the Act, thereby reducing the complexity that would otherwise exist if different matters were to be prescribed across more than one type of instrument,
- it enables the number and content of legislative instruments made under the Act to be rationalised,
- it simplifies the language and structure of the provisions in the Bill that provide the authority for the legislative instruments, and
- it shortens the Bill.

Due to these advantages, paragraph 17 of the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

The Drafting Direction states that matters such as offence or civil penalty provisions, powers of arrest, detention, entry, search or seizure, the imposition of a tax, appropriations, and amendments to the text of an Act should be included in regulations unless there is a strong justification for prescribing those provisions in another type of legislative instrument. The Bill does not enable rules to include any of these types of provisions, and subclause 30(2) of the Bill specifically prohibits this for the avoidance of doubt. As rules made under the Bill will not be able to provide for these matters, it is appropriate that the matters that *are* able to be prescribed under the Bill are prescribed in rules rather than regulations.

In addition, clause 30 clarifies that rules made under the Bill will be legislative instruments for the purpose of the *Legislation Act 2003.* Under sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the

> Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations, including consideration by the Senate Standing Committee on Regulations and Ordinances. Subclauses 30(3) and (4) further clarify that rules made under the Bill will be subject to disallowance and sunsetting, even though they would otherwise be exempt from these requirements because the Bill facilitates the operation of a scheme involving the Commonwealth and one or more States.
>
> These measures will ensure that appropriate oversight mechanisms are in place for any rules made under the Bill.

Committee comment

2.75 The committee thanks the minister for this response. The committee notes the minister's advice that requirements in the bill to consult with the Human Rights Commissioner and the Information Commissioner when making rules are important accountability measures. The committee welcomes the minister's advice that he accepts the committee's recommendations and will propose government amendments to the bill to provide that the minister must, after consulting the Human Rights Commissioner and the Information Commissioner, have regard to any submissions made by those commissioners prior to making any rules and if the minister makes rules that are inconsistent with the advice provided by the commissioners, that the minister provide reasons explaining why the rules depart from that advice.

2.76 The committee also notes the minister's advice as to why it is considered appropriate to include the relevant information in rules rather than regulations, including that the bill provides that the rules are not to include matters such as offence or civil penalty provisions, powers of arrest, detention, entry, search or seizure, the imposition of a tax, appropriations, or amendments to the text of an Act.

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

2.78 In light of the minister's commitment to amend the bill in line with the committee's proposals, the committee makes no further comment on this matter.

Reversal of evidential burden of proof[51]

2.79 Subclause 21(1) seeks to make it an offence for an entrusted person who has obtained protected information in his or her capacity as an entrusted person to make a record of the information or to disclose the information to another person.

51 Clause 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Subclause 21(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is authorised by, or is in compliance with a requirement under, a Commonwealth, State or Territory law. The offence carries a maximum penalty of two years imprisonment.

2.80 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.

2.81 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.

2.82 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. The reversal of the evidential burden of proof in clause 21 has not been addressed in the explanatory materials.

2.83 The committee notes that the *Guide to Framing Commonwealth Offences*[52] 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
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[53]

2.84 In this case, it is not apparent that whether the conduct is authorised by, or is in compliance with, a requirement under a Commonwealth, State or Territory law are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

2.85 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the

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

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

burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[54]

2.86 The committee considers it may be appropriate if proposed subclause 21(1) were amended to provide that a person commits the offence if the conduct is not authorised by, or in compliance with a requirement under, a law of the Commonwealth or of a State or Territory. The committee requests the minister's advice in relation to this matter.

Minister's response

2.87 The minister advised:

> *The use of an offence-specific defence*
>
> The Committee has sought my advice on why it is proposed to reverse the evidential burden of proof in relation to an offence contained in the Bill. Specifically, the Bill contains an offence for the unauthorised disclosure or recording of protected information by entrusted persons (i.e. staff or other persons working for the Department of Home Affairs). The Bill contains an exception to this offence where the conduct is authorised by, or is in compliance with a requirement under, a Commonwealth, State or Territory law. By including this as an exception to the offence, the Bill places the evidential burden of proof on a defendant to establish that their disclosure or recording of protected information was authorised under law, rather than placing the onus on the prosecution to establish that the conduct was not authorised under law. This is contrary to the standard approach that the prosecution must establish all elements of a criminal offence.
>
> The Committee notes that the explanatory material to the Bill does not address this issue, and that the Committee's consideration of the appropriateness of the provision would be assisted if this material explicitly addressed relevant principles set out in the *Guide to Framing Commonwealth Offences* (the Guide).
>
> The offence in clause 21 of the Bill has been designed to provide the greatest possible protection to the protected information contained in, transmitted through, or related to, the systems that support the identity-matching services. In developing the offence, consideration was given to the best-practice guidance in the Guide. The Guide specifically states that offence-specific defences should only be included in very limited circumstances, namely where the relevant facts are peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. The provision in the Bill meets these requirements.

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

> For the offence contained in the Bill to be effective, it must be able to be prosecuted. If the defence in subclause 21(2) was included as an element of the offence itself, it would be extremely difficult for the prosecution to establish that the conduct was not authorised under any law of the Commonwealth, or a State or Territory. This could require the prosecution to examine a very large array of legislation in order to establish that there was no authorising law in the particular circumstance to the requisite burden of proof.
>
> By contrast, it would be expected that an entrusted person with access to information in, or about, the systems, would be aware of the authorisation upon which they are relying when disclosing that information. This authorisation should be clearly documented for the particular disclosure, or would be contained in policy, procedural or legal arrangements governing business-as-usual disclosures. Any decision taken by an entrusted person to disclose protected information should be based on one or more legislative authorisations, and the particular authorisation relied on in a particular case will be known to the entrusted person.
>
> As such, it would be considerably less onerous for the defendant to positively establish the specific legislative authorisation for their disclosure in each particular case, than for the prosecution to prove that they had no authorisation for the disclosure under any law.
>
> The Bill has been developed to ensure that disclosure of protected information is appropriately restricted to protect the privacy of individuals whose personal and sensitive information is contained within, or transmitted via, the systems operated by the Department. In placing the burden of proof in relation to the defence on the defendant, subclause 21(2) places the onus on each entrusted person to ensure, in all circumstances, that their level of care when handling the information (including their regard to the legislative authorisations they have to disclose the information) is commensurate with the sensitivity of the information concerned. I also note that the drafting of this defence is consistent with secrecy provisions designed to protect other types of particularly sensitive information in other Commonwealth legislation, such as the *Australian Border Force Act 2015.*

Committee comment

2.88 The committee thanks the minister for this response. The committee notes the minister's advice that if the defence in subclause 21(2), which provides a defence for an entrusted person to record or disclose information if it was done in accordance with a Commonwealth, State or Territory law, was included as an element of the offence, it would be extremely difficult for the prosecution as it would be required to examine a large array of legislation in order to establish there was no authorising law. The committee also notes the minister's advice that it would be expected that an entrusted person would be aware of the authorisation on which they were relying and the particular authorisation 'will be known to' the entrusted

person, and as such it would be 'considerably less onerous' for the defendant to establish the relevant matters.

2.89 While the committee acknowledges that it may be difficult for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in the offence, the committee emphasises that it generally considers a matter is appropriate for inclusion in an offence-specific defence when:

- it is *peculiarly* within the knowledge of the defendant; *and*
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[55]

2.90 As the minister's advice does not explain how knowledge of relevant Commonwealth, State or Territory law is *peculiarly* within the knowledge of the defendant, the committee remains of the view that it may not be appropriate to reverse the evidential burden of proof in relation to this matter.

2.91 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*).

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

Adequacy of parliamentary oversight

Privacy[56]

2.93 As noted above, clause 21 seeks to make it an offence for an entrusted person who has obtained protected information in his or her capacity as an entrusted person to make a record of the information or to disclose the information to another person. Clauses 22 to 25 provide exceptions as to when information can be disclosed, which include to lessen or prevent a serious and imminent threat to human life or health,[57] or to the [Integrity] Commissioner if it relates to corruption.[58]

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

56 Clauses 23, 24 and 28. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

57 Clause 23.

58 Clause 24.

The committee notes that these provisions impact on privacy as it allows for further disclosure of personal information. This does not appear to have been addressed in the explanatory materials.

2.94 The committee notes that clause 28 seeks to require the secretary of the Home Affairs department to provide the minister with an annual report, which is to be tabled in Parliament, on the operation of the identity-matching services, including statistics relating to requests made under the scheme. However, the committee notes that there is no requirement to record instances of when information was disclosed pursuant to clauses 23 and 24.

