The Senate

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 comments on the following bill and, in some instances, seeks a response or further information from the relevant minister.

Customs Amendment (Product Specific Rule Modernisation) Bill 2019

Purpose	This bill seeks to amend the *Customs Act 1901* to change the way in which the product specific rules of origin of six of Australia's free trade agreement are given effect domestically.
Portfolio	Home Affairs
Introduced	House of Representatives on 12 September 2019

Parliamentary scrutiny[1]

1.2 The main provisions in this bill seek to amend the *Customs Act 1901* (the Customs Act) to change the way in which the product specific rules of origin (PSRs) of six of Australia's free trade agreements (FTA) are given effect domestically. PSRs are set out in an Annex to each FTA and list goods according to their Harmonized System classification. Currently, the relevant PSRs for each FTA are prescribed via regulations made under the Customs Act. The bill seeks to amend the Customs Act to apply the PSRs for each FTA by direct reference to the PSR Annex in each FTA.

1.3 In addition, the bill also seeks to amend the Customs Act to:

- amend the definitions of 'Harmonized System' in the Customs Act for each FTA to expressly recognise the version of the Harmonized System currently set out in each FTA and to allow subsequent versions of the Harmonized System to be recognised if and when the PSRs are updated to recognise a newer version of the Harmonized System in each FTA;[2] and
- repeal the definition of 'textile and clothing goods' in section 126AE and insert a new definition of 'textile or apparel good' which would provide that this term has the meaning given by Article 1.2 of Chapter 1 of the Australia-United States FTA (section 126AE provides that authorised officers may

1 General comment. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

2 Items 8, 18, 26, 33, 40 and 46 of Schedule 1.

request records or ask questions relating to the exportation of textile and clothing goods to the United States).[3]

1.4 Each of these changes will have an impact on the level of parliamentary scrutiny of changes to the relevant FTAs. The amendments to the definitions of 'Harmonized System' and 'textile and clothing goods' mean that when the definitions of these terms are updated in the relevant FTAs the Customs Act will not need to amended to recognise the updated definitions.

1.5 In relation to applying the PSRs for each FTA by direct reference to the PSR Annex for each FTA, these amendments will remove the need for regulations under the Customs Act to prescribe the PSRs for each FTA. The bill also provides that if the relevant Annex is updated, the updated version will apply. As a result, there will be no need to amend regulations when changes are made to the PSRs under the FTAs.

1.6 The explanatory memorandum states:

> Directly referring to the Annex containing the PSRs, rather than implementing them through regulations, does not change the operation of the PSRs. The amendments merely aim to simplify the way in which the PSR Annexes are implemented domestically.[4]

1.7 However, 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 obligated to obey the law may have inadequate access to its terms.

1.8 Additionally, the committee notes that the removal of the PSRs from regulations may limit the opportunity of Parliament to review and scrutinise the content of the PSRs. The *Legislation Act 2003* requires that all legislative instruments, including regulations, are required to be tabled in both Houses of the Parliament. Members of either House of the Parliament can then give notice that they intend to a motion to disallow a legislative instrument within 15 sitting days of the instrument being tabled before that House. This provides Parliament with the ability to review and scrutinise delegated legislation made by the executive.

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3 Items 1–4 of Schedule 1.

4 Explanatory memorandum, p. 6.

1.9 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of amending the definitions of 'Harmonized System' and 'textile and clothing goods' in the Customs Act and removing the product specific rules from regulations and instead incorporating them by reference in the primary legislation.

Bills with no committee comment

1.10 The committee has no comment in relation to the following bills which were introduced into the Senate between 11 – 14 November 2019:

- Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019; and
- Public Governance, Performance and Accountability Amendment (Tax Transparency in Procurement and Grants) Bill 2019.

Commentary on amendments and explanatory materials

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

- National Disability Insurance Scheme Amendment (Streamlined Governance) Bill 2019;[5] and
- Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019.[6]

5 On 14 November 2019 the Senate agreed to two Government amendments, the Minister for Social Services (Senator Ruston) tabled a supplementary explanatory memorandum and the bill was read a third time.

