Senate Standing

Committee for the Scrutiny of Bills

Scrutiny Digest 4 of 2024

20 March 2024

ISSN 2207-2004 (print)
ISSN 2207-2012 (online)

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This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 49.

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

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Committee information

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 50.

Chapter 1
Initial scrutiny

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

Agriculture (Biosecurity Protection) Charges Bill 2024
Agriculture (Biosecurity Protection) Levies Bill 2024[2]

Purpose	The bills seek to provide for the imposition of a new biosecurity protection levy and charge to be payable by certain producers of agricultural, forestry and fisheries products within Australia.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 28 February 2024
Bill status	Before the House of Representatives

Charges and levies in delegated legislation[3]

1.2 Subclause 7(1) of each of the Agriculture (Biosecurity Protection) Charges Bill 2024 and the Agriculture (Biosecurity Protection) Levies Bill 2024 (together, the Imposition Bills) seek to provide for the imposition, via regulation, of a biosecurity protection charge and levy (BPL) on a product that is exported from Australia, or on the export of a product from Australia.[4] Subclause 11(1) of each of the Imposition Bills seek to provide that the rate of the BPL is the rate specified in or worked out in accordance with the regulations.

1.3 The committee considers that it is for the Parliament, rather than the Executive, through the making of delegated legislation, to set the rates of a tax. At a minimum, some guidance in relation to the amount of a charge or levy that may be imposed in delegated legislation should be included in the enabling Act. Where a bill leaves the setting of the rate of a charge or levy to delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to do so. Further, if there is no limit on the amount of the charge or levy

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Agriculture (Biosecurity Protection) Charges Bill 2024 and Agriculture (Biosecurity Protection) Levies Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 51.

3 Subclauses 7(1) and 11(1) of each of the bills. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

4 Subclause 8(1) further seeks to provide that the regulations may impose a BPL in relation to one or more specified products in the circumstances prescribed by the regulations and clause 9 provides that the regulations may provide for exemptions from a charge.

that may be imposed, the explanatory memorandum should provide justification as to why it would not be appropriate to include such a limitation on the face of the bill.

1.4 In this instance, neither of the Imposition Bills provide a cap that will be applicable to the charges and levies. The explanatory memorandum explains:

> The Act would establish a framework that provides for [BPL or] charges to be imposed in relation to different products by regulations. Due to the number of products on which [BPL or] charge is to be imposed, it is necessary and appropriate for certain details of [levy rates or] charges to be included in the regulations rather than in the Act.
>
> By providing certain [BPL or] biosecurity protection charge settings to be located in the regulations, rather than split between the Act and the regulations, the proposed Act would increase accessibility for industry in understanding charge settings and would provide the necessary flexibility for rates of BPL to be adjusted where necessary and appropriate.[5]

1.5 While acknowledging the explanation in the explanatory memorandum, the committee remains concerned that the rate of a charge or levy may be set by the Executive, through the making of delegated legislation, without constraint that could be provided by including on the face of the bill appropriate guidance or the inclusion of limits on the amounts of BPL that may be imposed.

1.6 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the rates of charges and levies in each of the Agriculture (Biosecurity Protection) Charges Bill 2024 and the Agriculture (Biosecurity Protection) Levies Bill 2024 to be specified in, or worked out in accordance with, the regulations.

Incorporation of external materials as existing from time to time[6]

1.7 Subclause 18(1) of each of the Imposition Bills seek to provide that the Governor-General may make regulations prescribing matters required or permitted by the Act or by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subclause 18(3) seeks to provide that, despite subsection 14(2) of the *Legislation Act 2003*, the regulations may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

1.8 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

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5 Explanatory memorandum, pp. 16 and 30.

6 Subclause 18(3) of each of the bills. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

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.

1.9 The explanatory memorandum explains:

> It is considered appropriate to enable the incorporation of documents as they exist from time to time because the documents that would be referred to may include technical reference materials or production standards that are updated as required.
>
> It is intended that where the regulations would incorporate such documents, they would either be freely or publicly available, or they would be documents required in the ordinary course of doing business in the particular industry. For example, the tea tree oil levy is imposed with reference to the ISO standard for tea tree oil production. In Australia, industry practice requires tea tree oil to conform to this standard, so access to the standard is already an industry requirement.
>
> In order to comply with paragraph 15J(2)(c) of the Legislation Act, the explanatory statements for the regulations that apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time would contain a description of the relevant incorporated material and indicate how it may be obtained.[7]

1.10 While the committee acknowledges this explanation, the committee considers that documents required in the ordinary course of doing business in the particular industry should be freely and readily available to all persons interested in the law, whether or not they are involved in the industry concerned. The committee does not consider that the inclusion of 'a description of the relevant incorporated material' would be sufficient for the purposes of making the content of the law accessible to all interested parties.

1.11 The committee understands that, in instances where incorporated documents are not otherwise freely available, it is not uncommon for the documents to be made available by Departments in other manners, such as via access through public library systems, the National Library of Australia, or at Departmental offices, for free viewing by interested parties.[8]

1.12 The committee requests the minister's advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law, including individuals not in the industries concerned.

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7 Explanatory memorandum, pp. 17 and 31.

8 See, for example, correspondence between the Attorney-General and the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245].

Agriculture (Biosecurity Protection) Levies and Charges Collection Bill 2024[9]

Purpose	The bill seeks to provide for the collection of levies and charges imposed by, or under, the Agriculture (Biosecurity Protection) Levies Bill 2024 and the Agriculture (Biosecurity Protection) Charges Bill 2024.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 28 February 2024
Bill status	Before the House of Representatives

Broad delegation of administrative powers
Coercive powers
Infringement notices[10]

1.13 Clause 20 of the bill seeks to empower a compliance officer to exercise a range of monitoring powers under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) in relation to the provisions of the bill or the rules; or an offence against the *Crimes Act 1914* (Crimes Act) or the *Criminal Code 1995* (Criminal Code) that relates to the bill or its rules.

1.14 Subclause 20(10) seeks to provide that a compliance officer can be assisted by other persons in carrying out their duties or functions under the Regulatory Powers Act in relation to the bill. Subclause 20(11) seeks to provide that, in executing a monitoring warrant, both an authorised person and a person assisting can use such force against things as is necessary and reasonable in the circumstances.

1.15 Clause 21 of the bill seeks to provide a mirroring provision enabling the investigatory powers in Part 3 of the Regulatory Powers Act to apply in relation to the bill's offence and civil offence provisions, and offences against the Crimes Act or the Criminal Code that relate to this bill or its rules.

1.16 Clause 23 of the bill seeks to provide that the following provisions of the bill are subject to an infringement notice under Part 5 of the Regulatory Powers Act:

- subclauses 17(1), (2), (3) or (4) (penalties for failure to give return or notice under the rules);

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9 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Agriculture (Biosecurity Protection) Levies and Charges Collection Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 52.

10 Clauses 20, 21 and 23. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (ii).

- subclauses 18(1) or (2) (penalties for failure to make or keep records under the rules);
- subclauses 26(4) or (5) (Secretary may require information or documents); and
- subclauses 42(1), (3), (5) or (8) (civil penalty provisions for false or misleading information or documents).

1.17 Further, subclause 23(2) seeks to provide that for the purposes of Part 5 of the Regulatory Powers Act a compliance officer is an infringement officer.

1.18 Clause 4 of the bill seeks to define a compliance officer as either the Secretary or an Australian Public Service (APS) employee in the department appointed by the Secretary under clause 47 of the bill.

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

1.20 In this case, the committee's concerns in relation to this broad delegation are heightened due to the coercive nature of the powers that can be exercised by compliance officers and persons assisting, including the power to use such force against things as is necessary and reasonable in the circumstances.

1.21 In relation to authorising the use of force against things, the explanatory memorandum to the bill explains:

> This power is intended to help ensure the successful execution of a warrant and access to relevant information. Access to this information would be critical to the department's enforcement activities and ensuring overall compliance with the BPL [biosecurity protection levy] system.
>
> Examples of use of force against things, as is necessary and reasonable in the circumstances in executing a monitoring warrant could include use of force to gain access to premises, or to open a secure container or a cabinet to access relevant information. Without the power to use force against things, the successful execution of warrants would depend on the cooperation of persons occupying premises to which the warrant relates.
>
> While the general offence relating to the failure to provide reasonable facilities and assistance in subsection 31(2) of the Regulatory Powers Act provides an incentive for cooperation, it does not guarantee cooperation. In the absence of cooperation or the ability to assist, the use of force against

> things might be considered appropriate and necessary, such as where a matter is time sensitive or where documents may be destroyed if an authorised person or a person assisting them were to leave the premises and return later.
>
> Whether the use of force against things is necessary and reasonable would depend on the circumstances of each case. The provision would not authorise the use of force against a person.
>
> Subsection 20(11) would be consistent with the equivalent provision in subsection 20(11) of the Primary Industries Levies and Charges Collection Act.[11]

1.22 In relation to the breadth of individuals who may be appointed as a compliance officer, the explanatory memorandum explains:

> It is intended that the Secretary would appoint APS employees who have relevant experience and training under the Primary Industries Levies and Charges Collection Act, or who would be required to undertake appropriate training prior to exercising powers under the legislation.
>
> Compliance officers that are currently appointed by the Secretary, under existing departmental legislation, are specialised staff who carry out compliance activities in relation to the existing agriculture levy system. There are currently around 20 officers responsible for carrying out compliance and monitoring activities. Consistent with best practice, the longstanding practice of the department is to ensure that these officers are provided with appropriate training in relation to investigation and monitoring powers. This practice will continue in order to ensure that powers are exercised in accordance with legislative requirements.
>
> Officers assisting compliance officers will be supervised and directed by experienced compliance officers to ensure the correct and appropriate use of their powers. In addition, the provisions in Division 5 of Part 4 expressly limit any actions taken in executing a monitoring or investigation warrant against things by such persons to what is necessary and reasonable in the circumstances. The Regulatory Powers Act also requires that such persons must act in accordance with a direction given to them by the authorised person.[12]

1.23 The committee raised similar concerns regarding broad delegation of administrative powers and coercive powers, alongside an infringement notice scheme, in its comments relating to the Primary Industries Levies and Charges Collection Bill 2023.[13] This bill sets out a similar framework in relation to the biosecurity protection levy system. At the time of writing, the Primary Industries Levies and Charges Collection Bill 2023 is before the Senate. In *Scrutiny Digest 1 of 2024*, the

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11 Explanatory memorandum, p. 27.

12 Explanatory memorandum, pp. 55–56.

13 Senate Scrutiny of Bills committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–22.

committee welcomed the minister's undertaking to table an addendum to the explanatory memorandum to provide additional information in relation to these matters.[14]

1.24 The committee welcomes that this information has also been included in the explanatory memorandum to the current bill. Nevertheless, it is the committee's view that an infringement officer for the purposes of the bill should, at a minimum, be limited to APS employees who possess the appropriate skills, knowledge and qualifications to perform these functions and duties. As such, the committee reiterates its preference that the bill should have required that only employees in possession of the appropriate training, qualifications, skills or experience be designated compliance officers or persons assisting compliance officers, and considers that it would be appropriate for the bill to be amended to provide as such.

1.25 In light of the above, the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for a broad delegation of administrative power without a requirement that compliance officers exercising such power have appropriate skills, experience or training on the face of the bill, noting in particular the coercive nature of the powers that may be exercised.

Reversal of the evidential burden of proof[15]

1.26 Subclause 40(1) of the bill seeks to provide an offence if:

- a person is, or has been, an entrusted person;[16]
- the person has obtained or generated information in the course of, or for the purposes of:
  - administering, or assisting a person to administer, the bill or the rules; or
  - monitoring compliance with, or assisting a person to monitor compliance with, the bill or the rules;

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14 Senate Scrutiny of Bills committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 41–43.

15 Subclause 40(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

16 Clause 4 defines 'entrusted person' to mean the Minister, the Secretary, an APS employee in the Department, any other person who is employed or engaged by the Commonwealth to provide services to the Commonwealth in connection with the Department, and any other person who is employed or engaged by the Commonwealth or a body corporate that is established by a law of the Commonwealth and in a class of persons prescribed by rules.