2.95 The committee seeks the minister's advice as to the appropriateness of amending clause 28 (which sets out the matters to be included in an annual report on the operation of the scheme) to include a requirement to report on the number of instances in which an entrusted person discloses protected information pursuant to clauses 23 and 24.

Minister's response

2.96 The minister advised:

> *Annual reporting*
>
> The Committee has sought my advice as to the appropriateness of amending clause 28 of the Bill (which sets out the matters to be included in an annual report on the operation of the scheme) to include a requirement to report on the number of instances in which an entrusted person discloses protected information pursuant to clauses 23 (disclosure to lessen or prevent threat to life or health) and 24 (disclosure relating to corruption issue).
>
> The annual reporting requirements in the Bill will ensure that the public has appropriate visibility of the provision of identity-matching services by the Department. Although reporting on disclosures made under clause 23 does not go to the use of the services themselves, I accept the Committee's comments that such disclosures have privacy implications and should be transparent. As such I will propose an amendment to the Bill to accommodate this proposal.
>
> In relation to reporting on the number of disclosures relating to corruption issues, the Department has consulted with the Attorney-General's Department, which administers the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act). Consistent with their advice, which was informed by consultation with the Australian Commission for Law Enforcement Integrity (ACLEI).
>
> A reporting requirement of this nature has the potential to jeopardise the confidentiality of disclosures made to the Integrity Commissioner under clause 24 of the Bill. Under the Bill, an entrusted person may make a disclosure to the Integrity Commissioner without the Secretary's knowledge. It would be inappropriate to amend the Bill to require an

> entrusted person to notify the Secretary of any disclosure made by them under clause 24 in order for the Secretary to accurately report on these disclosures. This would remove entrusted persons' ability to make confidential disclosures to the Integrity Commissioner, and may have the effect of deterring them from making corruption-related disclosures altogether. This may have a negative impact on the effective operation of the LEIC Act, which is essential to the detection, prevention and prosecution of corruption-related issues.
>
> I also note that any disclosure made under clause 24 would already be captured by the extensive reporting requirements already imposed upon the Integrity Commissioner under the LEIC Act. This is a more appropriate reporting mechanism for this type of information, which does not compromise the confidentiality of disclosures made to the Integrity Commissioner. Therefore, I do not consider it appropriate to add this to the reporting provisions in the Bill.

Committee comment

2.97 The committee thanks the minister for this response. The committee notes the minister's advice that when information is disclosed pursuant to clause 23 (to lessen or prevent a serious and imminent threat to human life or health), he accepts the committee's comments that such disclosures have privacy implications and should be transparent. The committee welcomes the minister's advice that government amendments will be proposed to ensure disclosures of such information will be reported on under clause 28.

2.98 The committee also notes the minister's advice in relation to the disclosure of information pursuant to clause 24 (disclosure to the Integrity Commissioner if it relates to corruption) that reporting on such disclosures would have the potential to jeopardise the confidentiality of disclosures made to the Integrity Commissioner. As an entrusted person is intended to be able to make a disclosure to the Commissioner without the secretary's knowledge, the committee notes the minister's advice that it would be inappropriate to require that the secretary be notified of the disclosure, as this would remove confidentiality and may deter an entrusted person from making corruption-related disclosures. The committee also notes the advice that any disclosure under clause 24 would already be captured by the Integrity Commissioner's existing reporting requirements under the *Law Enforcement Integrity Commissioner Act 2006*.

2.99 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*).

2.19 In light of the detailed information provided and the minister's commitment to amend the bill in relation to reporting on disclosures pursuant to clause 23, the committee makes no further comment on this matter.

Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

Purpose	This bill seeks to amend the *Intelligence Services Act 2001* to establish the Australian Signals Directorate as an independent statutory agency
Portfolio	Defence
Introduced	House of Representatives on 15 February 2018
Bill status	The bill received Royal Assent on 11 April 2018

2.100 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2018*. The minister responded to the committee's comments in a letter dated 13 April 2018. 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.[59]

Broad delegation of administrative powers[60]

2.101 Proposed subsection 27N(1) seeks to allow the Director-General of the Australian Signals Directorate (ASD)[61] to delegate all or any of his or her functions or powers under proposed Part 5A to any staff member at the Executive Level 1 (EL1) level or above. Proposed Part 5A sets out the Director-General's powers in relation to employment and termination, engagement of consultants and service providers, secondments, the application of the principles of the *Public Service Act 1999* to ASD employees, voluntary movement of ASD staff to the Australian Public Service and staff grievance procedures.

2.102 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

59 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

60 Schedule 1, item 27, proposed subsection 27N(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

61 The Director-General of ASD is a position the bill seeks to create. See Schedule 1, item 27, proposed section 27B.

offices 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.

2.103 In this case, the explanatory materials provide no information about why these powers are proposed to be delegated to ASD staff members holding positions at the EL1 level or higher.

2.104 The committee requests the minister's advice as to why it is necessary to allow the powers and functions of the Director-General under proposed Part 5A to be delegated to Executive Level 1 employees or above, rather than to members of the Senior Executive Service.

Minister's response

2.105 The minister advised:

> Accountable Officers routinely have delegation powers to assist them in the effective and efficient running of their organisations. This is a sensible and prudent business practice. I note the Committee's stated preference that delegation powers be normally limited to Senior Executive Service officers.
>
> Importantly, the delegation power only relates to Part 5A of the Act which sets out employment arrangements for staff; it does not extend to operational matters which appropriately remain with the Director-General of the Australian Signals Directorate.
>
> The Australian Signals Directorate operates a range of sophisticated technical capabilities and systems. Similarly, there are a number of secondments to partner agencies, as well as other bodies and organisations, that need to exercise delegations, and these secondment arrangements occur at a range of employment categories and levels. In this context, the expertise regarding the use and engagement of staff for how these capabilities and systems can be best applied and used to meet the Government's requirements at times rests with officers outside of the Senior Executive Service.
>
> The proposed delegation power for the Director-General of the Australian Signals Directorate, which is limited to Part 5A, is intended to be used sparingly, and only after careful consideration has been applied as to what the activity is and the outcomes required. Strict boundaries will be set on the extent and limitations of the delegated powers or functions, along with the requirements for how the officer is to exercise those delegations.
>
> In preparing this provision within the Act, careful consideration was taken as to the appropriate limit of the delegation, such as restricting it to officers at the Executive Level 1 classification or higher. I would further note that Executive Level 1 officers - while not fulfilling the types of leadership roles undertaken by Senior Executive Services officers - do fill senior positions and have significant responsibilities.

> While the Director-Generals of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service both have similar delegation powers, these are without restriction as to the level of employee able to receive the delegation.
>
> While the proposed provision seeks to provide the same broad delegation function to the Director-General of the Australian Signals Directorate that his intelligence counterparts have, the delegation function has been limited. In this context, an appropriate balance has been found in providing this necessary flexibility to the Director-General of the Australian Signals Directorate, but importantly limiting it to Executive Level 1 officers and above.

Committee comment

2.106 The committee thanks the minister for this response. The committee notes the minister's advice that the Director-General's delegation power would be limited to proposed Part 5A, relating to employment arrangements for ASD staff. The committee also notes the minister's advice that the ASD operates a range of 'sophisticated technical capabilities and systems' and also undertakes secondments with other agencies and that, for these reasons, expertise regarding the use and engagement of staff sometimes rests with officers outside the Senior Executive Service.

2.107 The committee further notes the minister's advice that it is intended that the proposed delegation power be used sparingly and only after consideration of the nature of the activity and required outcomes. The committee finally notes the minister's advice that, although Executive Level 1 officers do not fulfil the types of leadership roles undertaken Senior Executive Service officers, they do fill senior positions and have significant responsibilities.

2.108 The committee reiterates its preference that generally delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, that a limit is set on the scope and type of powers that may be delegated. In this instance the committee acknowledges that, although the proposed delegation power would allow functions and powers to be delegated to employees outside the Senior Executive Service, it is otherwise limited to ASD employees at Executive Level 1 or higher and the scope is limited to powers and functions relating to employment arrangements for ASD staff.

2.109 In light of the information provided and the fact that this bill has already passed both Houses of Parliament, the committee makes no further comment on this matter.

Privacy[62]

2.110 Item 43 of Schedule 1 proposes to insert a new section 133BA in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The proposed section would allow the Director-General of ASD to communicate AUSTRAC information to a foreign intelligence agency if he or she is satisfied that it is appropriate in all the circumstances of the case to do so and the foreign intelligence agency has given appropriate undertakings for protecting the confidentiality of the information, controlling the use of the information, and ensuring the information will only be used for the purpose for which it is communicated to the foreign country.