6 On 12 November 2019 the Senate agreed to one Government amendment, the Minister for Finance tabled a supplementary explanatory memorandum and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

Aged Care Legislation Amendment (New Commissioner Functions) Bill 2019

Purpose	This bill seeks to amend various Acts in relation to aged care to transfer additional aged care regulatory functions to the Aged Care Quality and Safety Commissioner
Portfolio	Health
Introduced	Senate on 16 October 2019
Bill status	Before the Senate

Use of force[1]

2.1 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to what safeguards will be in place to ensure that force is only used by authorised officers and persons assisting them in appropriate circumstances.[2]

Minister's response[3]

2.2 The minister advised:

> Subsections 74B(5) and 74D(4) of the Quality and Safety Commission Act, and subsections 92-1(6) and 92-3(4) of the Aged Care Act empower authorised officers to use such force against things as is necessary and reasonable in the circumstances. The explanatory memorandum notes authorised officers will require the ability to use force to open locked

1 Schedule 2, items 29 and 85, proposed Part 6.4 of the *Aged Care Act 1997* and proposed Part 8A of the *Aged Care Quality and Safety Commission Act 2018*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 1-2.

3 The minister responded to the committee's comments in a letter dated 22 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

doors, cabinets, drawers and other similar objects when executing a warrant obtained in circumstances such as where entry has been demanded but refused, or where an approved provider has abandoned the premises. The Committee has requested advice on what safeguards will be implemented to ensure force is only used in appropriate circumstances.

Under the Bill, the use of force powers will only be exercised in the execution of a monitoring or investigation warrant under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). Under subsections 32(2) and 70(2) of the Regulatory Powers Act a judicial officer can only grant a warrant if the officer is satisfied that it is reasonably necessary that an authorised officer has access to premises for the purposes of determining whether a provision is being complied with or information given in purported compliance with a provision is correct, or where there are reasonable grounds for suspecting there is evidence of an offence on the premises within the next 72 hours, respectively. Further, as a matter of practice, it is intended authorised officers will only seek warrants where consent of occupiers to enter premises cannot be obtained. This is consistent with existing regulatory practice, where regulatory officials of the Quality and Safety Commission and authorised officers of the Department are generally able to successfully negotiate entry to premises, without resorting to the use of warrants.

While persons assisting an authorised officer are also empowered to use force, consistent with principles set out under *A Guide to framing Commonwealth offences, infringement notices and enforcement powers*, this power is appropriately limited to the use of force against things and does not extend to the use of force against persons. In practice, additional safeguards here will not be necessary since persons assisting authorised officers are intended to either be authorised officers themselves or, where these persons are not authorised officers, these persons are not intended to assist an authorised officer by using force. Please see below for further explanation regarding the intended role of persons assisting.

To ensure the use of force is only exercised when necessary and appropriate, directions could be given for this purpose. Paragraphs 23(2)(d) and 53(2)(d) of the Regulatory Powers Act will require a person assisting an authorised officer to act in accordance with a direction given by the authorised officer. Under subsections 76(2) of the Quality and Safety Commission Act, authorised officers will in turn be subject to the directions of the Quality and Safety Commissioner.

These arrangements may help ensure the power to use force is only available in circumstances where it is necessary to enter premises under warrant to determine compliance or gather evidential material where there are reasonable grounds to suspect this material is at the premises.

Committee comment

2.3 The committee thanks the minister for this response. The committee notes the minister's advice that the use of force powers will only be exercised in the execution of a monitoring or investigation warrant under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*. The committee also notes the minister's advice that it is intended authorised officers will only seek warrants where consent of occupiers to enter premises cannot be obtained.

2.4 The committee further notes the minister's advice that where persons assisting authorised officers are not authorised officers themselves, these persons are not intended to assist an authorised officer by using force. The committee also notes the minister's advice that directions could be given either by authorised officers or the Quality and Safety Commissioner about the use of force.

2.5 While the committee welcomes the minister's detailed advice, the committee notes that no details have been provided regarding whether appropriate guidance materials will be developed by the Commission around the use of force. In addition, if the use of force is intended to only be used by persons who are authorised officers, it is unclear why that limitation cannot be provided for on the face of the primary legislation.

2.6 Noting the scrutiny concerns outlined above, the committee considers that it may be appropriate to amend the bill to limit the use of force to persons who are authorised officers by omitting proposed paragraphs 92-1(6)(b) and 92-3(4)(b) of the *Aged Care Act 1997* and proposed paragraphs 74B(6)(b) and 74D(4)(b) of the *Aged Care Quality and Safety Commission Act 2018*.