- the information is protected information;[17] and
- the person uses or discloses the information.

1.27 The offence carries a maximum penalty of 12 months imprisonment.[18]

1.28 Subclause 40(4) seeks to provide an offence-specific defence if the use or disclosure of the information is required or authorised by the bill or another law of the Commonwealth, or law of a State or Territory prescribed by the rules. A note to the subsection clarifies that the evidential burden of proof is reversed in relation to the defence.[19]

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

1.30 The committee 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]

1.31 The committee reiterates its consistent scrutiny view that adherence to these principles would assist to keep to a minimum the number of provisions that impose a burden of proof on a defendant.

1.32 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 explanatory memorandum states:

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17 Subclause 40(3) provides that protected information is information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence.

18 Subclause 40(2) provides a mirror civil offence with a maximum penalty of 60 penalty units.

19 Subsection 13.3(3) of the Criminal Code 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.

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.

> The purpose of this subsection is to ensure that authorised uses and disclosures of protected information are not subject to the civil penalty and offence provisions.
>
> The option to prescribe a law of a State or Territory will ensure consistency with similar Commonwealth legislation. It will also enable flexibility in the future to add such laws, so that entrusted persons have clarity and are not exposed to liability if a relevant State or Territory law might require disclosure of protected information.
>
> …
>
> The reversal of the evidential burden is appropriate and justified on the basis that the relevant matter is peculiarly within the knowledge of the defendant.[22]

1.33 In this case, while the explanatory memorandum states that the matters in proposed subclause 40(4) are matters peculiarly within the defendant's knowledge, it is not clear to the committee the basis on which this conclusion has been reached. It is not immediately apparent to the committee that whether or not conduct is authorised by the bill, its rules, or a Commonwealth or State or Territory law would be a matter that is *peculiarly* within the defendant's knowledge.

1.34 Further, the explanatory memorandum does not address the second element in the *Guide to Framing Commonwealth Offences*: whether it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter in subclause 40(4).

1.35 It also appears to the committee that the passage in the explanatory memorandum referred to above suggests that the matters in subclause 40(4) are central to the question of a defendant's culpability for the offence provided by subclause 40(1), as opposed to the subclause providing an optional exception to criminal responsibility.

1.36 For these reasons, without further explanation, it appears to the committee that it may be more appropriate for the bill to be amended to provide that these matters are specified as elements of the offence.

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

- **whether consideration could be given to moving an amendment to clause 40 to include the matters in subclause 40(4) as an element of the offence in subclause 40(1);**
- **otherwise, why it is considered appropriate to use an offence-specific defence for the criminal offence in subclause 40(1);**

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22 Explanatory memorandum, p. 48.

- **whether it could be better articulated as to how the matters in subclause 40(4) are *peculiarly* within the knowledge of the defendant and such knowledge not available to the prosecution; and**
- **if the relevant matter was instead included as part of the offence, the nature of any difficulties that it is anticipated the prosecution would have in proving that matter.**

1.38 The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted by if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

Automated decision-making[23]

1.39 Subclause 48(1) seeks to provide that the Secretary may arrange for the use, under the Secretary's control, of computer programs for any purpose for which the Secretary may, under the bill or the rules, make a decision of a kind specified in the rules. Subclause 48(2) would require the Secretary to take all reasonable steps to ensure that each decision made by a computer program is a decision the Secretary could validly make under the bill or rules. Subclause 48(4) also seeks to provide that the Secretary may substitute a computer-made decision if they are satisfied that the decision is not the correct or preferable decision.

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

1.41 The committee notes that clause 43 of the bill provides for internal merits review of certain decisions made under the bill, including decisions made under clause 9 and clause 11 to refuse to remit an amount that a person is liable to pay by way of penalty and any other decision prescribed by the rules.

1.42 Clause 44 also provides for external merits review by the Administrative Appeals Tribunal of listed decisions.

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[23] Subclause 48. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

1.43 That provision has been made for certain decisions made under the bill to be both internally and externally reviewable indicates that these decisions are complex and discretionary. Such decisions are therefore more vulnerable to legal error due to the imposition of automated decision-making.

1.44 In relation to the use of automated decision-making, the explanatory memorandum states:

> Subsection 48(1) would employ appropriate safeguards as the types of decisions for which computer programs may be used would be specified in a legislative instrument (rules under the proposed Act) that would be subject to parliamentary scrutiny and consultation under section 17 of the Legislation Act. These decisions could also be closely examined by the Senate Standing Committee for the Scrutiny of Delegated Legislation. It is intended that appropriate consultation would occur with levied industries, levy payers and collection agents as to how the automation of such decisions might affect them.
>
> Subsection 48(1) would, in future, allow for the use of computer programs to make decisions to support the efficient and effective administration of the proposed Act. Decisions made by computers, where appropriate, can provide greater speed and consistency, provide cost-effectiveness and reduce administrative burden.
>
> As the proposed Act does not oblige the Secretary to automate decisions, the Secretary would retain the discretion not to automate decisions, particularly if it was considered more appropriate for decisions to be made by a decision-maker.
>
> Subsection 48(2) would provide that the Secretary must take all reasonable steps to ensure that each decision made by the operation of a computer program under an arrangement made under subsection (1) is a decision that the Secretary could validly make under this Act or the rules. This subsection would ensure that decisions made by computer are decisions that could lawfully be made under the Act or the rules.
>
> Section 49 of the Act would prevent the Secretary from delegating his or her powers under subsection 48(1) or (2), such that they must always be exercised by the Secretary personally. As these powers could only be exercised by the Secretary, they would always be exercised with the high level of accountability that comes with that role. Consideration at the highest departmental level would therefore be required prior to the Secretary arranging for a computer program to make a decision. How such automation would comply with administrative law requirements, such as procedural fairness, internal and external review rights, the requirement to consider relevant matters, and the rule against fettering of discretionary power, would be relevant considerations in making such decisions.[24]

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[24] Explanatory memorandum, pp. 56–57.

1.45 The committee notes that proposed subclause 48(1) provides that the rules will specify which decisions made under the bill will be subject to automated decision-making. In light of the potential effects on administrative decision-making outlined above, the committee is of the view that none of the decisions listed in clauses 43 and 44 may be appropriate for automated decision-making. The committee raised similar concerns regarding automated decision-making in the Primary Industries Levies and Charges Collection Bill 2023.[25]

1.46 The committee notes that chapter 17 of the report of the Royal Commission into the Robodebt Scheme (Robodebt Royal Commission) was focused on the impact of automated decision-making.[26] The Robodebt Royal Commission reflected on the effects of automation, and the need for appropriate oversight and for the design of automated systems to have regard to the most current version of best practice principles regarding automation in government decision making. This culminated in two recommendations (17.1 and 17.2). The committee further notes the Government's subsequent $5.6 million commitment in the Mid-Year Economic and Fiscal Outlook 2023-24 to introduce a consistent legislative approach to automated decision making across the Commonwealth.[27]

1.47 In light of this, it is unclear to the committee whether this bill has been developed with a view to the intended consistent legislative approach and whether automated decision-making under the bill will comply with the principles set out in recommendation 17.1 of the Robodebt Royal Commission's report as well as relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

1.48 It is further unclear to the committee what kinds of decisions are anticipated to be appropriate for automated decision-making, the degree of discretion involved in those decisions, whether the Commonwealth Ombudsman's report, *Automated decision-making: Better practice guide,*[28] will be complied with, and whether reviewable decisions will be prohibited from being automated.

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

- **what kinds of decisions are likely to be considered appropriate for automated decision-making;**
- **how much discretion will be involved in automated decisions;**
- **whether consideration has been given to prohibiting the decisions listed in proposed clauses 43 and 44 from being prescribed by the rules as being decisions to which automated decision-making apply;**

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25 Senate Scrutiny of Bills committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 26–28.

26 Royal Commission into the Robodebt Scheme, *Report*, 2023, pp. 469–494.

27 Mid-Year Economic and Fiscal Outlook 2023-24, p. 218.

28 Commonwealth Ombudsman, *Automated decision-making: Better practice guide* (2020).

- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **whether consideration has been given to:**
  - **the Commonwealth Ombudsman's report, *Automated decision-making: Better practice guide*; and**
  - **whether the principles outlined in recommendation 17.1 of the Royal Commission into the Robodebt Scheme will be applied in relation to the automation of decisions under the bill.**

Incorporation of external materials as existing from time to time[29]

1.50 Subclause 55(1) of the bill seeks to provide that, for better securing the payment of levy or charge imposed in relation to products or goods, the Secretary may, by legislative instrument, make rules prescribing matters required or permitted by this Act or by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to this Act. Subclause 55(5) seeks to provide that, despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.

1.51 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.

1.52 The explanatory memorandum explains:

> It is considered appropriate to enable the incorporation of documents as they exist from time to time because the documents that would be referred to would, in general, be technical reference materials or production standards that are updated as required.
>
> It is intended that where the rules would incorporate such documents, they would either be freely and publicly available, or they would be documents required in the ordinary course of doing business in the particular industry.

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[29] Subclause 55(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

> In order to comply with paragraph 15J(2)(c) of the Legislation Act, the explanatory statements for the rules would contain a description of the relevant incorporated material and indicate how it may be obtained.[30]

1.53 While the committee acknowledges this explanation the committee considers that documents required in the ordinary course of doing business in the particular industry should be freely and readily available to all persons interested in the law, whether or not they are involved in the industry concerned. The committee does not consider that the inclusion of 'a description of the relevant incorporated material' would be sufficient for the purposes of making the content of the law accessible to all interested parties.

1.54 The committee understands that, in instances where incorporated documents are not otherwise freely available, it is not uncommon for the documents to be made available by Departments in other manners, such as via access through public library systems, the National Library of Australia, or at Departmental offices, for free viewing by interested parties.[31]

1.55 The committee requests the minister's advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law, including individuals not in the industries concerned.

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30 Explanatory memorandum, p. 64.

31 See, for example, correspondence between the Attorney-General and the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245].

Private senators' and members' bills that may raise scrutiny concerns[32]

The committee notes that the following private senators' and members' bills may raise scrutiny concerns under Senate standing order 24. Should these bills proceed to further stages of debate, the committee may request further information from the bills' proponents.

Bill	Relevant provisions	Potential scrutiny concerns
Airline Passenger Protections (Pay on Delay) Bill 2024	Subclauses 4(1) and 5(1)	These provisions may raise scrutiny concerns under principle (iv) in relation to the inclusion of significant matters in delegated legislation.
Legislate the Date to End Live Sheep Export Bill 2024	Item 2, proposed section 23A	This provision may raise scrutiny concerns under principle (i) in relation to provisions that are subject to significant penalties.

Accountability of Grants, Investment Mandates and Use of Public Resources Amendment (End Pork Barrelling) Bill 2024

1.56 Items 14 and 16 of Schedule 1 of the bill seek to amend the Legislation (Exemptions and Other Matters) Regulation 2015 to provide that directions that are an investment mandate in specified Acts are not exempt from disallowance and sunsetting, respectively.

1.57 The committee welcomes the proposed amendments, which will have the effect of subjecting investment mandates to greater parliamentary scrutiny and oversight. Nevertheless, the committee's view is that matters relating to the disallowable status of an instrument are significant matters which should be contained in primary rather than delegated legislation.

1.58 In this light, the committee notes that it would be possible to remove the exemptions from disallowance and sunsetting via other mechanisms, for example by amending the enabling legislation that allows for the investment mandates. See, for example, subsection 39(4) of the *Federal Safety Commissioner Act 2022* and subsections 28(4) and (5) of the *National Vocational Education and Training Regulator Act 2011*.

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32 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 53.