2.111 The committee notes that AUSTRAC information[63] may include a wide array of personal and financial information and the proposed section does not limit the purposes for which the Director-General may communicate such information with a foreign intelligence agency, other than that the Director-General considers it is appropriate to do so in all the circumstances. The explanatory materials accompanying the bill do not provide any information on why it is necessary to provide the Director-General with a broad discretion with respect to the purposes for which such information can be communicated to foreign intelligence agencies, merely explaining the operation of proposed section.[64]

2.112 The committee therefore requests the minister's advice as to why it is considered necessary and appropriate to provide the Director-General with a broad discretion as to the purposes for which AUSTRAC information may be communicated with a foreign intelligence agency.

2.113 The committee also requests the minister's advice as to the appropriateness of amending the bill so as to include at least high-level guidance as to the purposes for which AUSTRAC information may be communicated to a foreign intelligence agency.

Minister's response

2.114 The minister advised:

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62 Schedule 1, item 43, proposed section 133BA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

63 AUSTRAC information is defined in section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* as meaning eligible collected information (or a compilation or analysis of such information) and 'eligible collected information' is defined as information obtained by the AUSTRAC CEO under that Act or any other Commonwealth, State or Territory law or information obtained from a government body or certain authorised officers, and includes financial transaction report information as obtained under the *Financial Transaction Reports Act 1988*.

64 Explanatory memorandum, p. 20.

> The new section 133BA for the *Anti-Money laundering and Counter-Terrorism Financing Act 2006* includes a very important consequential amendment as a result of the Australian Signals Directorate becoming an independent statutory agency.
>
> At present the Australian Signals Directorate is part of the Department of Defence and is covered by the Department's own provision within the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006.* As the Australian Signals Directorate will be becoming its own entity on 1 July 2018 it now requires its own listing under this Act.
>
> This amendment to the Act does not extend or alter the current arrangement the Australian Signals Directorate receives by being part of the Department of Defence. Similarly, it is consistent with arrangements provided for all other intelligence and security agencies who require this function.
>
> In this context, there already exists strong compliance safeguards and the Australian Signals Directorate is subject to some of the most rigorous oversight arrangements in the country. This includes being subject the oversight of the Inspector-General of Intelligence and Security, who has the powers of a standing royal commission and can compel officers to give evidence and hand-over materials. The Inspector-General regularly reviews activities to ensure the Australian Signals Directorate's rules to protect the privacy of Australians are appropriately applied.
>
> This amendment made to the *Anti-Money laundering and Counter-Terrorism Financing Act 2006* is critical to the Australian Signals Directorate's work to combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime.
>
> As an independent statutory agency, this amendment now ensures that information is able to be appropriately shared, consistent with how other Australian domestic intelligence and security agencies manage this type of information. This work across the intelligence and security community is central to defending Australia and its national interests.
>
> In relation to the committee's further suggestion regarding whether it is necessary to amend the Bill to provide high-level guidance as to the purposes for which AUSTRAC information may be communicated to a foreign intelligence agency, I can advise that this is not necessary. This amendment is not, in effect, creating a new arrangement for the Australian Signals Directorate. These provisions reflect longstanding arrangements for agencies in the intelligence and security community, and there are strong safeguards in place, including the powers of the Inspector-General of Intelligence and Security, as noted above, to ensure the function is appropriately exercised.

Committee comment

2.115 The committee thanks the minister for this response. The committee notes the minister's advice that inserting proposed new section 133BA in the *Anti-Money*

Laundering and Counter-Terrorism Financing Act 2006 would not extend or alter the arrangements that currently apply to the ASD by virtue of being a part of the Department of Defence and is consistent with arrangements in place for other intelligence and security agencies. The committee also notes the minister's advice that this amendment is critical to the ASD's work to 'combat terrorism, online espionage, transnational crime, cybercrime and cyber-enabled crime' and that the ASD is already subject to 'strong compliance safeguards', including the oversight of the Inspector-General of Intelligence and Security, which will ensure the proposed power is exercised appropriately.

2.116 The committee finally notes the minister's advice that it is considered not necessary to amend the bill so as to include high level guidance as to the purposes for which AUSTRAC information may be communicated to a foreign intelligence agency for similar reasons—that is, the proposed amendment does not in effect create a new arrangement for the ASD and adequate safeguards are in place.

2.117 While the committee appreciates that the ability to communicate AUSTRAC information with foreign intelligence agencies is critical to the ASD's work, it notes that the minister's response does not directly address its original question—that is, why it is considered necessary to provide the Director-General with a broad discretion as to the purposes for which AUSTRAC information may be communicated with a foreign intelligence agency. The committee has consistently held that the existence of similar or equivalent powers in existing legislation is not a sufficient justification for including such powers in new legislation. The committee therefore remains concerned that the proposed provision would allow the communication of AUSTRAC information—which may include a wide array of personal and financial information—subject only to the requirement that the Director-General considers it appropriate, in all the circumstances of the case, to do so.

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

National Housing Finance and Investment Corporation Bill 2018

Purpose	This bill seeks to establish the National Finance and Investment Corporation
Portfolio	Treasury
Introduced	House of Representatives on 15 February 2018
Bill status	Before the Senate

2.119 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2018*. The Treasurer responded to the committee's comments in a letter dated 26 April 2018. 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.[65]

Parliamentary scrutiny: section 96 grants to the states[66]

2.120 The bill seeks to establish the National Housing Finance and Investment Corporation (NHFIC). The functions of the NHFIC would include making loans, investments and grants to improve, directly or indirectly, housing outcomes; determining terms and conditions for such loans, investments and grants; and providing business advisory services and other capacity-building assistance to community housing providers.[67] Subclause 8(2) provides that the NHFIC's functions would include granting financial assistance to states and territories in relation to these matters and determining terms and conditions for such grants of financial assistance.[68]

2.121 The explanatory memorandum states that the bill enables the NHFIC to perform its functions for purposes related to specific constitutional powers, and further states that the NHFIC is likely to perform its functions in relation to the corporations power, the external affairs power, a Territory and/or 'granting financial assistance to which section 96 of the Constitution applies'.[69]

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65 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

66 Subclause 8(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

67 Paragraphs 8(1)(a) and (b).

68 Subclause 8(2).

69 Explanatory memorandum, p. 19.

2.122 The committee notes that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine terms and conditions attaching to them.[70] Where the Parliament delegates this power , 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.

2.123 The committee notes that the bill contains no guidance on its face as to the terms and conditions that will attach to financial assistance granted to the states by the NHFIC. The bill does, however, seek to allow the minister to direct, by legislative instrument, the board of the NHFIC in relation to the performance of its functions and provides that these directions may, among other matters, set out decision-making criteria and limits for the granting of financial assistance to states and territories.[71] Such ministerial directions will be known as the 'investment mandate', and by reason of regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003* will not be subject to disallowance.[72]

2.124 The committee further notes that, although the bill provides that the investment mandate may set out decision-making criteria and limits for the granting of financial assistance to the states and territories, the exposure draft of the NHFIC investment mandate direction does not appear to contain any such guidance.[73]

2.125 The committee is concerned that the level of parliamentary scrutiny afforded to grants made by the NHFIC to the states and territories will be very limited, given that the bill does not contain on its face any guidance as to the terms and conditions attaching to such grants, the draft investment mandate for the NHFIC contains no such guidance, and the legislative instruments making up the investment mandate will not be subject to disallowance.

2.126 Noting that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine terms and conditions attaching to them, the committee suggests it may be appropriate for the bill to be amended to:

- include some high-level guidance as to the terms and conditions under which financial assistance may be granted by the NHFIC to the states and territories; and

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70 Section 96 of the Constitution provides that: '…the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

71 See clause 12 and paragraph 13(b)(ii).

72 See note to subclause 12(1).

73 Exposure draft of the National Housing Finance and Investment Corporation Investment Mandate Direction 2018, available at https://treasury.gov.au/consultation/c2018-t263622/.

- subject the legislative instruments making up the NHFIC investment mandate to disallowance (despite regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*).

2.127 The committee seeks the Treasurer's advice in relation to the above. The committee also seeks the Treasurer's advice as to why the exposure draft of the NHFIC investment mandate does not include any directions about the decision-making criteria for granting financial assistance to states and territories, including guidance as to the terms and conditions under which financial assistance may be granted to the states and territories.