2.7 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*).

2.8 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the use of force provisions in the bill.

Broad delegation of investigatory powers[4]

2.9 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to the appropriateness of amending the bill to require that any person assisting an authorised officer have appropriate skills, training or experience.[5]

Minister's response

2.10 The minister advised:

> Subsections 74B(5) and 74D(3) of the Quality and Safety Commission Act and subsections 92-1(5) and 92-3(3) of the Aged Care Act will provide for an authorised officer to be assisted by other persons exercising powers or performing functions under Parts 2 and 3 of the Regulatory Powers Act. A person assisting may exercise these powers or perform these functions for the purposes of assisting an authorised officer to monitor a provision or to investigate the contravention of a civil penalty or an offence provision. Paragraphs 23(1)(a) and 53(1)(a) of the Regulatory Powers Act provide that a person exercising monitoring or investigation powers may only be assisted by another person if it is necessary and reasonable to do so. The Committee requests advice on the appropriateness of amending the Bill to require persons assisting authorised officers to have appropriate skills, training or experience.
>
> It is unnecessary to specify in legislation that persons assisting authorised officers have particular skills or attributes relating to their training or experience given the circumstances in which the assistance of another person will be necessary and reasonable will not always require that person to have particular skills and experience relating to the exercise of any coercive regulatory powers. In most circumstances, a person assisting an authorised officer will already be an authorised officer of the Quality and Safety Commission. In other circumstances, a person will assist an authorised officer in the areas identified in the explanatory memorandum by providing relevant expertise and advice to inform an authorised officer in determining whether an approved provider has complied with a monitored provision, or in gathering evidential materials relating to a contravention of a civil penalty or offence provision. A person assisting is not expected to assist an authorised officer to determine compliance or gather evidential material by separately determining compliance or gathering evidential material under Parts 2 and 3. A person assisting would also be subject to any directions given by an authorised officer under paragraphs 23(2)(d) and 53(2)(d) who will continue to have direct

4 Schedule 2, items 29 and 85, proposed subsections 92-1(5) and 92-3(3) of the *Aged Care Act 1997* and proposed subsections 74B(5) and 74D(3) of the *Aged Care Quality and Safety Commission Act 2018*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, p. 2.

responsibility and oversight of the powers exercised and functions performed under Parts 2 and 3 of the Regulatory Powers Act.

Committee comment

2.11 The committee thanks the minister for this response. The committee notes the minister's advice that it is unnecessary to specify in legislation that persons assisting authorised officers have particular skills or attributes relating to their training or experience given the circumstances in which the assistance of another person will be necessary and reasonable will not always require that person to have particular skills and experience relating to the exercise of any coercive regulatory powers.

2.12 The committee further notes the minister's advice that in most circumstances, a person assisting an authorised officer will already be an authorised officer of the Quality and Safety Commission and in other circumstances, a person will assist an authorised officer in the areas identified in the explanatory memorandum by providing relevant expertise and advice to inform an authorised officer in determining whether an approved provider has complied with a monitored provision, or in gathering evidential materials relating to a contravention of a civil penalty or offence provision.

2.13 The committee reiterates that its consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have the appropriate training and experience. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular circumstances of an investigation however, from a scrutiny perspective, the committee remains concerned that 'other persons' will be authorised to assist in monitoring and investigation without any requirement for them to have the appropriate training or expertise to use the relevant monitoring or investigatory powers. The committee's concerns are heightened in this instance by the inclusion of provisions allowing for the use of force.

2.14 If the bill is not amended to limit the use of force to persons who are authorised officers as outlined at paragraph 2.6 above, the committee considers that it may be appropriate to amend the bill to require that a person assisting an authorised officer has suitable training or experience to properly exercise the powers for which the person will be authorised to use.

2.15 In this respect, the committee notes that existing provisions of the bill provide that the Secretary and Commissioner must not appoint a person as an authorised officer unless the Secretary or Commissioner is satisfied that the person has suitable training or experience to properly perform the functions, or exercise

the powers, of an authorised officer,[6] however this requirement does not extend to persons assisting.