Bills with no committee comment[33]

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

- Agriculture Legislation Amendment (Modernising Administrative Processes) Bill 2024
- Environment Protection and Biodiversity Conservation Amendment (Protecting Environmental Heritage) Bill 2024
- Fair Work (Registered Organisations) Amendment (Protecting Vulnerable Workers) Bill 2024
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 Forever and Protect Our Coastal Waters) Bill 2024
- Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024
- Social Services Legislation Amendment (Child Support and Family Assistance Technical Amendments) Bill 2024.

[33] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 54.

Commentary on amendments and explanatory materials[34]

The committee makes no comment on amendments made to the following bill:

- Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023
    - On 29 February 2024, the Senate agreed to two Opposition amendments to the bill.

No explanatory memoranda to which the committee monitors were tabled in either house of the Parliament during the relevant period.

[34] This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 55.

Chapter 2
Commentary on ministerial responses

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

Appropriation Bill (No. 3) 2023-2024
Appropriation Bill (No. 4) 2023-2024[35]

Purpose	The Appropriation Bill (No. 3) 2023-2024 seeks to appropriate additional money out of the Consolidated Revenue Fund for the ordinary annual services of the government. The Appropriation Bill (No. 4) 2023-2024 seeks to appropriate additional money out of the Consolidated Revenue Fund for services that are not the ordinary annual services of the government.
Portfolio	Finance
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Parliamentary scrutiny—measures marked as 'not for publication'[36]

2.2 Clause 4 of both Appropriation Bill (No. 3) 2023-2024 and Appropriation Bill (No. 4) 2023-2024 provide that portfolio statements (in this case known as Portfolio Additional Estimates Statements – or PAES) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PAES may be considered in interpreting the provisions of each bill. Moreover, the explanatory memoranda to the bills state that they should be read in conjunction with the PAES.[37]

2.3 Noting the important role of the PAES in interpreting Appropriation Bills Nos 3 and 4, the committee expresses its scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as 'not for publication' (nfp), meaning that the proposed allocation of funding to those budget measures is not published

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35 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 3) 2023-2024 and Appropriation Bill (No. 4) 2023-2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 56.

36 Appropriation Bill (No. 3) 2023-2024, clause 4; Appropriation Bill (No. 4) 2023-2024, clause 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

37 Explanatory memorandum to Appropriation Bill (No. 3) 2023-2024, p. 5; Explanatory memorandum to Appropriation Bill (No. 4) 2023-2024, p. 5.

within the PAES. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are legally or commercially sensitive.

2.4 In *Scrutiny Digest 3 of 2024*, the committee requested the minister's detailed advice as to:

- whether future Department of Finance guides on preparing portfolio budget or additional estimates statements can include guidance that, where a measure is marked as nfp, as much detail should be provided as is necessary to substantiate the decision to not publish the financial details of the measure due to the public interest; and
- the basis on which the financial details of the measures 'Northern Endeavour decommissioning – future funding' and 'National Quantum Strategy – implementation' have been marked as nfp.[38]

Minister for Finance's response[39]

2.5 The Minister for Finance (the minister) advised the committee that she has asked her department to 'consider, where possible, enhancing the guidance on information which may be provided as part of measure descriptions in budget papers and/or portfolio budget statements in relation to measures that have been marked as nfp'.

2.6 In relation to the specific measures the committee sought further information about, the minister advised that for the measure 'Northern Endeavour decommissioning—future funding', the amounts are commercially sensitive as the Department of Industry, Science and Resources (DISR) will undertake a procurement process for services to continue work to decommission the Northern Endeavour floating oil production, storage and offtake facility. Disclosure of amounts would impair the Commonwealth's position in negotiation contracts for these services. The minister further noted that the application of nfp due to commercial sensitivities is consistent with previous expenditure measures related to the Northern Endeavour.

2.7 In relation to the 'National Quantum Strategy—implementation', the amounts include funding for Finance and DISR to test the maturity of the market around quantum computing and evaluate commercially sensitive information. Again, the minister advised that publication of the amounts would impair the Commonwealth's negotiating position in relation to these activities.

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38 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 14–17.

39 The minister responded to the committee's comments in a letter dated 7 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Committee comment

2.8 The committee thanks the minister for this response and welcomes the advice that further consideration will be given to enhancing guidance on information which may be provided alongside budget measures marked as nfp.

2.9 The committee notes the information provided in relation to the basis upon which two specific budget measures, 'Northern Endeavour decommissioning—future funding' and 'National Quantum Strategy—implementation', were marked as nfp.

2.10 In light of the above, the committee welcomes the minister's commitment to consider improving guidance on measures marked as nfp, but nevertheless draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual budget measure.

Australian Naval Nuclear Power Safety Bill 2023[40]

Purpose	This bill seeks to establish a framework to regulate the nuclear safety aspects of Australia's nuclear-powered submarine enterprise.
Portfolio	Defence
Introduced	House of Representatives on 16 November 2023
Bill status	Before the House of Representatives

Significant penalties
Reversal of the evidential burden of proof[41]

2.11 Part 2 of the bill provides for numerous civil penalties and offences relating to nuclear safety and licences. Subclause 18(1) provides that a person who conducts a regulated activity must,[42] so far as is reasonably practicable,[43] ensure nuclear safety when conducting the activity. Subclause 18(4) provides that it is an offence for a person to engage in conduct that is a regulated activity and the conduct results in a contravention of subsection 18(1). The penalty for an individual is 12 years imprisonment or 700 penalty units, or both.

2.12 Further, subclause 18(5) provides that it is an offence for a person to engage in conduct that is a regulated activity, results in a contravention of subsection 18(1), a nuclear safety incident occurs and the person is reckless, or negligent, as to whether the conduct would cause or contribute to the nuclear safety incident. The penalty for an individual is 25 years imprisonment or 1,400 penalty units, or both.

2.13 Subclause 19(1) provides that a person must not conduct a regulated activity if the person does not hold a licence authorising the person to conduct the regulated activity. Subclause 19(3) provides that it is an offence if the person conducts a regulated activity and the person does not hold a licence authorising the person to conduct the regulated activity. The penalty for an individual is 6 years imprisonment or 350 penalty units, or both. The bill also provides for numerous other offences with significant terms of imprisonment (3 or 6 years).[44]

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40 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Naval Nuclear Power Safety Bill 2023, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 57.

41 Part 2, subclauses 18(4), 18(5), 19(3), 20(3), 21(5), 22(3), 24(3) and 25(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

42 Clause 9 defines 'regulated activity' to mean a facility activity, a submarine activity and a material activity, which are further defined in clauses 11, 13 and 14 respectively.

43 Subclause 5(2) further defines 'reasonably practicable'.

44 See subclauses 20(3), 21(5), 22(3), 24(3) and 25(3).

2.14 In *Scrutiny Digest 1 of 2024*, the committee requested the minister's advice as to:

- the appropriateness of the penalties proposed in subclauses 18(4), 18(5), 19(3), 20(3), 21(5), 22(3), 24(3) and 25(3); and
- whether these penalties are broadly equivalent to similar offences in Commonwealth legislation and if not, why not.[45]

Minister for Defence's response[46]

2.15 The Minister for Defence (the minister) advised that the penalties in the bill were developed having regard to relevant principles in the *Guide to Framing Commonwealth Offences*, including that significant penalties may be appropriate where the consequences of the commission of the offence are particularly dangerous or damaging. In the context of nuclear safety, 'the consequences of offending conduct could involve serious harm to the environment, injuries or death, and significant social, economic, diplomatic or strategic harm to Australia'.

2.16 The minister further advised the penalties were developed having regard to existing offences of a similar kind or seriousness, including the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act). However, given the particular circumstances it was considered that the offences and penalties in the ARPANS Act are not appropriate to be reproduced in the bill. Instead, the minister advised that '[p]articular penalty amounts have been determined by assessing the relative seriousness of the offence within the legislative scheme, having regard to the classes of persons to which the offence would apply (licence holders, who must be a Commonwealth-related person (subclause 29(1)), and other persons who may be authorised by a licence), and whether the offence involves a nuclear safety incident.'

2.17 The minister advised that the penalty for the most serious criminal offence in the bill, subclause 18(5), which applies where a person engages in conduct that is a regulated activity and a nuclear safety incident occurs, is benchmarked against penalties for industrial manslaughter offences recently enacted in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* which are broadly commensurate with the seriousness of the offence. The minister also provided further information in relation to penalty amounts for other offences in the bill, which were determined by reference to the seriousness of the offences comparative to the offence in subclause 18(5).

Committee comment

2.18 The committee thanks the minister for this response.

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45 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 2–4.

46 The minister responded to the committee's comments in a letter dated 5 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

2.19 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Minister for Defence be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.20 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the significant penalties for offences in Part 2 of the bill.

Reversal of the evidential burden of proof[47]

2.21 As noted above, subclause 19(1) provides that a person must not conduct a regulated activity if the person does not hold a licence authorising the person to conduct the regulated activity. Subclause 19(3) provides that it is an offence if the person conducts a regulated activity and the person does not hold a licence authorising the person to conduct the regulated activity. Subclause 19(5) provides for exceptions to the offence if the person is not the holder of a licence but is authorised by a licence to conduct the regulated activity, or an exemption granted under section 144 applies to the person in relation to the activity.[48] A defendant bears an evidential burden of proof in relation to these matters.

2.22 Similarly, the evidential burden of proof is reversed for exceptions in subclause 23(5), in relation to an offence for licence holders not complying with licence conditions; and subclause 25(5), in relation to an offence for authorised persons not complying with licence conditions.

2.23 In *Scrutiny Digest 1 of 2024*, the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclauses 19(5), 23(5) and 25(5).[49]

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47 Subclauses 19(5), 23(5) and 25(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

48 Clause 144 provides that the Regulator may exempt specified persons from the application of subsection 19(1) or another provision of the Act prescribed by the regulations, in relation to a regulated activity, or the application of a specified licence condition.

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 4–5.

Minister for Defence's response[50]

2.24 The minister advised that, in accordance with the *Guide to Framing Commonwealth Offences*, a matter should only be included in an offence-specific defence where 'it is peculiarly within the knowledge of the defendant'. In this case, the minister advised that while only Commonwealth-related persons can be licence holders, those licences may authorise other persons and classes of persons to perform regulated activities specified in the licence. Whether a person is authorised by a license or falls within a class of persons specified within a licence will be information that is within the knowledge of a defendant.

2.25 The minister further advised that the *Guide to Framing Commonwealth Offences* states that a matter should only be included in an offence-specific defence where 'it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter'. The minister advised that the scale and volume of classes of persons authorised by a licence to conduct regulated activities will vary according to the nature of the activity and identity of the licence holder, and information about whether an individual is either specifically authorised by a licence or within a class of persons authorised by a licence, or exempt from a requirement to be authorised by a licence, will be more readily and cheaply provided by a defendant.

2.26 The minister further advised that the *Guide to Framing Commonwealth Offences* states that it may be appropriate for a matter to be a defence if 'the conduct prescribed by the offence poses a grave danger to public health or safety', and the contraventions of these relevant offences could involve conduct that poses a grave danger to public health or safety and the environment.

Committee comment

2.27 The committee thanks the minister for this response.

2.28 The committee considers that while the information would be within the knowledge of the defendant and it may be easier for the defendant to provide, it is not necessarily *peculiarly* within the knowledge of the defendant or *significantly* more difficult for the prosecution to disprove.

2.29 Nevertheless, the committee notes the minister's advice drawing attention to the context in which the evidential burden of proof is reversed, specifically the potential risk to public health and safety.

2.30 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof under proposed subclauses 19(5), 23(5) and 25(5).

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50 The minister responded to the committee's comments in a letter dated 5 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Coercive powers—entry and search powers[51]

2.31 Part 4, Division 2 of the bill provides for powers relating to 'monitoring areas'.[52] Clause 40 provides that an inspector may, at any time, enter a monitoring area and exercise monitoring powers to:

- determine whether the Act has been or is being complied with;
- determine whether information provided under or for the purposes of the Act is correct; or
- investigate a nuclear safety incident if, at the time the inspector enters, they do not reasonably suspect that the incident involves a contravention of an offence or civil penalty provision of the Act.