Treasurer's response

2.128 The Treasurer advised:

> The Committee notes that section 96 of the Constitution confers on the Parliament the power to make grants of financial assistance to the States and to determine the terms and conditions attaching to such grants and suggested that it may be appropriate for the Bill to: include some high-level guidance as to the terms and conditions under which financial assistance may be granted by the NHFIC to the States and Territories; and subject the NHFIC investment mandate to disallowance.
>
> *References to grants to States and Territories*
>
> The object of the NHFIC is to improve housing outcomes for Australians, and it will achieve this through the administration of three programs: the Affordable Housing Bond Aggregator, the National Housing Infrastructure Facility (NHIF) and capacity building activities. The Affordable Housing Bond Aggregator and capacity building activities are only available to registered community housing providers. In terms of the $1 billion allocation for the NHIF, there is a limited amount of grant funding available ($175 million), and most finance will be in the form of loans.
>
> The Bill provides that the NHFIC's functions include granting financial assistance to the States and Territories to improve housing outcomes and determining terms and conditions for such grants of financial assistance. This is included to provide flexibility in the way payments are made to eligible project proponents and to reflect the constitutional powers which support the NHFIC's functions.
>
> *Guidance on terms and conditions*
>
> The approach taken with regard to the NHFIC is consistent with other Commonwealth bodies tasked with providing financial assistance to the States. Parliament can and does delegate its power under section 96 of the Constitution to determine terms and conditions attaching to grants of financial assistance. A recent example is the Northern Australia Infrastructure Facility Act 2016, in which Parliament delegated this power to the Facility, which operates commercially and is governed by an independent Board. Another example is the annual even-numbered

Appropriation Acts, which appropriate amounts to be paid to the States under section 96 of the Constitution and enable the Minister to determine the terms and conditions that apply to such payments.

The Board of the NHFIC will be independent and appointed based on relevant skills and experience. The Board will be equipped to decide whether to provide a loan or grant, or make an equity investment, to support the construction of housing-enabling infrastructure (such as new sewerage infrastructure). It will apply commercial discipline and its expertise to decide which projects to fund in light of the objectives of the NHFIC to improve housing outcomes for Australians, and consistent with the terms of the investment mandate.

The investment mandate will provide guidance to the NHFIC on its operations, including the types of projects that are eligible for NHIF finance, the types of loan concessions that the NHFIC can provide and criteria for making NHIF financing decisions. Providing the details in the investment mandate rather than in the Bill provides flexibility to allow the NHFIC to respond to evolving market conditions. The draft investment mandate specifies a number of factors that the Board must take into account when making a NHIF financing decision, including the likely impact of the project on the supply and ongoing availability of affordable housing.

While specific terms and conditions for grants of financial assistance to the States and Territories are not included in the Bill or the draft investment mandate, eligibility and decision making criteria which apply generally are provided in the latter. That is, the guidance to be provided in the investment mandate will apply to all finance provided by the NHIF, irrespective of the project proponents.

Disallowance of the NHFIC investment mandate

Like other legislative instruments, the investment mandate is required to be tabled in Parliament and registered on the Federal Register of Legislative Instruments. This enables the public and Parliament to hold the Government accountable for the directions it issues to the Board.

However, I do not consider that subjecting the investment mandate to parliamentary disallowance is appropriate. The investment mandate should provide certainty to both the Board and the market about the way in which the NHFIC is to exercise its functions and powers. This certainty would be delayed if the mandate is disallowable. In addition, in the event that an objection is raised and the mandate ceases to operate, the Board would be placed in a very difficult situation leading to significant uncertainty and impracticality.

I also draw the Committee's attention to the fact the Government has undertaken extensive public consultation at every stage of the development of the NHFIC Bill and investment mandate.

> Finally, I note that this approach is consistent with legislation such as the *Northern Australia Infrastructure Facility Act 2016*, the *Clean Energy Finance Corporation Act 2012* and the *Future Fund Act 2005*.

Committee comment

2.129 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that allowing the NHFIC to grant financial assistance to the states and territories, and determine the terms and conditions attaching to such grants, will provide flexibility in the way payments are made to eligible project proponents.

2.130 The committee also notes the Treasurer's advice that providing guidance to the NHFIC on its operations—including on the types of projects that are eligible for finance, the types of loan concessions that may be provided, and the criteria for making financing decisions—in the investment mandate, rather than in the bill, will allow flexibility to respond to evolving market conditions. The committee further notes the advice that although the draft investment mandate does not include specific terms and conditions for grants of financial assistance to the states and territories, it does include general eligibility and decision-making criteria that apply to all finance provided by the NHCIF.

2.131 The committee also notes the Treasurer's advice that he considers it would not be appropriate to subject the legislative instruments making up the investment mandate to disallowance as this would create uncertainty for the board and the market with respect to the functions and powers of the NHFIC and that, in the event that these instruments were disallowed, the board would be placed in 'a very difficult situation leading to significant uncertainty and impracticality.'

2.132 The committee reiterates that the power to make grants to the states and to determine the terms and conditions attaching to such grants is conferred on the Parliament by section 96 of the Constitution. Where the Parliament delegates this power to the executive, 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.

2.133 The committee acknowledges the Treasurer's advice that the general eligibility and decision-making criteria that are set out in the draft investment mandate will also apply to grants of financial assistance to the states and territories and that, to this extent, the draft investment mandate does contain guidance on the terms and conditions of such grants. However, the committee remains concerned that this guidance is not set out in the bill itself, nor is it contained in a legislative instrument subject to disallowance.

2.134 The committee remains of the view that, from a scrutiny perspective, it would be more appropriate to include in the bill, instead of in the investment mandate, the general eligibility and decision-making criteria, as well as at least high-

level guidance about the strategies and policies to be followed for the effective performance of the NHFIC's functions. Alternatively, if this guidance is to be included in a legislative instrument, the committee considers it would be appropriate that this instrument be subject to disallowance. The committee acknowledges the advice that subjecting such instruments to the usual disallowance processes could cause 'significant uncertainty and impracticality' in the event that the investment mandate came into effect and was subsequently disallowed.[74] However, the committee notes that there are other methods to ensure parliamentary scrutiny over such instruments. For example, it would be possible to provide that the instruments making up the investment mandate do not come into effect until the relevant disallowance period has expired.[75]

2.135 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of delegating to the NHFIC the Parliament's power under section 96 of the Constitution to make grants to the states where guidance as to the terms and conditions attaching to such grants, and the strategies and policies to be followed for the effective performance of the NHFIC's functions, is to be left to non-disallowable legislative instruments.

Broad delegation of administrative powers[76]

2.136 Clause 55 provides for the delegation and subdelegation of the powers and functions of the Chief Executive Officer (CEO) of the NHFIC. Subclause 55(1) seeks to allow the CEO to delegate any of his or her powers or functions under the bill to a 'senior member' of staff of the NHFIC, and subclause 55(2) seeks to allow the CEO to subdelegate to a senior member of staff of the NHFIC powers or functions originally delegated by the board.

2.137 The committee notes that neither the bill nor the explanatory memorandum provide any definition of a 'senior member of the staff' of the NHFIC.[77] Although the explanatory memorandum states that allowing the delegation of powers or functions

74 In contrast, subsection 11(4) of the *Regional Investment Corporation Act 2018* provides that the operating mandate for the Regional Investment Corporation, which is similar to the investment mandate for the NHFIC, is subject to parliamentary disallowance.

75 For an example of this approach, see section 79 of the *Public Governance, Performance and Accountability Act 2013*.

76 Clause 55. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

77 Clause 45 provides that the NHFIC may employ such persons as it considers necessary and subclause 45(3) provides that the NHFIC may make arrangements for the services of officers or employees of the Commonwealth or a State or Territory or any other organisation or body to be made available to the NHFIC.

to senior staff is 'a normal administrative arrangement',[78] it does not provide any guidance as to the level at which an NHFIC staff member would be considered to be a senior member of staff, nor any guidance as to the qualifications or attributes they will be required to possess.

2.138 The committee is concerned that, although the bill restricts the delegation and subdelegation of powers and functions by the CEO to 'senior members' of staff, the range of staff that could be included under this term remains unclear. It is therefore difficult to assess the appropriateness of allowing the delegation and subdelegation of powers and functions to this category of staff members.

2.139 The committee requests the Treasurer's advice as to the intended meaning of 'senior member' of the NHFIC staff under the bill. The committee also requests the Treasurer's advice as to whether the bill or explanatory memorandum could be amended to provide some guidance as to the staff levels that will be considered to be 'senior members' of staff and the skills and attributes they will be required to possess.