2.16 The committee otherwise draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing authorised officers to be assisted by other persons with no requirement that the other person has suitable training or experience to properly exercise the powers for which the person will be authorised to use.

Broad delegation of administrative power[7]

2.17 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to:

- why it is necessary to allow the Commissioner's powers under Part 7B to be delegated to *any* Commission staff member or APS employee of the department; and
- the appropriateness of amending the bill to provide some legislative guidance as to the scope of the powers that might be delegated, or the categories of people to whom those powers might be delegated.[8]

Minister's response

2.18 The minister advised:

> Subsection 76(1A) of the Quality and Safety Commission Act will provide that the Quality and Safety Commissioner may, in writing, delegate any of the Commissioner's functions or powers under Part 7B to a member of the staff of the Quality and Safety Commission or to an APS employee in the Department. Broad discretion in the delegation of the functions under Part 7B is necessary to ensure the broader policy objectives of the Bill to transfer, centralise and integrate regulatory functions, can be achieved through its administration.
>
> The Committee has requested advice on why it is necessary to allow these functions and powers to be delegated to any of these categories of persons and whether it would be appropriate to confine the scope of powers that might be delegated or the categories of persons to whom these powers might be delegated. These are set out below.
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> Delegation to particular persons

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6 Proposed subsection 94-2(2) of the *Aged Care Act 1997* and proposed subsection 75A(2) of the *Aged Care Quality and Safety Commission Act 2018*.

7 Schedule 2, item 90, proposed subsections 76(1A) and (1B). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, p. 3.

Limiting the delegation of the Quality and Safety Commissioner's functions under Part 7B of the Quality and Safety Commission Act to either staff members of the Quality and Safety Commission or APS employees of the Department ensures that coercive regulatory powers are only exercised by officers who are subject to the accountabilities of their employment by the Commonwealth. This is consistent with position set out in *A Guide to framing Commonwealth offences, infringement notices and enforcement powers*.

Delegation of particular powers under Part 7B

In addition, it would not be appropriate to limit the delegation of the Quality and Safety Commissioner's functions under Part 7B of the Quality and Safety Commission Act in terms of the powers or functions delegated as set out below.

Delegations to a member of the staff of the Quality and Safety Commission
The power to delegate the Quality and Safety Commissioner's functions or powers under Part 7B of the Quality and Safety Commission Act to any member of staff of the Quality and Safety Commission is intended to ensure the Commissioner retains the flexibility to determine how the functions and powers which will transfer to the Commissioner will be integrated into the Commissioner's existing functions. This is consistent with the broader policy objectives of the Bill to address fragmentation and silos in the regulation of quality of care and safety, which were identified in the Review of National Aged Care Quality Regulatory Processes. The Bill's policy objective is set out in the outline of the explanatory memorandum.

Delegations to an APS employee of the Department
Subsection 63N(2) of the Quality and Safety Commission Act provides that the Quality and Safety Commissioner's function to impose sanctions under Part 7B, is to be performed with regard to Information provided by the Secretary about an approved provider's compliance with the aged care responsibilities imposed under paragraphs 63-1(1)(a) and 63-1(1)(h) of the Aged Care Act. Given the Quality and Safety Commissioner's enforcement of these responsibilities under Part 7B directly supports the Secretary's functions relating to appraisals and reappraisals of the needs of care recipients under Part 2.4 of the Aged Care Act, the Commissioner's functions under Part 7B may be delegated to an APS employee of the Department under paragraph 76(1A)(b) of the Quality and Safety Commission Act.

The Quality and Safety Commissioner is intended to have the flexibility to delegate the Commissioner's functions under Part 7B of the Quality and Safety Commission Act to any APS employee of the Department, to ensure the Commissioner's delegated functions can be integrated with those functions which will continue to be performed by the Secretary under Part 2.4 of the Aged Care Act following the commencement of the Schedules of this Bill. Integration of these overlapping functions between the Quality

> and Safety Commissioner and the Secretary would be hindered by limiting in legislation the Commissioner's power to delegate powers or functions under Part 7B to particular persons since the Secretary's power to delegate functions or powers under Part 2.4 is not currently limited to any particular person under the Aged Care Act. Mutually corresponding provisions governing the delegation of these particular functions or powers by the Quality and Safety Commissioner and Secretary will be necessary to facilitate the integration of these functions where the exercise of this power to delegate by the Commissioner may be informed by how the Secretary delegates the Secretary's functions and powers under the Aged Care Act.