2.32 Monitoring powers include the power to search the monitoring area; examine or observe any activity conducted; inspect, examine, take measurements of or conduct tests on any thing; make any still or moving image or any recording; inspect any document; take extracts from, or make copies of, any such document; and powers relating to operating equipment.[53] Additionally, it includes the power to secure evidential material for up to 72 hours under particular conditions.[54] These powers can be exercised without the consent of any relevant person in relation to the monitoring area,[55] and without a warrant.[56]

2.33 In *Scrutiny Digest 1 of 2024*, the committee requested the minister's detailed advice as to whether consideration has been given to including a monitoring warrant regime in Part 4, Division 2 of the bill and, if it was considered not appropriate, why that is the case.[57]

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51 Part 4, Division 2. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

52 Part 4, Division 3 of the bill separately deals with powers relating to 'investigation areas'. Where an inspector reasonably believes that there may be evidential material in an investigation area, the inspector may enter and exercise investigation powers by consent or under warrant.

53 Clause 41.

54 Clauses 42 and 44.

55 Subclause 40(2).

56 Subclause 40(3).

57 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 6–7.

Minister for Defence's response[58]

2.34 The minister advised that the 'unique operating circumstances of the conventionally-armed, nuclear-power submarine enterprise necessitate a departure' from the monitoring warrant regime principles outlined in the *Guide to Framing Commonwealth Offences.* The minister advised that due to the operating environment and inherent mobility of Australian submarines, monitoring activities must be undertaken as and when the opportunity presents, and therefore a monitoring warrant scheme would be impractical. The minister considered that a 'requirement to obtain a warrant to enter those places on each occasion to exercise relevant powers would frustrate the objects of the Bill to promote nuclear safety'.

2.35 The minister advised that it is 'reasonable for a licence holder who conducts regulated activities in a monitoring area to expect that compliance with the nuclear safety requirements of the Bill will be monitored by suitably qualified and appointed inspectors'.

2.36 The minister further provided information about safeguards that are included in the bill in relation to the monitoring powers, including that inspectors must not be appointed unless the Director-General is satisfied of their competence, technical and other relevant expertise to properly exercise an inspector's powers. Further, inspectors must exercise their monitoring powers with regard to safety and security. Finally, the bill contains reporting requirements to the Director-General if an inspector exercises seizure powers during monitoring within 28 days. Further, the minister advised that as the new regulator is established, inspectors will be provided with appropriate training and guidance in the exercise of powers, including monitoring powers.

Committee comment

2.37 The committee thanks the minister for this response.

2.38 The committee considers that legislative authority to enter and search premises should always be regarded as an exceptional power. Unless there are exceptional circumstances, entry should only be by genuine and informed consent, or on production of a warrant. In the absence of consent or a warrant, legislation should typically authorise entry only in situations of emergency or threat. However, the committee has previously also considered that there may also be circumstances in which it may be impracticable to obtain a warrant, and that impracticability should be assessed in the context of the situation and by reference to current technology.[59]

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58 The minister responded to the committee's comments in a letter dated 5 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

59 Senate Scrutiny of Bills Committee, *entry and search provisions in Commonwealth legislation* (6 April 2000) p. 75.

2.39 While the minister has stated that it would be impractical to provide for a monitoring warrant regime, the committee considers it would have been helpful if it was explained how it would be impractical (noting that warrants can be obtained by telephone, fax or other electronic means), including by providing examples that illustrate the practical difficulties.

2.40 Nevertheless, the committee notes the minister's advice that licence holders who conduct regulated activities in a monitoring area can expect that compliance will be monitored by suitably qualified and appointed inspectors.

2.41 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Minister for Defence be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.42 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for a monitoring regime which allows for entry and search without a warrant.

Coercive powers—seizure
Use and derivate use of seized material[60]

2.43 Clause 43 provides for additional powers for an inspector to seize a thing without a warrant where:

- the thing is found during the exercise of a monitoring power under section 41; and
- an inspector reasonably believes that the thing is evidential material; and
- the power to seize the thing needs to be exercised without a warrant because it is not practicable to obtain a warrant or the circumstances are serious and urgent.

2.44 In general, the committee prefers seizure to only be allowed under a warrant, even if search and entry has been authorised in the absence of a warrant. The committee considers that where a bill seeks to confer coercive powers, which includes the seizing of evidential material, the explanatory memorandum should address why it is appropriate, what safeguards exist, and whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.

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60 Part 4, Division 2, clause 43; and Part 4, Division 2, clause 52. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

2.45 In *Scrutiny Digest 1 of 2024*, the committee requested the minister's detailed advice as to:

- what is meant by the term 'not practicable to obtain a warrant' in subparagraph 43(1)(b)(ii) and what guidance exists for inspectors;
- whether consideration has been given to including remote warrant provisions in relation to clause 43, and if it is not considered appropriate, why not;
- whether consideration has been given to including limits on the use and derivative use of seized material in relation to clauses 43 and 52; and
- whether the bill can be amended to more clearly define the extent of the seizure powers under clauses 43 and 52.[61]

Minister for Defence's response[62]

2.46 The minister advised that the term 'not practicable to obtain a warrant' is intended to apply in limited circumstances and given the context, this may arise where it would not be practicable for an inspector to obtain a warrant including by telephone, fax or other electronic means or where doing so may be prejudicial to national security.

2.47 The minister advised that consideration was given to including a remote warrant provision in relation to clause 43 and this is ordinarily the starting point for an inspector exercising monitoring powers. The minister clarified that clause 43 only applies in limited circumstances where an investigation warrant is unable to be obtained by any means, because it is not practicable or the circumstances are serious and urgent. The minister explained that the term 'circumstances are serious and urgent' is intended to apply to scenarios where it is necessary to seize material to prevent concealment, loss or destruction of the evidential material.

2.48 In relation to use and derivative use of seized material, the minister advised that limits have been considered and are applied in relation to powers exercisable in relation to 'evidential material' which is limited to material concerning offence or civil penalty provisions in the bill, and does not encompass material concerning other Commonwealth, state or territory offences.

2.49 In relation to whether the bill can be amended to more clearly define the extent of the seizure powers under clauses 43 and 52, the minister further advised that the Government is committed to ensuring sensible amendments are considered through the Foreign Affairs, Defence and Trade Legislation committee inquiry process and broader legislative process.

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61 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 7-10.

62 The minister responded to the committee's comments in a letter dated 5 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Committee comment

2.50 The committee thanks the minister for this response and the explanation on how the provisions are intended to operate, collectively.

2.51 Nevertheless, the committee notes that the power to secure a thing for up to 72 hours without a warrant under clause 42 is subject to the same conditions as the power to seize a thing without a warrant under clause 43 – specifically, that it is not practicable to obtain a warrant or the circumstances are serious and urgent. As such, the committee considers it may be more appropriate to constrain the power to seize a thing to instances in which the power to secure would not appropriately manage the situation.

2.52 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Minister for Defence be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.53 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of clause 43 which seeks to provide for a power for an inspector to seize a thing without a warrant in particular circumstances.

Autonomous Sanctions Amendment Bill 2024[63]

Purpose	The bill amends the *Autonomous Sanctions Act 2011* to explicitly confirm that individuals and/or entities can be validly sanctioned based on past conduct or status. The bill also ensures the validity of sanctions that were made based on past conduct or status. For the avoidance of doubt, the bill further confirms that sanctions are valid even where it is not explicitly clear that the Minister considered their discretion: • to sanction the person/entity at all, where they meet the criteria for imposing sanctions, or • to decide whether to only designate a person for targeted financial sanctions or only declare them for travel bans, or both.
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 15 February 2024
Bill status	Before the Senate

Retrospective validation[64]

2.54 Part 2 of Schedule 1 to the bill contains validation provisions which would retrospectively validate actions taken prior to commencement of the bill.

2.55 Item 3 would validate regulations made by the Governor-General prior to commencement by assuming that new section 10A as inserted by the bill into the *Autonomous Sanctions Act 2011* (the Act) had been in force when the regulations were made and that the regulations would have been permitted by paragraph 10(1)(a) of the Act.

2.56 Item 4 would validate instruments made by the Minister prior to commencement under regulations made for paragraph 10(1)(a) of the Act which proscribed a person or entity on the basis of specified circumstances or the actions or position held by the person or entity. The item applies to instruments which would otherwise be wholly or partly invalid only because the instrument was not authorised by those regulations because of the period of time that had elapsed between the circumstances, action or position having existed or been so held, and the proscription of the person or entity.

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63 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Autonomous Sanctions Amendment Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 58.

64 Schedule 1, Part 2, items 3, 4 and 5. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

2.57 Subitem 5(1) would validate instruments made by the Minister prior to commencement under regulation 6 or 6A of the Autonomous Sanctions Regulations 2011 (the Regulations) if the instrument would otherwise be wholly or partly invalid only because the minister did not consider whether they should exercise their discretion to designate a person or entity, or declare a person, or designate and declare a person. Subitem 5(2) would also validate an instrument that was made by the minister before commencement of sub-regulation 9(3) of the Regulations if the instrument would otherwise be wholly or partly invalid because the minister did not consider whether they should exercise their discretion to declare that a specified designation of a person or entity continues to have effect, or declare that a specified declaration of a person continues to have effect, or declare that a specified designation and a specified declaration of a person continue to have effect.

2.58 Subitems 3(6), 4(4), and 5(5) provide that the items apply in relation to civil and criminal proceedings instituted on or after commencement, civil and criminal proceedings instituted prior to commencement, and proceedings concluded prior to commencement.

2.59 In *Scrutiny Digest 3 of 2024* the committee requested the minister's advice as to:

- whether any persons are likely to be adversely affected (in the broadest sense of the phrase) by the retrospective validation provided for in items 3, 4 and 5 of Part 2 of Schedule 1 to the bill, and the extent to which their interests are likely to be affected; and
- if persons could be detrimentally affected, the justification for the retrospective validation;
- why it is necessary and appropriate that the relevant conduct be subjected to sanction on an ongoing basis; and
- when and how the department became aware that it would be necessary to retrospectively validate regulations and instruments made under paragraph 10(1)(a), and instruments made under regulation 6 of 6A of the Autonomous Sanctions Regulations 2011.[65]

Minister for Foreign Affairs' response[66]

2.60 The Minister for Foreign Affairs (the minister) advised that 'no Australians or Australian businesses would likely be adversely affected' due to the retrospective validation. Rather, the minister advised, the bill confirms the validity of sanctions listings and does not create any new rights or responsibilities, nor change existing

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65 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 19–22.

66 The minister responded to the committee's comments in a letter dated 14 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

sanctions. The response indicated that '[t]hose affected by sanctions laws…are already operating on the correct assumption that existing sanctions are valid.'

2.61 The minister further advised that the bill would not impact sanctioned persons' or entities' rights to seek judicial review of their sanction listing, and that it would not be appropriate to comment on how the bill would impact on current litigation. The response also indicated that the bill does not prevent persons from seeking revocation of their sanctions listings.

2.62 In relation to how the department became aware of the issue, the minister advised that the department keeps the sanctions framework under continuous monitoring and review, by responding to domestic and international cases and judgments of relevant, emerging challenges posed by the changing sanctions landscape, feedback from industry engagement and ongoing review of internal processes.

2.63 The minister also advised that while sanctions do not apply on an ongoing basis, Australia's sanctions instruments have a three-year duration and will expire unless renewed. The renewals are considered on a case-by-case basis.

Committee comment

2.64 The committee thanks the minister for the response, which provides advice that sanctions are a highly targeted and effective foreign policy tool aimed at addressing egregious conduct and situations of international concern. The committee acknowledges that the bill will not likely adversely affect those Australians and Australian businesses who have assumed that the existing sanctions are valid and have been guided by that assumption in considering their obligations under the Act.