Treasurer's response

2.140 The Treasurer advised:

> The Bill provides for the delegation of functions by the NHFIC and by the Board to the CEO, and for the delegation and sub-delegation by the CEO to a senior member of the NHFIC staff.
>
> The Committee requested advice as to the intended meaning of 'senior member' of the NHFIC staff, and whether the Bill or explanatory memorandum could be amended to provide some guidance as to the staff levels and skills of staff considered to be senior members of staff.
>
> It is not unusual for Commonwealth entities to be permitted to delegate statutory powers and functions to individual members of staff. Indeed, it is generally considered necessary to include a delegation power in relation to an entity and its CEO. Some precedents include the Export Finance and Insurance Corporation and the Regional Investment Corporation.
>
> The NHFIC will need to have in place appropriate governance and supervisory arrangements for all staff. Subject to this expectation, I consider that it is appropriate for the NHFIC, as an independent corporate Commonwealth entity, to determine its staffing arrangements and structure. What constitutes a 'senior member' of the NHFIC's staff according to the ordinary meaning of the term will need to be determined in the context of the staffing arrangements and structure the NHFIC adopts.
>
> It will be the NHFIC's responsibility to ensure that only those senior staff with appropriate qualifications and experience and relevant training are

78 Explanatory memorandum, p. 40.

> delegated functions. I am confident that the NHFIC will appropriately balance its risks in relation to delegations and do not consider that the Bill or explanatory memorandum require amendment to deal explicitly with this matter.

Committee comment

2.141 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the NHFIC will need to have in place appropriate governance and supervisory arrangements for all staff and that what constitutes a 'senior member' of staff according to the ordinary meaning of the term will need to be determined in the context of the staffing arrangements the NHFIC adopts. Finally, the committee notes the Treasurer's advice that it will be the NHFIC's responsibility to ensure that only those senior staff with 'appropriate qualifications and experience, and relevant training are delegated functions', and that he does not consider that the bill requires amendment to deal with this matter.

2.142 However, the committee reiterates its concern that the range of employees that could be considered to be 'senior members' of staff remains unclear. The committee also notes that, despite the Treasurer's advice that it will be the NHFIC's responsibility to ensure that functions and powers are only delegated to senior staff with appropriate qualifications, experience and training, there is nothing on the face of the bill that would limit delegations in this way.

2.143 The committee considers it may be appropriate to amend the bill to require that the CEO be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.

2.144 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the delegation of administrative powers to a broad range of persons as provided for in clause 55 of the bill.

Treasury Laws Amendment (2018 Measures No. 3) Bill 2018

Purpose	This bill seeks to amend the *Competition and Consumer Act 2010* to: • increase the maximum civil pecuniary penalties and penalties for criminal offences; • provide protection, through a safe harbour, for egg producers who comply with the requirements of the Free Range Egg Labelling Information Standard; and • ensure that confidential supplier information obtained by the Australian Energy Regulator during its wholesale market monitoring and reporting functions remains confidential under the Commonwealth law
Portfolio	Treasury
Introduced	House of Representatives on 15 February 2018
Bill status	Before the House of Representatives

2.145 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2018*. The assistant minister responded to the committee's comments in a letter received 10 April 2018. 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.[79]

Reversal of the evidential burden of proof[80]

Initial scrutiny – extract

2.146 Section 18, paragraph 29(1)(a) and paragraph 151(1)(a) of the Consumer Law make it unlawful for a person to engage in misleading and deceptive conduct or to make false or misleading representations about goods or services. A breach of paragraph 151(1)(a) constitutes an offence. Contraventions of section 18 and paragraph 29(1)(a) are subject to civil penalties.

2.147 Proposed section 137A seeks to provide a specific exemption (an offence-specific 'safe harbour' defence) to the offence and civil penalty provisions in

79 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

80 Schedule 2, item 2, proposed section 137A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

section 18, paragraphs 29(1)(a) and paragraph 151(1)(a). Proposed subsection 137A(1) provides that the relevant offence and civil penalty provisions do not apply in relation to the labelling or displaying of eggs as free range eggs if, when doing so, the person is complying with all requirements:

- specified in an information standard for eggs; and
- relating to the labelling or displaying of free range eggs, including requirements about:
  - the use of the words 'free range'; or
  - representing that eggs are free range eggs.

2.148 Proposed subsection 137A(2) then provides that, if a person seeks to rely on proposed subsection 137A(1) in proceedings brought against the person in respect of section 18 or paragraph 29(1)(a) or 151(1)(a) of the Consumer Law, the person bears an evidential burden in relation to the matters set out in subsection 137A(1).

2.149 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important part 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.

2.150 In this instance, the defendant would bear 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. However, the committee would still expect the reversal of the burden of proof to be justified.

2.151 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences*[81] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the relevant offence) where:

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

2.152 In this instance, the explanatory memorandum states:

> In placing an evidential burden on the respondent/defendant, consideration has been given to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition.
>
> This evidential burden is appropriate in these circumstances because the evidence as to whether a respondent/defendant has complied with the

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

> information standard and the free range egg labelling or display requirements is peculiarly within the knowledge and control of the respondent/defendant.
>
> For the current information standard, *Australian Consumer Law (Free Range Eggs Labelling) Information Standard 2017,* compliance would require consideration of whether:
>
> - the hens had meaningful and regular access to an outdoor range during daylight hours during a laying cycle;
> - the hens were able to roam and forage on the outdoor range; and
> - the eggs were laid by hens subject to a stocking density of 10,000 hens per hectare or less.
>
> It is the respondent/defendant who can readily access evidence of this kind, which would not be easily accessible and available to the applicant/prosecution. It would be significantly more difficult and costly for the applicant/prosecution to obtain evidence that could be easily adduced by the defendant.[82]

2.153 The committee notes the explanation provided for the reversal of the burden of proof in proposed section 137A. However, while the committee appreciates that it may be easier for the defendant than for the prosecution to adduce evidence relating to the matters in proposed subsection 137A(1), it is not apparent that those matters would be *peculiarly* within the defendant's knowledge, or that the matters would be significantly more costly and difficult for the prosecution to establish.

2.154 The committee further notes that the reversal of the burden of proof in proposed section 137A may relate to civil penalties (where that section is relied on as a defence to section 18 or paragraph 29(1)(a)). However, the committee recognises that, in certain cases, there may be a blurring of distinctions between criminal and civil penalties, with civil penalties applied in circumstances that are akin to criminal offences. The committee considers that reversals of the burden of proof in such cases merit careful scrutiny,[83] as there could be a risk that reversing the burden of proof in such cases may unduly trespass on personal rights and liberties. This is particularly the case where more significant penalties are imposed. In this case, the committee notes that contraventions of section 18 and paragraph 29(1)(a) are punishable by a civil penalty of $220,000 for individuals. Moreover, the bill proposes to increase the penalty imposed in relation to these sections to $500,000.[84]

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82 Explanatory memorandum, p. 23.

83 In this regard, see also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), December 2015, p. 284.

84 See Schedule 1, items 48 and 49.

2.155 The committee seeks the assistant minister's more detailed advice as to the appropriateness of reversing the evidential burden of proof in relation to the 'safe harbour' defence in proposed section 137A, noting that the offence and civil penalty provisions to which the defence applies carry significant financial penalties.

Assistant Minister's response

2.156 The assistant minister advised:

> The reverse burden of proof was considered to be appropriate for a number of reasons. In the past, producers who chose to label their eggs 'free range' were not required to adhere to prescribed mandatory requirements. It will now be the case that, should producers choose to label their eggs 'free range', they must be able to prove that they have met the requirements of the *Free Range Egg Labelling Information Standard.* Producers would generally prove that they have met these requirements by gathering information through daily monitoring of hens and record keeping. This information is within the producers' knowledge and there would be no additional burden on producers to produce it as evidence should the need arise.
>
> If the burden of proof for the safe harbour was not reversed, the regulator would be required to undertake costly and difficult investigations. In some cases the regulator may have some difficulty accessing properties, would only be able to observe the hens on sporadic occasions, may face health and safety difficulties and could pose biosecurity risks when visiting farms.

Committee comment

2.157 The committee thanks the assistant minister for this response. The committee notes the assistant minister's advice that the reversal of the evidential burden of proof was considered appropriate because the information that would be relied on by a producer to prove that they had met the requirements of the *Free Range Egg Labelling Information Standard* (Information Standard) would be within the producer's knowledge, and that there would be no additional burden on producers to produce that information as evidence should the need arise.

2.158 The committee further notes the assistant minister's advice that, were the burden of proof for the safe harbour defence not reversed, the regulator would be required to undertake costly and difficult investigations, could face difficulties gathering information, and could pose biosecurity risks when visiting farms.