Committee comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that limiting the delegation of the Quality and Safety Commissioner's functions under Part 7B of the Quality and Safety Commission Act to either staff members of the Quality and Safety Commission or APS employees of the Department ensures that coercive regulatory powers are only exercised by officers who are subject to the accountabilities of their employment by the Commonwealth.

2.20 The committee further notes the minister's advice that the power to delegate the Quality and Safety Commissioner's functions or powers to any member of staff of the Quality and Safety Commission is intended to ensure the Commissioner retains the flexibility to determine how the functions and powers which will transfer to the Commissioner will be integrated into the Commissioner's existing functions. The committee also notes the minister's advice that the Quality and Safety Commissioner is intended to have the flexibility to delegate the Commissioner's functions to any APS employee of the Department, to ensure the Commissioner's delegated functions can be integrated with those functions which will continue to be performed by the Secretary under the Aged Care Act

2.21 While the committee notes this advice, the committee reiterates its preference that 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. The committee has generally not accepted administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

2.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Aged Care Quality and Safety Commissioner to delegate any of his or her functions or powers under Part 7B to any staff member of the Commission or any APS employee of the Department.

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2019

Purpose	This bill seeks to amend various Acts in relation to communications to: • remove reporting requirements that require incoming controllers of regulated media assets to notify Australian Communications Media Authority (ACMA) of changes in the control of a licence or publication; • remove requirements for certain television broadcaster to apply different classification standards for films when developing industry codes of practice; • enable the Minister to appoint an industry-based numbering manager in place of ACMA; • update the transition support payment for Network Investments; • remove tariff-filing arrangements applying to the telecommunications industry; • review statutory information collection powers of ACMA and the Australian Competition and Consumer Commission every five years; • permit the National Broadband Network companies to dispose of surplus non-communications goods; • require ACMA to publish a notice both on its website and in one or more forms that are readily accessible when it is determining, varying or revoking a program standard or standard relating to datacasting; • remove the obligation on a developer to install fibre-ready pit and pipe; and • repeal various spent Acts
Portfolio	Communications, Cyber Safety and the Arts
Introduced	House of Representatives on 16 October 2019
Bill status	Passed the House of Representatives

Parliamentary scrutiny
Adequacy of review rights[9]

2.23 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to:

- the appropriateness of potentially removing parliamentary scrutiny and oversight of the scheme for the numbering of carriage services by providing an avenue for the scheme to be established other than by disallowable legislative instrument;
- whether judicial review and independent merits review of decisions made under a numbering scheme managed by the number scheme manager will be available; and
- the appropriateness of amending the bill to include additional guidance about what would constitute 'effective complaints processes' for the purposes of proposed paragraph 454C(2)(n).[10]

Minister's response[11]

2.24 The minister advised:

> The Bill proposes amendments to the *Telecommunications Act 1997* (Tel Act) to enable the Minister for Communications to appoint an industry-based numbering manager, a function that is currently managed by the Australian Communications and Media Authority (ACMA). The changes will mean that industry, which is directly involved in developing telecommunications services, could introduce new numbering ranges for use in Australia more quickly than ACMA. Also, the reduction in regulatory involvement by ACMA could result in reduced administrative costs for the Government.
>
> Under the proposed measure, the transition to industry-based numbering management would only take place if a number of safeguards were met. The Minister would only be able to appoint someone to be the numbering scheme manager if he or she was satisfied that they would be able to administer the scheme in accordance with the numbering scheme principles in the Bill. The Minister is not compelled to appoint an industry manager, and in this sense, the alternative arrangement is voluntary. It is expected that any proposed numbering scheme would be well-developed

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9 Schedule 6, item 10, proposed Subdivision AA of Division 2 of Part 22 of the *Telecommunications Act 1997*. The committee draws senators' attention to this provision pursuant to Senate Standing Orders 24(1)(a)(iii) and (v).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 13-15.

11 The minister responded to the committee's comments in a letter dated 25 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

before the Minister would consider appointing a private numbering manager. Before determining a person to be the numbering scheme manager, the Minister would be statutorily required to consult with ACMA and the Australian Competition and Consumer Commission (ACCC). Additionally, the Minister's appointment of a numbering scheme manager would be done by a legislative instrument, which is subject to Parliamentary scrutiny through the disallowance process.