2.65 While the committee acknowledges the minister's explanation that the bill clarifies the operation of the sanctions framework as it has always been intended, the committee is required under its standing orders to consider, amongst other matters, whether legislative provisions unduly trespass on personal rights and liberties. In discharging its duties accordingly in respect of provisions that retrospectively validate previous actions, the committee is assisted by an explanation of any detrimental impact on individuals of the retrospective validation. Such analysis should take into account the possibility that the previous actions were not undertaken in accordance with the law regardless of the Government's views on the remoteness of this possibility. The detrimental impact could then be balanced against the policy justification for the validation provisions, of which the intention of the Parliament in enacting the provisions, and the remoteness of the possibility of legal invalidity would be relevant factors.

2.66 In this case, the committee notes that the Act contains a number of criminal offence provisions that relate to the sanctions framework and that there is no information before the committee as to whether persons have been charged with or convicted of any offence to which the validity of regulations proscribing persons or entities would be material. As the validation provisions in Part 2 of Schedule 1 to the

bill (the validation provisions) impact criminal proceedings, including those that concluded before commencement, the committee would have been assisted in discharging its duties if a clear statement had been provided relating to this point. The committee further notes that the inclusion of item 6, sometimes referred to as a historic shipwrecks clause, suggests that there was a view taken in the drafting of the bill that the validation provisions may have detrimental impact on persons.

2.67 The committee therefore remains concerned about the possibility that affected persons may have structured their activities on the basis of a correct view that a court would declare certain sanctions to be invalid. In particular, it remains unclear to the committee why the retrospective validation should apply to litigation which is on foot, as in such instances the assumption of validity is the subject of litigation by affected persons.

2.68 The committee notes the minister's statement that 'It would not be appropriate to comment on how the bill would impact on current litigation' suggests the possibility that there is indeed litigation on foot. If so, the existence and nature of the litigation would be relevant matters that the Parliament should be aware of in considering the appropriateness of the validation provisions.

2.69 The committee takes the view that retrospective validation is not, except perhaps in exceptional circumstances, an appropriate way for the Government to insulate itself from judicial review or similar proceedings.

2.70 The committee notes with regret that the response largely declined to engage in substance with the committee's requests for information as to how these issues came to light, and the nature and extent of any relevant litigation which has concluded or remains on foot.

2.71 On this point, the committee acknowledges the minister's advice that the amendments arose as part of the Department's work in monitoring and responding to domestic and international cases and judgments of relevant, emerging challenges posed by the changing sanctions landscape, feedback from industry engagement and ongoing review of internal processes. However, the committee does not consider that this fully addresses the question of when and how the need for the provisions became apparent.

2.72 Finally, the committee is aware that the *Bills Digest* relating to the bill, published by the Parliamentary Library,[67] notes that the proposed amendments appear to respond in part to the judgment of the Federal Court of Australia in *Alexander Abramov v Minister for Foreign Affairs (No 2)*.[68] Justice Kenny, in that decision, indicated that sanctions could be applied under the existing legislation with

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67 Leah Ferris, Autonomous Sanctions Amendment Bill 2024, *Bills Digest No. 51*, 2023-24, Parliamentary Library, Canberra, 2024.

68 *Alexander Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099.

respect to past conduct or activities provided that the Minister was satisfied that the conduct or activity was still of strategic significance to the relevant country.[69]

2.73 The committee considers that as this case provides important context to the amendments and validation provisions contained in the bill it would have been appropriate for the explanatory memorandum and response to the committee's scrutiny concerns to have noted this decision in any discussion of the impact of the provisions.

2.74 **The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective validation provisions contained in Part 2 of Schedule 1 to the bill.**

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69 *Alexander Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099 at [70].

Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024[70]

Purpose	The bill amends the *Competition and Consumer Act 2010* to establish a new designated complaints function. The ACCC will be required to assess, and respond to, designated complaints submitted by designated complainants. The ACCC may take further action in relation to a designated complaint if the complaint relates to significant or systemic market issues that affect consumers or small businesses (or both) and relates to either a breach of the Act or a power or function of the ACCC under the Act.
Portfolio	Treasury
Introduced	House of Representatives on 15 February 2024
Bill status	Before the Senate

Significant matters in delegated legislation[71]

2.75 Item 2 of Schedule 1 to the bill seeks to introduce a range of provisions which would allow for significant matters to be left to delegated legislation.

2.76 Proposed section 154ZZ would provide that the minister may make a determination by legislative instrument prescribing matters required or permitted by Part XIE of the *Competition and Consumer Act 2010* (the Act) to be prescribed by the designated complaints determination.

2.77 Proposed section 154ZH empowers the Australian Competition and Consumer Commission (the ACCC) to give a designated complainant a notice that no further action will be taken in relation to a complaint. Under this subsection, the ACCC can issue a no further action notice (amongst other grounds) if not satisfied that the complaint meets any requirements prescribed in the designated complaints determination (proposed subsection 154ZH(3)).

2.78 In determining that it is appropriate to take no further action the ACCC must have regard to any matter prescribed for the purposes of paragraph 154ZH(6)(a), and may have regard to any matter prescribed for the purposes of paragraph 154ZH(6)(b), in the designated complaints determination.

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70 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 59.

71 Schedule 1, item 2, proposed sections 154ZH, 154ZQ, and 154ZZ. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

2.79 Under proposed subsection 154ZQ(5), the Minister must not grant approval to an entity as a designated complainant if doing so would result in the number of designated complainants being above the limit prescribed in the designated complaints determination.

2.80 These elements, taken together, set up key elements of the overall scheme to provide for a designated complaints process.

2.81 In *Scrutiny Digest 3 of 2024* the committee requested the Treasurer's advice as to:

- whether proposed subsection 154ZH(5) could be amended to provide guidance as to the mandatory and discretionary factors that will be set out in delegated legislation for the ACCC to consider when deciding to issue a no further action notice;
- whether proposed subsection 154ZH(3) could be amended so that it refers to 'content requirements' as opposed to 'any requirements'; and
- whether proposed subsection 154ZQ(5) could be amended to provide at least a minimum threshold to the cap on the overall number of complainants that may be approved.[72]

Assistant Minister for Competition, Charities and Treasury's response[73]

2.82 The Assistant Minister for Competition, Charities and Treasury (the assistant minister) advised that they do not intend to seek amendments to proposed subsections 154ZH(3) or (5), or proposed subsection 154ZQ(5).

2.83 In relation to proposed subsection 154ZH(5) the assistant minister advised that the power for the ACCC to prescribe matters to be considered when issuing a no further action notice is appropriate to ensure the regime is 'responsive to changes in circumstances such as changes in operational requirements, market conditions and ACCC regulatory procedures'.

2.84 In relation to proposed subsection 154ZH(3), the assistant minister advised that while the explanatory memorandum indicates the power will relate to prescribing additional content requirements of a designated complaint, this is not intended to be a strict limitation, due to the likelihood of unforeseen circumstances emerging. The assistant minister advised that such a limitation would prevent the adaptability and effective operation of the scheme.

2.85 In relation to proposed subsection 154ZQ(5), the assistant minister advised that the limit prescribed for the number of approvals granted to entities as designated complainants must be flexible to allow the ACCC the appropriate resources for

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72 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 23–26.

73 The assistant minister responded to the committee's comments in a letter received on 13 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

compliance and enforcement. Providing the minister with the flexibility to limit or increase the number of entities ensures market responsiveness.

2.86 In relation to each of the above proposed subsections the assistant minister advised that they considered the explanation in the explanatory memorandum to sufficiently address these issues.

Committee comment

2.87 The committee thanks the assistant minister for this advice.

2.88 While noting the advice, the committee reiterates its view that the matters to be prescribed in delegated legislation are key elements of the designated complainant scheme which would be more appropriate for parliamentary consideration through inclusion in primary law.

2.89 The committee generally does not accept arguments for a need for flexibility or responsiveness as a justification for the inclusion of significant matters in delegated legislation. The further information provided in this instance by the assistant minister that flexibility of these matters is necessary to respond to changing and unforeseen circumstances does not, in the committee's view, justify the inclusion of these matters in delegated legislation.

2.90 In relation to proposed subsection 154ZH(3), the committee notes the assistant minister's advice that the provision is not intended to be strictly limited to defining relevant 'content requirements'. However, it appears to the committee that this is inconsistent both with the heading to the subsection—'Complaint does not meet other *content* requirements' or the explanation of the provision in the explanatory memorandum. In the absence of any further explanation, it is unclear to the committee what other requirements may legitimately be provided in the designated complaints determination pursuant to subsection 154ZH(3). This could have unknown impact on the ability of complainants to have action taken on complaints.

2.91 In relation to proposed subsection 154ZQ(5), the committee reiterates its view that allowing unfettered discretion to set the number of permissible complainants in delegated legislation, including the ability to set the number at 0, provides the potential for delegated legislation to undermine the intentions of the Parliament in establishing the scheme.

2.92 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsections 154ZH(3),(5), and 154ZQ(5) providing for significant matters in relation to the designated complainant scheme to be left to delegated legislation.**

2.93 The committee draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Availability of merits review

Significant matters in delegated legislation[74]

2.94 Proposed section 154ZP provides that an entity may apply to the minister for approval as a designated complainant. An entity may be (amongst other things) an individual as per the relevant definition in proposed section 154ZE.

2.95 Proposed section 154ZQ sets out the conditions under which the minister may grant approval of an application to become a designated complainant. Proposed subsection 154ZQ(2) sets out the considerations that the minister must have regard to, including:

- the experience and ability of the applicant in representing the interests of consumers or small businesses in Australia in relation to a range of market issues that affect them (proposed paragraph 154ZQ(2)(a));
- the extent to which the Minister is satisfied that the applicant will, if approved as a designated complainant, act with integrity in connection with being a designated complainant (proposed paragraph 154ZQ(2)(b)); and
- any other matters as prescribed by the designated complaints determination or that the minister considers relevant (proposed subsection 154ZQ(3)).

1.1 Proposed subsection 154ZV empowers the minister to vary or revoke an existing approval. Proposed paragraph 154ZV(1)(c) provides (amongst other conditions to be met) that the minister may do so if they are satisfied that it is appropriate to make the variation or revocation. Proposed subsection 154ZV(3) provides that for the purposes of being satisfied that it is appropriate to make the variation or revocation, the minister may have regard to the following matters:

- any matter mentioned in subsection 154ZQ(2) or (3) (proposed paragraph 154ZV(3)(a));
- whether the designated complainant has contravened, or is contravening, a condition to which the approval is subject (proposed paragraph 154ZV(3)(b));
- any matter prescribed in the designated complains determination (proposed paragraph 154ZV(3)(c)); and
- any other matter the minister considers relevant (proposed paragraph 154ZV(3)(d)).

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[74] Schedule 1, item 2, proposed subsections 154ZQ(1) and 154ZV(1). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iii) and (iv).

2.96 In *Scrutiny Digest 3 of 2024* the committee sought the Treasurer's advice as to why it is necessary and appropriate not to provide for independent merits review of a decision made under proposed subsections 154ZQ(1) and 154ZV(1) of the bill.[75]

Assistant Minister for Competition, Charities and Treasury's response[76]

2.97 The assistant minister advised that in accordance with the Administrative Review Council's guidance document, *What decisions should be subject to merits review?,* decisions made under proposed subsection 154ZQ(1) are not appropriate for merits review. The assistant minister noted that there would be no appropriate remedy under the circumstances.

2.98 First, the assistant minister noted that the designated complaints determination prescribes a maximum number of entities that can be a designated complainant, meaning that any further entities that apply for status cannot be approved regardless of the merits of their application. Secondly, the assistant minister noted that the cost of merits review would be disproportionate to the significance of the decision in light of the ACCC's finite resources, as supported by the Administrative Review Council's guidance.

2.99 In relation to decisions made under proposed subsection 154ZV(1) to vary or revoke an entity's approval, the assistant minister advised that there is no appropriate remedy for merits review to achieve. The assistant minister noted this is again due to the limit on the number of entities which can become designated, as the revocation of an entity would lead to the approval of a new entity and the maximum number of complainants would be reached. The assistant minister further advised that merits review would be inappropriate due to the finite resources of the ACCC in investigating significant or systemic market issues, and, noting the high impact such actions may have on the market, the cost of merits review would be disproportionate to the benefit.