2.159 While noting the minister's advice, the committee reiterates that the *Guide to Framing Commonwealth Offences*[85] provides that a matter should only be included as an offence-specific defence where it is peculiarly within the knowledge of

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

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

2.160 It is unclear in this instance that whether a defendant has met the requirements of the Information Standard is a matter that would be peculiarly within the knowledge of the defendant. Rather, it appears to be a matter of which both the defendant and the prosecution would have, or could obtain, knowledge. In this regard, the committee emphasises that a matter being 'within the producer's [that is, the defendant's] knowledge' does not equate to the matter being *peculiarly* within the knowledge of the defendant.

2.161 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in proposed section 137A.

Treasury Laws Amendment (Illicit Tobacco Offences) Bill 2018

Purpose	This bill seeks to amend the *Excise Act 1901*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to: • provide a comprehensive set of offences that can be applied to illicit tobacco: - that has been domestically manufactured or produced; or - for which the origin of production or manufacturing is unknown or uncertain; • create new offences for possession of equipment for producing or manufacturing illicit tobacco; • provide that illicit tobacco for which the origin of production or manufacturing is unknown or uncertain can be seized and forfeited; and • amend the meaning for excise and excise-equivalent customs duty purposes so that the amount of duty on dutiable products is determined in a consistent manner.
Portfolio	Treasury
Introduced	House of Representatives on 15 February 2018
Bill status	Before the Senate

2.162 The committee dealt with this bill in *Scrutiny Digest No. 3 of 2018*. The minister responded to the committee's comments in a letter received 13 April 2018. 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.[86]

86 See correspondence relating to *Scrutiny Digest No. 5 of 2018* available at: www.aph.gov.au/senate_scrutiny_digest

Absolute liability offences[87]

2.163 Proposed Subdivision 308-A seeks to create a number of offences ('reasonable suspicion offences') relating to the possession, purchase, sale, manufacture and production of illicit tobacco (that is, tobacco on which excise or customs duty has not been paid). Proposed Subdivision 308-B seeks to create additional offences ('fault-based offences') relating to the possession, manufacture and production of illicit tobacco. The penalties for the offences in proposed Subdivisions 308-A and 308-B vary depending on the weight of the tobacco, and range from the greater of 200 penalty units and five times the excise duty that would be payable on the tobacco, to 10 years imprisonment, the greater of 1,500 penalty units and five times the excise duty that would payable on the tobacco, or both.

2.164 The bill proposes to apply absolute liability to the weight of the tobacco as an element of the offences in proposed Subdivisions 308-A and 308-B. Additionally, the bill proposes to apply absolute liability as to whether it is reasonable to suspect that excise or customs duty has not been paid on the tobacco, and that no exemption to the payment of excise or customs duty exists under a law of the Commonwealth, as an element of the reasonable suspicion offences in proposed Subdivision 308-A.

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

2.166 As the imposition of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[88] In this regard, the committee notes that the *Guide* states that absolute liability should only be applied to particular elements of an offence (as opposed to the offence as a whole) where one of the following applies:

- requiring proof of fault would undermine deterrence, and there are legitimate grounds for penalising persons lacking fault and persons who make a reasonable mistake of fact in relation to the relevant element; or

87 Schedule 1, item 6, proposed Subdivisions 308-A and 308-B. The committee draws senators' attention to the provisions in those proposed subdivisions pursuant to Senate Standing Order 24(1)(a)(i).

88 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

- the element is a jurisdictional element, rather than an element going to the essence of the offence.[89]

2.167 The explanatory memorandum provides a detailed explanation for the application of absolute liability to the weight of the tobacco as an element of the offences in proposed Subdivisions 308-A and 308-B:

> Absolute liability is appropriate for [the weight of the tobacco] … as it is essentially a precondition of the offence and the state of mind of the defendant with respect to this element is not relevant to that element. There would be inherent difficulties of establishing a mental element in relation to the weight of the thing that would otherwise undermine deterrent. The prosecution must still prove the weight of the tobacco at the time of the offence.

2.168 The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised — a defence that remains available where strict liability is applied. The committee notes the explanation that there would be inherent difficulties in establishing a mental element as to the weight of a thing. The committee also notes the explanation in the explanatory memorandum that it is not considered appropriate to apply strict liability, instead of absolute liability, as this would mean there could be 'a significant risk that offenders may escape conviction solely on the basis of a mistaken belief about weight'.[90] However, the committee notes that the bill proposes to make it an offence to possess, buy or sell 5kg or more of tobacco (with more significant penalties applying depending on the weight of the tobacco). Possessing, buying or selling less than 5kg of tobacco is not proposed to be an offence. The committee is concerned that applying absolute liability to the weight of the tobacco could lead to a person being convicted of a criminal offence,[91] despite holding a reasonable belief that they had in their possession (or bought or sold) less than 5kg of tobacco (which is not an offence), and despite having taken reasonable steps to confirm the tobacco's weight.

2.169 In addition, the bill seeks to impose absolute liability on whether it is reasonable to suspect that excise or customs duty has not been paid or is exempt from being paid (for the offences in proposed Subdivision 308-A). In this regard, the explanatory memorandum states:

> It is for the Court to determine whether it is reasonable to suspect that duty has not been paid or an exemption applies. Therefore, it is appropriate that absolute liability applies to this element of the offence.

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89 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

90 Explanatory memorandum, p. 23.

91 Under proposed section 308-20, 308-35, 308-50 or 308-120.

> The state of mind that the defendant had at the time they possessed, bought or sold the tobacco is not relevant to the objective existence of reasonable suspicion (although it is relevant to the physical element of conduct (possessing, buying or selling) which is contained in a separate element to which the fault element of intention applies).[92]

2.170 The committee acknowledges that the element of 'reasonable suspicion' does not refer to the state of mind of the defendant, and refers instead to whether a court considers it reasonable to suspect that payable excise or customs duty has not been paid. In this regard, the committee notes that proposed section 308-55 sets out a number of circumstances that are taken to satisfy the 'reasonable suspicion' element of the offences in proposed Subdivision 308-A.

2.171 However the explanatory memorandum does not address why it is not appropriate to apply strict liability to the 'reasonable suspicion' element of the offences in proposed Subdivision 308-A, instead of absolute liability or why it is inappropriate to exclude the defence of reasonable mistake of fact. The committee is concerned that a person could be convicted of an offence under proposed Subdivision 308-A despite reasonably believing that excise duty or excise-equivalent customs duty had been paid. This is of particular concern with respect to the offences relating to the possession of tobacco in proposed sections 308-10, 308-15 and 308-20. For example, proposed subparagraph 308-55(1)(a) provides that the 'reasonable suspicion' element is taken to be satisfied if the tobacco is not in retail packaging that complies with the requirements in Chapter 2 of the *Tobacco Plain Packaging Act 2011* (Plain Packaging Act). If strict liability were applied to the 'reasonable suspicion' element, a person could raise a defence (to the offences relating to possession) if they came into possession of tobacco in packaging that they reasonably (yet mistakenly) believed to comply with the Plain Packaging Act. This appears consistent with the aims of the 'reasonable suspicion' element, which is to 'encourage persons dealing in tobacco to ensure that they comply with legislative requirements that apply to tobacco and tobacco products.'[93]

2.172 However, as absolute liability is applied that element, the person could be convicted of a possession offence (which may carry a significant custodial penalty) despite reasonably believing that the tobacco was packaged in accordance with the requirements of the Plain Packaging Act, and therefore reasonably believing that excise or customs duty had been paid.

2.173 The committee requests the minister's more detailed justification for the application of absolute liability (rather than strict liability) to:

- the weight of the tobacco, as an element of the offences in proposed Subdivisions 308-A and 308-B; and

92 Explanatory memorandum, p. 16.

93 Explanatory memorandum, p. 17.

- whether it is reasonable to suspect that excise or customs duty has not been paid, or is exempt from being paid under Commonwealth law, as an element of the offences in proposed Subdivision 308-A.

2.174 The committee's consideration of the appropriateness of applying absolute liability to these elements would be assisted if the justification explicitly addresses the principles set out in the *Guide to Framing Commonwealth Offences.*[94]

2.175 The committee also requests the minister's advice as to the appropriateness of amending the bill to apply strict liability, rather than absolute liability, to the elements identified above.