In addition, the Minister would be able to direct the numbering scheme manager to amend the rules or change the processes of the numbering scheme in a manner consistent with the numbering scheme principles. ACMA and the ACCC would each have power to direct the scheme manager in relation to the management of the numbering scheme. The Minister will also have the power to direct the numbering scheme manager to comply with additional principles. All of these directions would be exercisable through legislative instruments subject to public and Parliamentary scrutiny and disallowance. The Bill also includes a further layer of oversight by requiring the numbering scheme manager to publicly consult on any significant changes to the numbering scheme. Ultimately, the Minister will have the power to address any problems by revoking the appointment of the numbering scheme manager.

The proposed arrangements align with the movement towards industry-based regulation of the telecommunications sector. For example, the management of electronic addressing and various numbering allocation functions have been managed by industry since 1999 and 2014 respectively. This is consistent with the objectives of the Act set out in section 4 of the Tel Act, which provides that telecommunications be regulated in a manner that promotes the greatest practicable use of industry self-regulation. A proposal for numbering to be regulated by industry, as a form of self-regulatory functions is wholly consistent with this objective.

Decisions made by the numbering scheme manager would be subject to judicial review to the extent that the decision represented the exercise of a power delegated to it by a public body or public official, or the exercise by the manager of a public function or public power with remedies available in judicial review proceedings.

The Committee has also enquired about whether additional guidance should be required in the Bill as to what would constitute an 'effective complaints process' under new paragraph 454C(2)(n) of the Tel Act. Proposed paragraph 454C(2)(n) requires the numbering scheme manager to provide an effective complaints process to both the telecommunications industry and users of carriage services. This principle requires avenues to be in place through which industry and consumers can have their complaints about actions which may affect their rights and obligations heard and addressed. This assessment process is best developed on a flexible administrative basis, as an overly prescriptive

assessment process could prove impractical and could lead to increased and unnecessary costs for industry and the Government.

In the event that the numbering scheme manager does not have an effective process in place for complaints, the Minister, ACMA and the ACCC would be expected to promptly use their respective powers to direct the numbering scheme manager to remedy the situation, noting that the numbering scheme manager is obliged to comply with such directions. Similarly, the Minister will be able to revoke the appointment of the numbering scheme manager at any time.

Committee comment

2.25 The committee thanks the minister for this response. The committee notes the minister's advice that the appointment of a numbering scheme manager would be done by a legislative instrument, which is subject to parliamentary scrutiny through the disallowance process. The committee also notes the minister's advice that the minister would be able to direct the numbering scheme manager to amend the rules or change the processes of the numbering scheme and that the numbering scheme manager is required to publicly consult on any significant changes to the numbering scheme. The committee also notes the minister's advice that any directions by the minister would be legislative instruments.

2.26 The committee notes the minister's advice that decisions made by the numbering scheme manager would be subject to judicial review to the extent that the decision represented the exercise of a power delegated to it by a public body or public official, or the exercise by the manager of a public function or public power with remedies available in judicial review proceedings. The committee further notes the minister's advice that proposed paragraph 454C(2)(n) requires avenues to be in place through which industry and consumers can have their complaints about actions which may affect their rights and obligations heard and addressed and that in the event that the numbering scheme manager does not have an effective process in place for complaints, the Minister, ACMA and the ACCC would be expected to promptly use their respective powers to direct the numbering scheme manager to remedy the situation

2.27 The committee reiterates that a complaints process is quite different to a system for merits review. The latter typically provides for review by an independent tribunal or decision-maker who is empowered to make a substitute decision on the basis of their view of what the correct or preferable decision should be.

2.28 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*).

2.29 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing for independent merits review in circumstances where there is limited legislative guidance on the operation of the new 'effective complaints process'.