Committee comment

2.100 The committee thanks the assistant minister for this advice, and welcomes the justification provided for the exclusion of merits review with reference to the relevant Administrative Review Council guidance. The committee considers that these justifications and further information on how these decisions are made would have been useful if included in the explanatory memorandum to the bill.

2.101 **In light of the information provided the committee makes no further comment in relation to this matter.**

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75 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 26–27.

76 The minister responded to the committee's comments in a letter dated 12 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Defence Trade Controls Amendment Bill 2023[77]

Purpose	The bill seeks to amend the *Defence Trade Controls Act 2012* to regulate the supply of certain Defence and Strategic Goods List military or dual-use goods and technology.
Portfolio	Defence
Introduced	House of Representatives on 30 November 2023
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof
Significant penalties[78]

2.102 Subsection 10(1) of the *Defence Trade Controls Act 2012* (the DTC Act) provides an offence for supplying DSGL (Defence and Strategic Goods List) technology under particular circumstances. The penalty for the offence is ten years imprisonment or 2,500 penalty units, or both. Proposed substituted subsections 10(3) and 10(3A) and proposed new subsection 10(3B) of the bill provide exceptions to this offence.

2.103 Proposed subsection 10(3) provides that subsection 10(1) does not apply if the DSGL technology is supplied by, or on behalf of, a person or body to an officer or employee of the person or body; and the officer or employee is a citizen or permanent resident of Australia, or of a foreign country that is specified in an instrument, and the supply occurs in the course of the officer or employee's duties as an officer or employee.

2.104 Proposed subsection (3A) provides subsection 10(1) does not apply if the DSGL technology is supplied by, or to, a person who is a member or employee of particular defence, police or government forces,[79] and the supply occurs in the course of the person's duties as such a person and the supply is made solely or primarily for a purpose prescribed by the regulations.

2.105 Proposed subsection 10(3B) provides that subsection 10(1) does not apply if the DSGL technology is supplied to a person who holds a covered security clearance, and the supply is made solely or primarily for a purpose prescribed by the regulations.

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77 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Trade Controls Amendment Bill 2023, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 60.

78 Proposed sections 10, 10A, 10B and 10C. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

79 Specifically the Australian Defence Force, Australian Public Service, Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Australian Signals Directorate, Australian Federal Police or a state or territory police force.

2.106 For all three exceptions, the defendant bears an evidential burden of proof in relation to the matters.

2.107 Additionally, the bill proposes three new offences under proposed subsections 10A (supplying DSGL technology in Australia to a foreign person), 10B (supplying of DSGL goods or DSGL technology from outside Australia) and 10C (provision of DSGL services). All three proposed new offences have penalties of 10 years imprisonment or 2,500 penalty units, or both, and have numerous exceptions attached. The defendant similarly bears the evidential burden of proof.

2.108 In *Scrutiny Digest 1 of 2024*, the committee sought the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to proposed sections 10, 10A, 10B and 10C.[80]

Minister for Defence's response[81]

2.1 The Minister for Defence (the minister) has provided a detailed response justifying the inclusion of offence-specific defences. The minister advised that the matters in the offence-specific exceptions are not central to culpability for each offence and therefore are not appropriate as elements of the offences.

2.2 In relation to each of the offence-specific exceptions, the minister provided information as to how the matters are peculiarly within the knowledge of the defendant and how it would be significantly more difficult for the prosecution to provide evidence on the matter, in line with the guidance in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.

2.3 For a detailed explanation provided by the minister in relation to each offence, see the related correspondence on the committee's webpage.[82]

Committee comment

2.4 The committee thanks the minister for this detailed response and welcomes the minister's constructive engagement with the committee on this matter.

2.5 The committee notes the minister's advice that the offence-specific defences are appropriate in relation to each of these offences. While not persuaded that each of the offence-specific defences necessarily meet the principles as set out in the *Guide to Framing Commonwealth Offences*, the committee is of the view that sufficient guidance has been provided by the minister as to enable the Senate to determine the appropriateness of the evidential burden of proof being reversed in each instance.

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80 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 14–16.

81 The minister responded to the committee's comments in a letter dated 14 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

82 A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

2.6 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.7 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the matters set out under proposed sections 10, 10A, 10B and 10C.

Broad delegation of administrative powers or functions[83]

2.8 Proposed subsection 73(2A) provides for the delegation of functions or powers under sections 11 and 12 of the DTC Act to the Secretary, a Senior Executive Service (SES) or acting SES employee in the Department of Defence, or an Australian Public Service employee who holds, or is acting in, an Executive Level 1 or 2, or equivalent position, in the Department of Defence.

2.9 In *Scrutiny Digest 1 of 2024* the committee sought the minister's advice as to:

- why it is considered necessary and appropriate to provide the power to delegate the minister's functions or powers under proposed subsection 73(2A) to an Executive Level 1 or 2 employee in the Department of Defence; and
- whether those exercising the delegated powers or functions will possess the appropriate training, qualifications, skills or experience.[84]

Minister for Defence's response[85]

2.10 The minister advised that the delegation of powers and functions under proposed subsection 73(2A) to EL1 or EL2 employees is necessary to ensure the efficient administration of permits and conditions under sections 11 and 12 of the Act, and Act already allows for delegation to EL2 employees in the context of deciding and issuing permits.

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83 Proposed subsection 73(2A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

84 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2024* (18 January 2024) pp. 16–17.

85 The minister responded to the committee's comments in a letter dated 14 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

2.11 The minister advised that EL1 level employees will 'assess and approve low risk and low complexity applications' in limited circumstances, and ensure that relevant EL1 employees have the appropriate training and experience, as well as oversight from senior management. The minister also noted safeguards on this delegation in the bill, such as proposed subsection 73(9), which restricts EL1 or EL2 employees from refusing to give a person a permit for an activity if the delegate is satisfied that the activity would prejudice Australia's security, defence or international relations. Instead, such cases must be referred to the Minister, Secretary or a member of the SES within the department.

2.12 The minister further advised that the department provides formal and informal training to staff in the exercise of these powers and functions, and that these delegations are limited to staff in the Defence Export Controls Branch, who hold a range of technical qualifications and experience.

Committee comment

2.13 The committee thanks the minister for this detailed advice which clarifies how the delegation of powers made under proposed subsection 73(2A) will operate in practice. The committee welcomes the further information in relation to the relevant training, experience and qualifications of the staff, and the safeguards built into the bill to ensure the appropriate exercise of these powers and functions.

2.14 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Digital ID Bill 2023[86]

Purpose	The bill seeks to establish an accreditation scheme for entities providing digital ID services; provide additional privacy safeguards for the provision of accredited digital ID services; establish an Australian Government Digital ID System (the AGDIS); and strengthen the oversight and regulation of accredited digital ID providers, entities participating in the AGDIS and the integrity and performance of the AGDIS.
Portfolio	Finance
Introduced	Senate on 30 November 2023
Bill status	Before the Senate

Tabling of documents in Parliament[87]

2.16 Subclause 145(1) provides that the Minister for Finance (the minister) must cause periodic reviews to be undertaken of provisions in the Digital ID Rules that relate to the charging of fees by the Digital ID Regulator. Subclause 145(4) provides that the minister must cause a written report about each review to be prepared and published on the Digital ID Regulator's website. The provision does not require any such report to be tabled in both Houses of the Parliament.

2.17 In *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to whether the bill could be amended to provide that reports prepared under subclause 145(4) be tabled in Parliament in order to improve parliamentary scrutiny.[88] The minister responded to this concern that should the committee express a preference for tabling in Parliament, the Minister had no reservations in doing so.[89]

2.18 In *Scrutiny Digest 3 of 2024*, the committee indicated its preference accordingly and sought further advice from the minister on whether amendments to clause 145 of the bill could be moved in order to require the tabling of such reports in the Parliament.[90]

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86 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Digital ID Bill 2023, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 61.

87 Subclause 145(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

88 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) p. 31.

89 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

90 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) p. 74.

Minister for Finance's response[91]

2.19 The minister advised that given the committee's stated preference, the Government will move amendments to the bill to provide that the minister must cause the report for each periodic review of the charging framework in the Digital ID Rules to be laid before each House of the Parliament.

Committee comment

2.20 The committee thanks the minister for this response.

2.21 The committee welcomes the minister's undertaking to amend the bill to provide that reports prepared under subclause 145(4) in relation to the periodic review of the charging of fees by the Digital ID Regulator will be tabled in both Houses of the Parliament.

2.22 **In light of the above, the committee makes no further comment on this matter.**

Incorporation of external materials as existing from time to time[92]

2.23 Subclause 167(2) of the bill provides that the Accreditation Rules, the Digital ID Data Standards and the Digital ID Rules, which are core instruments that will be made pursuant to the bill, may apply, adopt or incorporate any matter contained in other material as in force or existing from time to time. The explanatory memorandum provides examples of material that may be incorporated, which includes Commonwealth documents relating to protective security and cyber security, international standards and digital identity standards set by internationally recognised organisations.[93]

2.24 In *Scrutiny Digest 2 of 2024*, the committee requested the minister's advice as to whether documents applied, adopted or incorporated by reference under clause 167 will be made freely available to all persons interested in the law.[94] The minister advised in response to this concern that there will be two kinds of incorporated documents in the legislative rules, one of which is not freely and publicly

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91 The minister responded to the committee's comments in a letter dated 7 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

92 Subclause 167(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

93 Explanatory memorandum, pp. 120–121.

94 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2024* (7 February 2024) p. 35.

available in full and that the other is unable to be made publicly available due to copyright.[95]

2.25 Accordingly, in *Scrutiny Digest 3 of 2024*, the committee noted that it is not uncommon for incorporated documents subject to copyright to be made available by Departments in other manners. The committee requested the minister's advice as to whether free access to documents that will be applied, adopted, or incorporated by reference into legislative instruments as a result of clause 167 made available via other means, such as through public libraries or by display at departmental offices on request.[96]

Minister for Finance's response[97]

2.26 The minister noted the committee's comment that it is not uncommon for incorporated documents subject to copyright to be made available via other means. The minister advised that the Department of Finance is further investigating the ways in which documents that are incorporated by reference and that are subject to copyright can legally be made available for free viewing by interested parties.[98]

Committee comment

2.27 The committee thanks the minister for this response, noting that it would appreciate further advice on the conclusion of the Department's investigations on this matter in due course.

2.28 **In light of the above, the committee makes no further comment on this matter.**

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95 The minister responded to the committee's comments in a letter dated 16 February 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 3 of 2024*).

96 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 78–80.

97 The minister responded to the committee's comments in a letter dated 7 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Financial Framework (Supplementary Powers) Amendment Bill 2024[99]

Purpose	The bill seeks to amend the *Financial Framework (Supplementary Powers) Act 1997* to clarify that the Commonwealth may make, vary or administer arrangements or grants of financial assistance under the Act even where this power exists in other legislation and to make similar arrangements in respect of the power of the Commonwealth to form a company, participate in the formation of a company, acquire shares in a company, or become a member of a company.
Portfolio	Finance
Introduced	Senate on 7 February 2024
Bill status	Before the Senate

Insufficient parliamentary scrutiny
Inappropriate delegation of legislative powers[100]

2.29 Item 3 of Schedule 1 to the bill seeks to substitute section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the Act) to remove the words '[i]f…apart from this subsection, the Commonwealth does not have power to'. The effect of this is to clarify that the Commonwealth may make, vary or administer arrangements or grants of financial assistance under this Act even where this power exists in other legislation.

2.30 Item 4 of Schedule 1 to the bill similarly seeks to substitute section 39B of the Act to remove the same words, such that the Commonwealth can form, participate in the formation of, acquire shares in, or become a member of, a company, even where the power to do this exists in other legislation.

2.31 The committee has long standing scrutiny concerns with section 32B of the Act, which are outlined more fully in *Scrutiny Digest 3 of 2024*.[101] In light of the importance of ensuring adequate parliamentary scrutiny of and oversight over

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99 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Financial Framework (Supplementary Powers) Amendment Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 62.