Minister's response

2.176 The minister advised:

> Proposed Subdivisions 308-A and 308-B create a range of offences that would apply to individuals that possess or otherwise deal with illicit tobacco. As the Committee notes, some elements of these offences, including those elements relating to the weight of the tobacco, and whether a reasonable suspicion exists that excise or excise-equivalent customs duty has not been paid, are subject to absolute liability.
>
> The Committee has sought more detailed justification for why these offences should not be subject to strict, rather than absolute, liability which would instead permit a defence of mistake of fact.
>
> I consider that, consistent with the Guide to Framing Commonwealth Offences, that both matters are pre-conditions of the offence for which the defendant's state of mind is not relevant.
>
> In the case of the weight of the tobacco, this is because the weight of the tobacco is an objective and important indicator of the seriousness of such offences. Consistent with the approach taken for offences involving commercial or marketable quantities of drugs, if a person holds or otherwise deals with the requisite quantity of tobacco it is appropriate and intended that the specified criminal and civil consequences should apply, even if the person mistakenly believed the quantity of tobacco involved was smaller.
>
> A potential imprisonment term applies for illicit tobacco offences for quantities of tobacco weighing 250 kilograms or more. As offences of this nature require large scale activities and organisation it is appropriate that absolute liability apply to the weight of the tobacco. Similarly, illicit tobacco offences involving tobacco weighing five kilograms or more are subject to a criminal offence for which a monetary penalty only applies. Five kilograms of tobacco represents the equivalent of 7,000 cigarettes

94 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 22-25.

with excise duty of over $4,500 applicable based on current duty rates and is a significant amount of tobacco. Given the highly regulated nature of tobacco, it would also be expected that any person controlling tobacco of this weight would be aware that serious consequences arise from possessing this quantity of tobacco without reason to believe that duty has been paid.

In this respect, it should be noted that these offences either require the prosecution to prove that duty was required to be paid and has not been paid on the tobacco or include a defence that will apply if the individual reasonably believed duty had been or was not required to be paid. Given this, a person can only be convicted of this offence as a result of a mistaken belief about weight if they either knew duty had not been paid or did not reasonably believe that duty was paid on the tobacco.

It should also be noted that the possessing or importing of any quantity of excisable or dutiable goods (including tobacco) remain offences under the *Excise Act 1901* and the *Customs Act 1901.*

In the case of reasonable suspicion, as the Committee notes, this element is also an entirely objective matter going to the circumstances in which the tobacco is held or otherwise dealt with rather than about the state of mind of the defendant. It is not relevant whether the defendant had a reasonable suspicion or was aware of the factor or factors that gave rise to the suspicion, merely that the factor or factors existed.

I understand the Committee has concerns that this may mean that a person may be convicted of the offence despite reasonably but mistakenly believing that a reasonable suspicion could not exist and therefore believing that the excise or customs duty had been paid.

All of the offences for which reasonable suspicion is an element of the offence include a defence that will apply if a person reasonably believes that duty has been paid or was not required to be paid, for whatever reason. This defence goes beyond the defence of mistake of fact and ensures that a person will not be subject to the offence even if the person may be aware of a factor that might give rise to a reasonable suspicion (such as a defect in packaging).

Committee comment

2.177 The committee thanks the minister for this response, and notes the minister's advice that the weight of the tobacco and whether a 'reasonable suspicion' exists are preconditions to offences for which the defendant's state of mind is not relevant, and it is therefore appropriate to apply absolute liability to these matters.

2.178 With respect to the weight of the tobacco, the committee notes the minister's advice that weight is an objective and important indicator of the seriousness of the relevant offences, and that it is appropriate and intended that the specified consequences should apply irrespective of whether the defendant mistakenly believed that the quantity of tobacco involved was smaller. The

committee also notes the minster's advice that this approach is consistent with the approach taken for offences involving commercial or marketable quantities of drugs.

2.179 The committee further notes the minister's advice that a custodial penalty may only be imposed for illicit tobacco offences involving quantities of tobacco weighing 250 kilograms or more, and that because offences of this nature require large scale activities and organisation it is appropriate that absolute liability apply to the weight of the tobacco. The committee also notes the minister's advice that only pecuniary penalties apply to offences involving tobacco weighing five kilograms or more, as well as advice that a person controlling tobacco weighing five kilograms or more[95] would be aware that serious consequences arise from possessing this quantity of tobacco without having reason to believe that duty has been paid or is not payable.

2.180 Finally, the committee notes the minister's advice that the offences applying absolute liability to the weight of the tobacco either require the prosecution to prove that duty was required to be paid and has not been paid, or include a defence that will apply if the individual reasonably believed that duty had been paid or was not payable. The committee notes the minister's advice that a person can therefore only be convicted of one of these offences as a result of a mistaken belief about weight if they either knew duty had not been paid or did not reasonably believe that duty was paid or was not payable.

2.181 With respect to the element of 'reasonable suspicion', the committee notes the minister's advice that this element is an entirely objective matter going to the circumstances in which the tobacco is held or otherwise dealt with, rather than to the state of mind of the defendant. The committee also notes the minister's advice that it is not relevant whether the defendant had a reasonable suspicion or was aware of the factor or factors that gave rise to the suspicion—it is sufficient that the relevant factor or factors existed.

2.182 The committee further notes the minister's advice that all of the offences for which reasonable suspicion is an element include a defence that will apply if a person reasonably believes that duty has been paid or is not payable. The committee notes the minister's advice that this goes beyond the defence of mistake of fact and ensures that a person will not be subject to the offence even if the person may be aware of a factor that might give rise to a reasonable suspicion.

2.183 Finally, the committee notes the minister's advice that, to the extent that a person may have made a mistake of fact about a matter giving rise to reasonable suspicion, but does not believe that duty has been paid or was not payable, then their mistake does not affect their culpability but only goes to the circumstances. In this regard, the committee notes the example provided by the minister that it would

95 The minister has advised that five kilograms of tobacco represents the equivalent of 7,000 cigarettes, and would attract an excise duty of over $4,500.

not be appropriate for a person's belief that they have properly packaged illicit tobacco to allow them to escape liability for an offence in relation to tobacco on which they believe duty has not been paid.

2.184 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*).

2.185 In light of the detailed explanation provided by the minister, the committee otherwise makes no further comment on this matter.

Reversal of the evidential burden of proof[96]

2.186 As noted above, proposed Subdivisions 308-A and 308-B seek to create a number of offences relating to the possession, purchase, sale, manufacture and production of tobacco. The penalties imposed in relation to those offences vary depending on the weight of the tobacco in question, and range from the greater of 200 penalty units and five times the excise duty that would be payable on the tobacco, to 10 years imprisonment, the greater of 1,500 penalty units and five times the excise duty that would payable on the tobacco, or both. Proposed Subdivision 308-C seeks to create two offences relating to the possession of equipment for the manufacture or production of tobacco. Those offences are punishable by imprisonment for 12 months, 120 penalty units, or both

2.187 In relation to each of the proposed offences, the bill proposes to include exemptions (offence-specific defences). The following exemptions are included in relation to all of the offences in proposed Subdivision 308-A, as well as in relation to a number of the offences in proposed Subdivision 308-B:[97]

- that the tobacco is kept or stored at premises specified in a licence under the Customs Act or the Excise Act;[98]

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96 Schedule 1, item 6, proposed Subdivisions 308-A, 308-B and 308-C. The committee draws senators' attention to the provisions in those proposed subdivisions pursuant to Senate Standing Order 24(1)(a)(i).

97 The exemption relating to permission under the Excise Act to possess, move or transfer the tobacco, or to deliver the tobacco for home consumption, does not apply to the offences in proposes sections 308-125, 308-130 and 308-135.

98 See proposed subsections 308-10(7), 308-15(7), 308-20(7), 308-25(7), 308-30(7), 308-35(7), 308-40(7), 308-40(7), 308-45(7), 308-50(7), 308-110(6), 308-115(6), 308-120(6), 308-125(6), 308-130(6) and 308-135(6).

- that the defendant is specified in a movement permission under the Customs Act or the Excise Act, or has an authority to take the tobacco into warehousing under the Customs Act;[99] and
- that the defendant has permission under the Excise Act to possess, move or transfer the tobacco, or to deliver the tobacco for home consumption.[100]

2.188 With respect to the offences in proposed Subdivision 308-A, the bill provides an additional defence. The defence applies where excise or customs duty has been paid, where there is an exemption to the payment of excise or customs duty under a law of the Commonwealth, or where the defendant has reasonable grounds to suspect that one of those circumstances exists.[101]

2.189 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.

2.190 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.

2.191 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences*[102] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the relevant offence) where:

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

2.192 With respect to the defences in proposed Subdivision 308-A, the explanatory memorandum states:

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99 See proposed subsections 308-10(8), 308-15(8), 308-20(8), 308-25(8), 308-30(8), 308-35(8), 308-40(8); 308-40(8), 308-45(8) and 308-50(8), 308-110(7), 308-115(7), 308-120(7), 308-125(7), 308-130(7) and 308-135(7).