Broad delegation of administrative powers[12]

2.30 In *Scrutiny Digest 8 of 2019* the committee requests the minister's advice as to:

- why it is considered necessary to allow for the ACMA's powers under the numbering plan to be delegated to any body corporate; and
- the appropriateness of amending the bill to provide guidance as to how a body corporate is to exercise any powers that are delegated to it.[13]

Minister's response

2.31 The minister advised:

> The Bill inserts proposed section 459A into the Tel Act which would enable ACMA to delegate, by writing, any or all of the powers conferred on ACMA by the numbering plan to a body corporate. Proposed section 459A replicates existing section 467 of the Tel Act, which is being repealed by the Bill. The change will make it certain that ACMA cannot apply this provision if there is an industry-based numbering scheme manager.
>
> ACMA has already been exercising its delegation function, with ZOAK Pty Ltd having been contracted in 2014 to undertake certain numbering functions on behalf of ACMA. The Government considers that including guidance in the Bill is not necessary, as the provision is working as intended.

Committee comment

2.32 The committee thanks the minister for this response. The committee notes the minister's advice that ACMA has already delegated certain numbering functions to a body corporate and that including additional guidance in the bill is not necessary as the provision is working as intended.

2.33 The committee reiterates its preference that, where a bill provides for the delegation of administrative powers, there is 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 does not consider the existence of

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12 Schedule 6, item 13, proposed section 459A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, p. 15.

provisions in current legislation to be, of itself, a sufficient justification for including a broad and undefined delegation power.

2.34 The committee draws its scrutiny concerns to senators and leaves to the Senate as a whole the appropriateness of allowing the ACMA's powers under the numbering plan to be delegated to any body corporate where no guidance is provided as to how a body corporate is to exercise any powers that are delegated to it.

Health Legislation Amendment (Data-matching and Other Matters) Bill 2019

Purpose	This bill seeks to authorise the matching of certain kinds of information to identify whether payments that have been made by the Commonwealth under the main health-related programs should not have been made The bill will also enable Commonwealth-funded health treatment to various persons administered by the Minister for Veterans' Affairs to be taken into account in determining whether a practitioner has engaged in a prescribed pattern of services that may be considered inappropriate practice for the purposes of the Professional Services Review scheme
Portfolio	Health
Introduced	House of Representatives on 23 October 2019
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Privacy[14]

2.35 In *Scrutiny Digest 8 of 2019* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the data-matching principles to delegated legislation; and
- the appropriateness of amending the bill to set out the principles on the face of the primary legislation.[15]

Minister's response[16]

2.36 The minister advised:

> I note the Committee's view that significant matters, such as the principles for how a data matching scheme will operate, should be included in the

14 Schedule 1, item 1, proposed section 132F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 21-22.

16 The minister responded to the committee's comments in a letter dated 24 November 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

primary legislation unless a sound justification for the use of delegated legislation is provided.

I wish to draw the Committee's attention to the significant operational provisions that govern the data matching scheme which are set out in primary legislation. These include:

- The restriction to data matching for specified compliance-related permitted purposes only (defined in section 132A of the Bill)
- Existing secrecy provisions in the *Health Insurance Act 1973* and the *National Health Act 1953* which govern disclosure of information obtained in the course of duties, including information which would form part of the data matching program
- The powers of the Australian Information Commissioner apply in relation to a breach of Part VIIIA of the Bill or the Australian Privacy Principles (section 132E of the Bill) and additional assessment powers also apply to the principles (proposed amendment to section 33C(1) of the *Privacy Act 1988*)
- Minimum requirements about what must be included in the principles and the requirement that the principles take into account the Australian Information Commissioner's *Guidelines to Data-matching in Australian Government Administration* (section 132F of the Bill).

In particular, section 132F of the Bill prescribes minimum requirements which must be included in the principles. For example, the principles must require the Chief Executive Medicare to take reasonable steps to ensure that personal information that is matched is accurate, complete and up to date, and must require the Chief Executive Medicare to take reasonable steps to destroy personal information that has been matched if the information is no longer needed for any purpose for which it was matched. In effect, the primary legislation ensures these protections will be in place.

However, the technical nature of the principles and the level of detail that is anticipated would not, in my view, be appropriate for primary legislation.

I refer to the *National Health (Privacy) Rules 2018* and the Australian Information Commissioner's *Guidelines to Data-matching in Australian Government Administration* as examples of detailed, technical information of this kind included in legislative instruments or non-legislative guidelines.