100 Schedule 1, item 3, section 32B; and Schedule 1, item 4, subsections 39B(1) and (2). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iv) and (v).

101 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 33–36.

expenditure, in *Scrutiny Digest 3 of 2024* the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to delegate to the Executive the power to authorise the expenditure of public money rather than for such matters to be proposed to the Parliament for consideration and approval (subject to any agreed amendments) in primary legislation;
- if the minister considers that there is sufficient justification for such delegation, whether consideration can be given to:
  - alternative approval or disallowance mechanisms for regulations made under section 32B of the *Financial Framework (Supplementary Powers) Act 1997* as suggested previously by the committee and the Standing Committee for the Scrutiny of Delegated Legislation; or
  - any other possible options to provide for additional parliamentary scrutiny of such matters;

  and, in each case, if not, why not.[102]

Minister for Finance's response[103]

2.32 The Minister for Finance (the minister) advised that the Financial Framework (Supplementary Powers) (FFSP) legislative framework was established in response to what is now known as the High Court decisions in *Williams* and is one of the mechanisms to provide legislative authority for Commonwealth expenditure. The minister advised that the framework is an important legislative mechanism that in certain circumstances can provide for more immediate spending authority than primary legislation and provided some examples of spending supported by the framework, including implementing measures in response to various Royal Commissions and in response to urgent situations like drought relief and emergency payments during the COVID-19 pandemic.

2.33 In relation to the consideration of any alternate approval or disallowance mechanisms for regulations made, the minister advised that the Government considers that the existing scrutiny mechanisms provide sufficient oversight for the regulations and reiterated its response to recommendation 14 of the Senate Standing Committee on Regulations and Ordinances'[104] report, *Parliamentary scrutiny of delegated legislation*, that 'affirmative resolution for regulations would significantly hinder the government's ability to respond promptly to issues…and delays to

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102 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 36-37.

103 The minister responded to the committee's comments in a letter dated 6 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

104 Now, the Senate Standing Committee for the Scrutiny of Delegated Legislation.

implementing legislative authority specifying expenditure could risk the Government not meeting its own policy objectives'.

2.34 The minister further advised that the purpose of the instrument is to provide legislative authority for government spending which has already been agreed to by the Government and the legislative instrument is subject to scrutiny and disallowance by the Parliament. Other possible options would not provide the same balance of efficient delivery of funding in emergencies and parliamentary scrutiny provided by the tabling of legislative instruments under the *Legislation Act 2003*.

Committee comment

2.35 The committee thanks the minister for this response.

2.36 The committee considers that it is difficult to reconcile the decision of the High Court in the *Williams* cases[105] with a legislative provision that seeks to empower the Executive, through the making of a legislative instrument, to expand its own powers to contract and spend. In making its decision in *Williams (No 1)*, the High Court noted that the system of responsible and representative government established under the Constitution requires that the Parliament, as the directly elected representatives of the people, to have control over the expenditure of money by the Executive.[106] The legal authority for spending must derive from statute or otherwise from non-statutory power found in the Constitution. In particular, the committee draws attention to the remarks of Hayne J that 'sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in this case *by legislation*' (emphasis added).[107]

2.37 In this light, the committee is not persuaded that the fact that government spending 'has already been agreed to by the Government' provides sufficient justification for the legislative provision. Similarly, the committee is of the view that although it may be the case that the time taken to provide legislative authorisation of expenditure may result in the 'Government not meeting its own policy objectives', it is still appropriately a matter for the Parliament to determine whether spending for a particular policy purpose should be so authorised. While section 56 of the Constitution vests the financial *initiative* in the Commonwealth Executive, financial *control* is vested to the Parliament.[108] The committee considers that, from a scrutiny perspective, negative approval of an expansion of the Executive's power to contract and spend through the absence of disallowance is not an optimal approach, and appears to

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105 *Williams v Commonwealth* (2012) 248 CLR 158 ('*Williams (No 1)*'); and *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 ('*Williams (No 2)*').

106 *Williams v Commonwealth* (2012) 248 CLR 158 at [516] .

107 *Williams v Commonwealth* (2012) 248 CLR 158 at [288].

108 Anne Twomey, 'Executive power following the *Williams* cases' in John Griffiths and James Stelios (eds), *Current issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (The Federation Press, 2020) 33, 37; Australian Constitution, section 83.

provide insufficient weight to the inherent benefits of parliamentary debate, and the importance of the role that the Parliament should play in authorising and scrutinising expenditure.

2.38 The committee notes the explanation that instruments made pursuant to section 32B of the Act have enabled the Government to respond to urgent situations, such as emergency payments relating to natural disasters. However, if it is to be accepted that it is appropriate for the Parliament to delegate its power to authorise spending for such purposes, there is no requirement that the power under section 32B of the Act be exercised only in relation to these kinds of events.

2.39 In this light, the committee notes instruments made under section 32B of the Act have recently authorised spending for the following purposes:

- to support NQ Spark Pty Ltd to contribute towards meeting the costs of the construction of the North Queensland Simulation Park ($32.2 million over three years);[109]
- to support the development and operation of a facility in the Burdekin region to utilise sugar cane waste to produce renewable fuels ($5.1 million over three years);[110] and
- to fund Aurora Education Foundation Ltd to deliver and evaluate new and existing high school program models ($1.5 million).[111]

2.40 While the committee does not comment on the policy merits of spending in relation to any of these measures, from a scrutiny perspective, it is unclear to the committee the extent to which such spending could be characterised as emergency spending to which there is an urgent need for authorisation by way of delegated rather than primary legislation.

2.41 The committee reiterates its view that a legislative instrument made by the Executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. The authorisation of the expenditure of public money is a significant matter which should be included in primary legislation.

2.42 At a minimum, the committee considers that it would be an improvement to the existing mechanism provided in section 32B of the Act if it was amended to provide that instruments that authorise expenditure for the purposes of natural disaster payments or other like emergencies be subject to the ordinary disallowance process,

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109 Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 3) Regulations 2023 [F2023L00801]; Explanatory statement, p. 4.

110 Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 2) Regulations 2023 [F2023L00537]; Explanatory statement, p. 2.

111 Financial Framework (Supplementary Powers) Amendment (Education Measures No. 2) Regulations 2023 [F2023L00543]; Explanatory statement, p. 2.

while providing for an alternative positive approval process in relation to instruments authorising expenditure for other purposes.

2.43 The committee draws its scrutiny concerns in relation to section 32B of the *Financial Framework (Supplementary Powers) Act 1997* to the attention of senators and leaves to the Senate as a whole the appropriateness of authorising, via regulation, the expenditure of public money.

Retrospective validation
Parliamentary scrutiny[112]

2.44 Item 20 of Schedule 1 to the bill seeks to provide that where, before the commencement of the item, the Commonwealth purported to make, vary or administer an arrangement or grant under section 32B and it also had the power to do so under other legislation, the Commonwealth is taken to have had, at the relevant time, the power to make, vary or administer that arrangement or grant. This provision provides for the retrospective validation of past action taken pursuant to section 32B to ensure that past spending which may have been authorised under the Financial Framework (Supplementary Powers) Regulations 1997 is legally valid.

2.45 Items 22 and 23 seek to provide retrospective validation in a similar effect in respect of the formation of companies and acquisition of shares, with respect to the amendments proposed to section 39B of the *Financial Framework (Supplementary Powers) Act 1997*.

2.46 In *Scrutiny Digest 3 of 2024,* the committee requested the minister's detailed advice as to:

- whether any persons are likely to be detrimentally affected by the retrospective validation of the matters provided for in items 20, 22 and 23 of Schedule 1 to the bill, noting, for instance, that the validity of arrangements or grants entered into, varied or administered by the Commonwealth may impact individuals other than grant recipients;
- the necessity of the amendments and the circumstances by which it became apparent to the minister that the amendments, and the retrospective operation of the amendments, may be necessary;
- in any case, why it is appropriate to retrospectively apply the legislation;
- the number of instances in which the Commonwealth made, varied or administered an arrangement or grant under existing section 32B of the Act

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112 Schedule 1, items 20, 22 and 23. The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(i) and (v).

in instances where, but for the retrospective validation provided by item 20 of the bill, the Commonwealth did not have the power to do so; and

- the detail of how much money was spent pursuant to such exercises of power as are proposed to be retrospectively validated by the bill.[113]

Minister for Finance's response[114]

2.47 The minister advised that the purpose of the validation provisions is to regularise the status of spending in which the Commonwealth has previously engaged in reliance on sections 32B and 39B of the Act, in the event that the provisions may not have been available to support that spending by reason of the existence of an alternative source of power. It is to ensure there is no uncertainty in relation to the legal status of that past spending. The minister reiterated that any retrospective impact of the validation would be beneficial to recipients of spending programs by negating any risk of invalidity of payments and it would have no detrimental effect on individuals.

2.48 The minister advised that the necessity of the amendment was recently identified by the Department of Finance as part of ongoing and regular review of the operation of the Act, and the amendments are necessary as Commonwealth entities that had relied on these provisions for authority for Commonwealth spending are potentially affected in circumstances where another source of legislative authority for the spending may exist.

2.49 The minister further advised that it is appropriate to retrospectively authorise the legislation as the validation provisions would provide that, from the commencement of the bill, the Commonwealth is taken to have had the necessary power under section 32B at relevant times in the past, and the bill would make similar provision in respect of the legal status of any past activities that relied on section 39B. It will ensure that any past spending under the FFSP framework is not at risk for being purportedly authorised under the Act when another source of legislative authority may also have existed.

2.50 In relation to the number of instances in which the Commonwealth made, varied or administered an arrangement or grant under existing section 32B and where, but for the retrospective validation, the Commonwealth did not have the power to do so, the minister advised that they are not aware of any spending that is invalid as a result of the existence of an alternative source of legislative authority and there is no litigation on foot relating to this issue.

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113 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) p. 39.

114 The minister responded to the committee's comments in a letter dated 6 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

2.51 The minister did not provide any information as to how much money may have been spent pursuant to such exercises of power that are proposed to be retrospectively validated by the bill.

Committee comment

2.52 The committee thanks the minister for this response.

2.53 In relation to the retrospective validation of previous spending made following the exercise of the power under section 32B, the committee notes the advice that the Government does not consider that any individual would be detrimentally impacted. The committee also acknowledges the advice that no litigation is currently on foot in relation to the matter.

2.54 However, the committee remains of the view that when assessing the impact of retrospective validation of potentially invalid former actions by the Executive, the broadest possible view should be taken of the rights and interests that could be considered to be detrimentally impacted. In this instance, it would appear to the committee that retrospective validation could impact the rights of people with an interest in challenging the validity of spending for a particular purpose. The explanatory materials and response also provide no insight into whether the retrospective validation of past action taken under section 39B could impact people, for instance those that sought to challenge actions taken by companies potentially invalidly formed by the Executive.

2.55 The committee considers that it would be appropriate for the explanatory materials to weigh any detrimental affect the provision could have on the interests of people against the benefits of providing clarity and certainty. This would enable the Parliament to make a fully informed decision as to whether the retrospective validation proposed by the items *unduly* trespasses on personal rights and liberties.

2.56 The committee acknowledges the advice that the Government is unaware of any instances in which previous spending may have been invalid due to the existence of an alternative source of legislative authority for the spending. Noting that the exercise of the power under section 32B of the Act is an exercise of legislative power delegated by the Parliament, the committee is of the view that it would have been appropriate for a proactive examination of all past exercises of the power to have taken place in light of the potential issues identified in the Department's ongoing review of the operation of the FFSP Act. This would have identified the extent of any potentially invalid previous exercises of the power, which would be a relevant factor for the Parliament to take into account in its consideration of legislation to validate past exercises of the power that it had delegated to the Executive.