100 See proposed subsections 308-10(9), 308-15(9), 308-20(9), 308-25(9), 308-30(9), 308-35(9), 308-40(9); 308-40(9), 308-45(9) and 308-50(9), 308-110(8), 308-115(8) and 308-120(8).

101 See proposed subsections 308-10(10), 308-15(10), 308-20(10), 308-25(10), 308-30(10), 308-35(10), 308-40(10), 308-40(10), 308-45(10) and 308-50(10).

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

> This is appropriate [that the defendant bears an evidential burden] given the knowledge that the defendant has concerning the possession, buying or selling of the tobacco, the capacity of defendants to provide that information, the difficulty of law enforcement agencies obtaining the information and the seriousness of the offence.
>
> …
>
> Having defences with an evidential burden of proof is appropriate and is consistent with the Guide to Framing Commonwealth Offences.[103]

2.193 The explanatory memorandum indicates that this explanation also applies to the defences in proposed Subdivision 308-B.[104] The explanatory memorandum does not provide further information about the defences in proposed Subdivisions 308-A and 308-B, merely restating the operation of the relevant provisions.

2.194 The committee notes the brief explanation in the explanatory memorandum. However, it remains unclear to the committee that all of the matters captured by the defences in proposed Subdivisions 308-A and 308-B would be *peculiarly* within the knowledge of the defendant. For example, the committee considers it likely that whether premises are covered by a licence, or whether a person is covered by movement permission, could be established by the prosecution through reasonable inquiries. The question of whether customs or excise duty has been paid, or whether an exemption exists to the payment of duty under a law of the Commonwealth (as a defence to the offences in proposed Subdivision 308-A) could similarly be established by the prosecution through reasonable inquiries.

2.195 The committee acknowledges that whether a person *has reasonable grounds to suspect* that excise or customs duty has been paid, or that an exemption to the payment of duty exists under a Commonwealth law (as a defence to the offences in proposed Subdivision 308-A), could in some circumstances be matters that are peculiarly within the knowledge of the defendant. However, the committee would expect a more detailed explanation of whether this is the case to be provided in the explanatory memorandum.

2.196 As the explanatory memorandum does not adequately address this issue, the committee requests the minister's more detailed justification for the reversal of the evidential burden of proof in the defences in proposed Subdivisions 308-A and 308-B. The committee's consideration of the appropriateness of provisions that reverse the evidential burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences.*[105]

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103 Explanatory memorandum, p. 24.

104 Explanatory memorandum, p. 31 (paragraph 1.132).

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

Minister's response

2.197 The minister advised:

> Proposed Subdivision 308-A and 308-B create a range of offences that would apply to individuals that possess or otherwise deal with illicit tobacco.
>
> As noted by the Committee, the Bill would also establish a range of defences to these offences, applying broadly if the tobacco is held, moved or otherwise dealt with under a permission, authority or licence that permits such dealings. The offences in Subdivision 308-A, which apply where there is a reasonable suspicion that excise or excise-equivalent customs duty was required to be paid and has not been paid also provide for a defence that would apply if excise or excise-equivalent customs duty has been paid or was not required to be paid on the tobacco, or the person reasonably believes that this was the case.
>
> The Committee has sought further justification for why these defences are not instead elements of the offence.
>
> I consider that the approach in the Bill is appropriate as the matters covered by the defences are peculiarly within the knowledge of the defendant and would create practical challenges for the prosecution to disprove.
>
> In the case of the permission authority and licence defences, there are a wide range of provisions under which a person may have legal authority to hold, transport or otherwise deal with tobacco. Many of the provisions provide for ongoing or continuing authorities and apply both to activities of a person and their agents.
>
> If tobacco is found in a defendant's possession, knowledge about the existence of any relevant authorisation (or at least of where details of such an authority may be obtained) will be peculiarly within the knowledge of the defendant. Absent evidence from the defendant, the prosecution will not have any knowledge about whether any specific provisions may apply but would need to consider each of the potentially applicable permissions. Checking a quantity of tobacco against each potentially applicable authorisation would impose a very significant burden on the prosecution that would be impractical to administer.
>
> In the case of defences relating to excise or excise-equivalent customs having been paid or the defendant reasonably believing that this is the case, as the Explanatory Memorandum to the Bill outlines in paragraphs 1.11 to 1.12 and 1.46 to 1.48, the new 'reasonable suspicion' offences are being introduced in part because of evidentiary challenges proving these matters in relation to existing offences. Specifically, enforcement agencies advised that where tobacco was found in Australia, there were significant practical obstacles proving whether tobacco was illegally produced or manufactured in Australia (and so should have been subject to excise) or

illegally imported to Australia (and so should have been subject to excise-equivalent customs duty).

Given this, including these elements or a similar element going to whether the defendant reasonably believed that duty had been or was not required to be paid in the new reasonable suspicion offences would have replicated existing problems. Instead, noting that details about the origins of the tobacco and the defendant's beliefs are readily accessible to the defendant, these matters have been addressed through the inclusion of specific defences.

Committee comment

2.198 The committee thanks the minister for this response. The committee notes the minister's advice that the reversal of the burden of proof in the defences in proposed Subdivisions 308-A and 308B is appropriate as the matters covered by the defences are peculiarly within the knowledge of the defendant and would create practical challenges for the prosecution to disprove.

2.199 With respect to the 'permission, authority and licence' defences, the committee notes the minister's advice that there a wide range of provisions under which a person may have the legal authority and where tobacco is found in a defendant's possession, knowledge about the existence of any relevant authorisation (or at least where details of such an authority may be obtained) 'will be peculiarly within the knowledge of the defendant'. The committee notes the minister's advice that, absent evidence from the defendant, the prosecution would not have any knowledge about whether any specific provisions apply but would need to consider each of the potentially applicable provisions which would impose a very significant burden on the prosecution that would be impractical to administer.

2.200 While noting the minister's advice, the committee remains concerned that the existence of an applicable authorisation, permission or licence does not appear in all cases to be a matter that is peculiarly within the knowledge of the defendant, as whether an authorisation has been granted would, for example, appear to be a matter of which the person or entity granting the relevant authorisation would be particularly apprised.

2.201 With respect to the defences relating to whether excise or excise-equivalent customs duty has been paid or is not payable, or the defendant reasonably believes this to be the case, the committee notes the minister's advice that the new 'reasonable suspicion' offences in proposed Subdivision 308-A[106] are being introduced in part because of evidentiary challenges in proving these matters in

106 The committee notes that the defences relating to whether excise or excise-equivalent customs duty has been paid (or is not payable), or the defendant reasonably believing this to be the case, apply only in relation to the 'reasonable suspicion' offences in proposed Subdivision 308-A.

relation to existing offences. The committee notes the advice that enforcement agencies have advised that, where tobacco was found in Australia, there were significant practical obstacles in proving whether the tobacco was illegally produced or manufactured in or imported to Australia, and whether the tobacco should therefore have been subject to excise or customs duty.

2.202 The committee further notes the minister's advice that including the matters of whether excise or customs duty had been paid or was not payable and whether the defendant reasonably believed this to be the case, as elements of the 'reasonable suspicion' offences in proposed Subdivision 308-A would replicate existing problems. The committee also notes the advice that these matters have therefore been included as offence-specific defences—in light of the fact that the origins of the tobacco and the defendant's beliefs about the payment of excise duty are readily accessible to the defendant.

2.203 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*).

2.204 In light of the information provided by the minister, the committee makes no further comment on the reversal of the evidential burden of proof in the defences to the 'reasonable suspicion' offences in proposed Subdivision 308-A.[107]

2.205 The committee otherwise draws its scrutiny concerns regarding the remaining defences (the 'permission, authority and licence' defences) in proposed Subdivisions 308-A and 308-B to the attention of senators, and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in those provisions.

107 The defences to the 'reasonable suspicion' offences appear in proposed subsections 308-10(10), 308-15(10), 308-20(10), 308-25(10), 308-30(10), 308-35(10), 308-40(10), 308-40(10), 308-45(10) and 308-50(10).

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 bills to the attention of Senators:

- **Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018**—clauses 12 and 20.
- **Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018**—Schedule 3, item 5, proposed subsection 278(3).

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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*.

- **Public Sector Superannuation Legislation Amendment Bill 2018**— Schedule 1, Part 1, item 8, proposed subsection 17AL(3).

Senator John Williams
Acting Chair