The principles made in a legislative instrument rather than primary legislation, allows necessary flexibility to respond in a timely fashion to changes in best practice in a rapidly evolving technological and privacy environment and to be responsive to advice provided by the Australian Information Commissioner and Australian National Audit Office.

The principles will sunset in 10 years which will enable an automatic review of their appropriateness to ensure they are modern and reflect contemporary realities. As the principles will be a legislative instrument for

> the purposes of the *Legislation Act 2003*, the making of the principles will require consultation and the scrutiny processes of that Act will also apply.
>
> It would not be appropriate to amend the Bill to include the data matching principles for the reasons set out above. I trust this addresses the Committee's concerns in relation to this issue.

Committee comment

2.37 The committee thanks the minister for this response. The committee notes the minister's advice that there are significant operational provisions that govern the data-matching scheme which are set out in primary legislation, including the minimum requirements for the principles set out in proposed section 132F of the bill. The committee further notes the minister's advice that the technical nature of the principles and the level of detail that is anticipated would not be appropriate for primary legislation.

2.38 The committee also notes the minister's advice that the principles will be subject to the usual sunsetting and parliamentary disallowance procedures in the *Legislation Act 2003*.

2.39 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*).

2.40 In light of the information provided and the fact that the data-matching principles will be subject to parliamentary disallowance, the committee makes no further comment on this matter.

Broad delegation of administrative powers[17]

2.41 In *Scrutiny Digest 8 of 2019* the committee therefore requested the minister's advice as to:

- why it is necessary to allow *all* of the Chief Executive Medicare's powers and functions to be delegated to *any* person; and
- the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.[18]

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17 Schedule 1, item 5, proposed subsections 6(9) – 6(12). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2019*, pp. 22-23.

Minister's response

2.42 The minister advised:

> I note the Committee's concerns in relation to legislation that allows the delegation of administrative powers to a relatively large class of persons, and the Committee's view that it prefers to see a limit set on either the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated.
>
> It is important for the Committee to note that under the Bill, delegates will be exercising their powers subject to the directions of the Chief Executive Medicare. The secrecy provisions in the *National Health Act 1953* still apply and delegates will only have access to information consistent with those existing restrictions (which will be persons working within the Medicare compliance framework).
>
> The nature of the powers in the Bill are unusual in that they do not relate to the making of decisions but to the task or act of matching data. Decisions in relation to compliance action taken as a result of data-matching, for example, are not authorised in the Bill.
>
> Data matching is highly technical and specialised and carried out by data experts who may not be holders of nominated office and unlikely to be Senior Executive Service officers. Therefore, the powers of delegation cannot be limited to these classes. It is also difficult to define qualifications and attributes to which a narrowing of the delegation may be hinged because of the diversity of qualifications and experience that is relevant in this field and the rapidly evolving technical environment.
>
> For these reasons, it is preferred that the delegation power to a person remains which is also consistent with the existing delegation power in the *National Health Act 1953*.

Committee comment

2.43 The committee thanks the minister for this response. The committee notes the minister's advice that delegates will be exercising their powers subject to the directions of the Chief Executive Medicare and that the secrecy provisions in the *National Health Act 1953* still apply. The committee further notes the minister's advice that the nature of the powers in the bill are unusual in that they do not relate to the making of decisions but to the task or act of matching data, which is highly technical and specialised and carried out by data experts who may not be holders of nominated office and unlikely to be Senior Executive Service officers.

2.44 The committee reiterates its preference that 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. The committee notes that there are no limitations on the face of the bill in regards to the scope of powers that may be delegated by the Chief Executive Medicare. For example, it appears to the committee that *any* of the Chief

Executive Medicare's existing or future powers under the *National Health Act 1953* (and regulations and legislative instruments made under the Act) will be able to be delegated to *any* person. The delegation of powers would therefore not be limited to the delegation of the proposed new data-matching powers in proposed Part VIIIA of the Act.

2.45 Noting the scrutiny concerns outlined above, the committee considers that it may be appropriate to amend item 5 of Schedule 1 to the bill to limit the delegation of the Chief Executive Medicare's powers to the delegation of the proposed new data-matching powers in proposed Part VIIIA of the *National Health Act 1953*.

2.46 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing *all* of the Chief Executive Medicare's powers and functions under the Act to be delegated to *any* person.

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

Senator Helen Polley
Chair

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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*.