2.57 Finally, while acknowledging the advice that the necessity of these amendments was identified by the Department as part of its ongoing review, the committee does not consider that this fully addresses the question of when and how

the need for the amendments and the retrospective validation of past actions became apparent. Noting that this advice may be of assistance both in determining:

- the extent to which the retrospective validation could impact on personal rights and liberties; and
- whether the necessity for the amendments outweighs any such impact;

the committee would welcome any additional advice that could be provided in relation to the review.

2.58 In light of the above, the committee requests the minister's further advice in relation to when and how the need for the amendments proposed by the bill and the retrospective validation of past uses of the power under section 32B became apparent during the Department's review of the operation of the *Financial Framework (Supplementary Powers) Act 1997*, referred to in the minister's correspondence.

2.59 Noting the possibility that the bill may pass the Parliament prior to the committee's next meeting, the committee notes that such advice could also be provided to the Senate during its consideration of the bill, in order to inform the debate.

National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024[115]

Purpose	The bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* to provide that the National VET Regulator has the regulatory tools to take action against non-genuine National VET Regulator registered training organisations and support the regulation of the VET sector.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Exemption from disallowance[116]

2.60 Item 22 of Schedule 1 to the bill seeks to insert proposed sections 231C and 231D into the *National Vocational Education and Training Regulator Act 2011* (the Act). Under proposed subsections 231C(1) and (3), the minister may, by legislative instrument, determine that the National VET (vocational education and training) Regulator is not required to do any processing activity relating to initial applications for registration, or may determine that the National VET Regulator must not do any processing activity, respectively. Proposed subsection 231C(6) provides that an instrument made under subsection (1) or (3) is a legislative instrument but section 42 of the *Legislation Act 2003* (Legislation Act) does not apply, meaning that these instruments are exempt from disallowance.

2.61 Similarly, proposed subsection 231D(1) provides that the minister may, by legislative instrument, suspend the making of initial applications for registration and proposed subsection 231D(4) provides that an instrument made under subsection (1) is a legislative instrument but section 42 of the Legislation Act does not apply.

2.62 In *Scrutiny Digest 3 of 2023* the committee sought the minster's advice as to whether the bill could be amended to omit subsections 231C(6) and 231D(4) so that legislative instruments made under subsections 231C(1), 231C(3) and 231D(1) are

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115 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 63.

116 Schedule 1, item 22, proposed subsections 231C(6) and 231D(4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

subject to appropriate parliamentary oversight through the usual disallowance process.

Minister for Skills and Training's response[117]

2.63 The Minister for Skills and Training (the minister) advised that they do not consider that the bill should be amended to provide that instruments made under the relevant sections of the Act are subject to disallowance.

2.64 The minister advised that instruments made under proposed subsections 213C or 231D must only be made with the approval of the Ministerial Council (consisting of the relevant portfolio ministers from each Australian jurisdiction). The minister further advised that the Act can be characterised as enabling legislation for an intergovernmental body or scheme and therefore delegated legislation made under the Act is appropriately exempt from disallowance for the purposes of section 44 of the *Legislation Act 2003*. The minister noted that express provision in the Act would need to be made in order to bring these instruments within the disallowance regime, and that this would not be appropriate because (in summary):

- there is a shared responsibility by the Ministerial Council for the NVET scheme;
- instruments made under the proposed subsections would be the result of significant negotiation by the Ministerial Council, which would afford scrutiny;
- it would be inappropriate for the Commonwealth Parliament to unilaterally disallow a legislative instrument that is part of an intergovernmental scheme; and
- unilateral disallowance could undermine confidence in the *Intergovernmental Agreement for Regulatory Reform in Vocational Education and Training*.

Committee comment

2.65 The committee thanks the minister for this detailed response. While noting the advice provided by the minister, the committee reiterates its concerns about the exemption from disallowance of instruments provided for by proposed subsections 231C(6) and 231D(4) of the bill.

2.66 The committee does not consider the fact that an instrument is made to facilitate the operation of an intergovernmental scheme is reason, in itself, for exempting an instrument from the usual parliamentary disallowance process. Moreover, the committee does not consider the fact that a number of executive

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117 The minister responded to the committee's comments in a letter dated 12 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

governments have reached agreement in relation to a particular matter precludes the need for parliamentary oversight of the laws resulting from such agreement.

2.67 The committee notes that the making of the determinations in question is an exercise by the Commonwealth Executive of legislative power that has been delegated to it by the Commonwealth Parliament in pursuance of the objectives of a scheme legislated by the Parliament. As such, the committee is of the view that it would be entirely appropriate for the Commonwealth Parliament to maintain oversight of such instruments through the disallowance process.

2.68 The committee reiterates its view that the importance of a matter set out in an instrument to the overall operation of an intergovernmental scheme would be appropriately weighed by a house of the Parliament and would inevitably be a subject of debate should a proposal to disallow the instrument be put to that house.

2.69 In addition, the committee notes that while the instruments would be subject to scrutiny by the Ministerial Council as part of their formation, the committee is primarily concerned with ensuring that executive actions are given proper Commonwealth parliamentary oversight, and this requirement is not fulfilled by oversight provided by executive bodies in other Australian jurisdictions.

2.70 While the committee accepts the minister's advice that consideration would need to be given to the nature of the amendments that would need to be moved in the Parliament to ensure that the relevant determinations are subject to parliamentary oversight through the disallowance process, the committee nevertheless remains of the view that such amendments would be appropriate.

2.71 **The committee therefore draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of instruments made under proposed subsections 231C(1) and (3), and proposed subsection 231D(1), of the bill not being subject to disallowance.**

Privacy[118]

2.72 Section 17A of the Act provides that the National VET Regulator must prepare a report of an audit conducted in relation to an application for registration and, under subsection 17A(3), the report must not include personal information, unless the personal information is the name of the applicant or an NVR registered training organisation. Section 35 of the Act provides that the National VET Regulator may, at any time, conduct a compliance audit of an NVR registered training organisation's operations, must prepare a report of the compliance audit and, under subsection 35(1C), the report must not include personal information, unless the personal

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118 Schedule 1, item 67, subsection 17A(3); and Schedule 1, item 69, subsection 35(1C). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

information is the name of the NVR registered training organisation to which the report relates.

2.73 Items 67 and 69 of Schedule 1 to the bill seeks to provide that, for both subsections 17A(3) and 35(1C), the requirement for the report to not include personal information only applies if the report is published.

2.74 In *Scrutiny Digest 3 of 2023* the committee sought the minister's advice as to:

- what kinds of personal information are expected to be included in audit and compliance audit reports under sections 17A and 35 of the *National Vocational Education and Training Regulator Act 2011* (the Act); and
- what safeguards are in place to protect personal information, including whether the *Privacy Act 1988* applies.

Minister for Skills and Training's response[119]

2.75 The minister advised that the following types of personal information are expected to be included in audit and compliance audit reports:

- the NVR RTO's policies and procedures, and training and assessment strategies;
- photographs of the NVR RTO's premises;
- student files, including enrolment forms and completed student assessments;
- training or assessor records;
- other documentation and evidence relevant to the scope of the audit;
- observations of facilities, and physical and virtual training and assessment equipment and resources; and
- evidence from interviews with the NVR RTO's management and trainers and assessors and students over 18 years of age.

2.76 The minister also confirmed that the Australian Privacy Principles and the *Privacy Act 1988* apply to this information, and that the Regulator must ensure that no personal information beyond the name of an NVR RTO or an applicant is disclosed in a published audit report.

2.77 The minister further advised of the Regulator's privacy policy, which makes clear that personal information will only be sought from owners, directors or high managerial agents of NVR RTOs, and sets out how the Regulator complies with its obligations under the Privacy Act.

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119 The minister responded to the committee's comments in a letter dated 12 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

Committee comment

2.78 The committee thanks the minister for clarifying the types of personal information that may be included in audit and compliance audit reports under sections 17A and 35 of the Act. The committee welcomes the confirmation that the collection and retention of this sensitive personal information will be protected by the safeguards in the *Privacy Act 1988*.

2.79 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Minister for Skills and Training be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Treasury Laws Amendment (Foreign Investment) Bill 2024[120]

Purpose	The bill seeks to provide an express ordering rule to ensure the law imposing non-Australian tax prevails in the event of any inconsistency with the provisions of Australia's bilateral tax treaties.
Portfolio	Treasury
Introduced	House of Representatives on 7 February 2024
Bill status	Before the Senate

Retrospective application[121]

2.80 Item 1 of Schedule 1 to the bill seeks to insert subsection 5(3) into the *International Tax Agreements Act 1953*, which provides that the operation of a provision of an agreement provided for in subsection 5(1) is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a state or territory, that imposes a tax other than Australian tax,[122] unless expressly provided otherwise in that law. Item 2 of Schedule 1 clarifies that the amendment applies in relation to taxes (other than Australian tax) payable on or after 1 January 2018, and in relation to tax periods that end on or after 1 January 2018.

2.81 The effect of this amendment is that where a provision of a tax treaty listed in subsection 5(1) of the *International Tax Agreements Act 1953* is inconsistent with a law of the Commonwealth, state or territory, the provision of the tax treaty will not operate to the extent of the inconsistency. The explanatory memorandum explains that this is to clarify any uncertainty and to ensure that the Commonwealth, state or territory tax continues to apply as intended and that taxes collected since 1 January 2018 are valid.[123]

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120 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Foreign Investment) Bill 2024, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 64.

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

122 Section 3 of the *International Tax Agreements Act 1953* defines Australian tax to mean: income tax imposed as such by an Act or fringe benefits tax imposed by the *Fringe Benefits Tax Act 1986*.

123 Explanatory memorandum, p. 35.

2.82 In *Scrutiny Digest 3 of 2024*, the committee requested the Treasurer's detailed advice as to:

- whether any persons are likely to be detrimentally affected by the retrospective application of the legislation and, if so, to what extent their interests are likely to be affected; and
- why it is considered necessary and appropriate for the amendment to operate retrospectively.[124]

Treasurer's response[125]

2.83 The Treasurer advised that the amendment maintains the status quo by clarifying the intended scope of Non-Discrimination Articles (NDAs) in Australia's bilateral tax treaties. At the time Australia entered the relevant treaties, it was envisaged that the NDAs would apply in respect of income tax (including the petroleum resource rent tax), the GST, the fringe benefits tax and to state and territory taxes. The Treasurer advised there has been some uncertainty in respect of the breadth of the NDAs and their interaction with taxes not typically covered by Australia's tax treaties, such as Commonwealth foreign investment fees and state and territory property surcharges. The Treasurer advised the amendment provides certainty that these Commonwealth, state and territory taxes remain payable, and therefore taxpayers who have paid these taxes will not be detrimentally affected by the retrospective application of the legislation.

2.84 The Treasurer further advised that the amendment operates retrospectively to resolve any ambiguity in the law and to provide taxpayers with certainty that taxes already collected remain payable. This ensures that applications made and approved under the foreign investment regime valid and can continue to be relied on by taxpayers.

Committee comment

2.85 The committee thanks the Treasurer for this response.

2.86 While the committee welcomes the intention to clarify the scope of the non-discrimination articles in the relevant bilateral tax treaties, it nevertheless remains unclear to the committee how the retrospective application of the amendment will not detrimentally impact some individuals.

2.87 The committee acknowledges that while the understanding of the Government may have been that the non-discrimination articles in particular bilateral treaties apply only in respect of certain taxes, the amendments provided by the bill

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124 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 48–50.

125 The minister responded to the committee's comments in a letter dated 13 March 2024. A copy of the letter is available on the committee's webpage (see correspondence relating to *Scrutiny Digest 4 of 2024*).

suggest that there is a possibility that these articles may apply more broadly. As such, the committee is of the view that it would have been of assistance to the committee if this was taken into account in an assessment of the possible detrimental impact of the retrospective application of the amendments.

2.88 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of retrospectively applying legislation to clarify the operation of non-discrimination provisions in bilateral tax treaties.

Chapter 3
Scrutiny of standing appropriations[126]

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.[127] 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.[128]

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 Dean Smith

Chair

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126 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 4 of 2024*; [2024] AUSStaCSBSD 65.

127 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*.

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