

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Annual Report 2020

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Chapter 1

Introduction

Overview

1.1 The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) (formerly the Senate Standing Committee on Regulations and Ordinances) was established in 1932. Its role is to examine all instruments made under the authority of Acts of Parliament which are subject to disallowance, disapproval or affirmative resolution by the Senate and which are of a legislative character.¹ The committee assesses whether those instruments comply with the committee's non-partisan scrutiny principles, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

1.2 In most years, thousands of pieces of delegated legislation are made, which have the same force in law as primary legislation and may form as much as half of the statutory law of the Commonwealth of Australia.²

1.3 The committee's work may be broadly described as technical legislative scrutiny. The committee does not generally consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny.

1.4 This annual report provides a summary of the committee's work for the period from 1 January to 31 December 2020. The annual report is set out in four chapters including this introductory chapter:

- Chapter 1 provides an overview of the committee's role, including its functions, powers, and publications.
- Chapter 2 discusses the committee's inquiry into the exemption of delegated legislation from parliamentary oversight, including details of the interim report tabled in December 2020.
- Chapter 3 sets out statistics relating to the work of the committee in 2020.
- Chapter 4 highlights the most significant scrutiny issues that the committee identified in 2020.

1 The committee also scrutinises instruments that are not subject to disallowance. However, it only comments on such instruments if they have been misclassified as non-disallowable.

2 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 432.

Changes to Standing Order 23

1.5 On 27 November 2019, the Senate agreed to amend Senate standing orders 23 and 25(2)(a).³ The amendments accord with the recommendations of the committee's bipartisan report of its inquiry into parliamentary scrutiny of delegated legislation and took effect on 4 December 2019. The amendments altered the committee's powers, procedures and scrutiny principles. The committee began operating in accordance with its new scrutiny principles for instruments registered from 4 December 2019.

1.6 The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3) which required, in 2020, the committee to scrutinise each instrument as to whether:

- a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
- b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
- c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
- d) those likely to be affected by the instrument were adequately consulted in relation to it;
- e) its drafting is defective or unclear;
- f) it, and any document it incorporates, may be freely accessed and used;
- g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
- h) it trespasses unduly on personal rights and liberties;
- i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- j) it contains matters more appropriate for parliamentary enactment; and
- k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

3 The Senate agreed to General Business Notice of Motion No. 84, standing in the name of the Chair of the Standing Committee on Regulations and Ordinances on 27 November 2019. The notice may be accessed at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fjournals%2Fcc444f08-d21e-4eb4-b9d0-2c9151c72bd2%2F0015%22>.

1.7 In addition, standing order 23(4) empowers the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issue that are likely to be of interest to the Senate.

Committee membership

1.8 Senate standing order 23 provides for the committee to be appointed at the commencement of each Parliament. The committee must comprise six members: three government senators and three non-government senators. The committee is to be chaired by a government senator.

1.9 A list of current committee members can be found at the beginning of this report and can also be found on the committee's website.⁴

1.10 The current committee members are unchanged since the beginning of 2020.

The committee processes

1.11 In undertaking its work, the committee is supported by a secretariat comprised of a secretary, two principal research officers, two senior research officers and a legislative research officer.

1.12 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Associate Professor Andrew Edgar served as the committee's legal adviser during the reporting period.

Delivery of instruments

1.13 Under the *Legislation Act 2003*, all legislative instruments must be registered on the Federal Register of Legislation as soon as practicable after they are made, and must be tabled in both Houses of the Parliament within six sitting days of registration.⁵ Once registered, instruments are delivered by the Office of Parliamentary Counsel to Parliament for tabling, and to the committee secretariat.

Scrutiny of instruments

1.14 Each instrument is scrutinised by the committee secretariat and the legal adviser against the committee's scrutiny principles. The committee meets regularly during Senate sitting weeks to consider any instruments that may give rise to scrutiny issues.

1.15 Where an instrument raises a scrutiny concern, the committee's usual approach is to include the instrument in its *Delegated Legislation Monitor* (the

4 Parliament of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, Committee Membership, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Committee_Membership (accessed 18 March 2021).

5 *Legislation Act 2003*, sections 15G, 15H and 38.

Monitor) and write to the responsible minister or agency seeking further explanation or requesting specific action to address the relevant issue.

The committee's use of the disallowance process

1.16 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.⁶

1.17 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.⁷ This extends the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.

1.18 The committee may otherwise give a notice of motion to disallow an instrument where it considers that the instrument raises serious, unresolved scrutiny concerns, and should be drawn to the Senate's attention or disallowed. In these circumstances, the committee will advise the relevant minister in writing of its intention to move to disallow the instrument and may publish a summary of its scrutiny concerns in Chapter 1 of its Monitor.⁸

1.19 In the vast majority of cases, these notices are withdrawn when the committee receives a satisfactory response from the relevant minister or agency which, for example, provides information that addresses the committee's concerns or includes an undertaking to amend the instrument or its explanatory statement. Where a satisfactory response is received, the Chair withdraws the notice of motion, having first notified the Senate of the intention to do so.⁹

Undertakings

1.20 Ministers or agencies may provide an undertaking to address the committee's concerns by taking steps at some point in the future. Typically, they will undertake to amend the instrument, its explanatory statement or to propose amendments to an instrument's enabling legislation. The acceptance of such undertakings by the committee has the benefit of securing a satisfactory outcome in

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 437.

7 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 438.

8 The committee commenced this practice after 1 July 2019.

9 Senate Standing Order 78 provides that any other senator may take over a notice of motion for disallowance once the intention to withdraw is advised to the chamber, and before the notice is withdrawn. A senator who does so may then pursue the disallowance motion on any grounds he or she wishes.

relation to the committee's scrutiny concerns without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

1.21 The committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The two other committees are the Parliamentary Joint Committee on Human Rights (PJCHR)¹⁰ and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee).¹¹

1.22 The work of the three committees is complementary in many respects. The committee therefore monitors the work of the PJCHR and the Scrutiny of Bills Committee and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

Committee publications

1.23 Committee publications may be accessed on the committee's website.¹² A brief overview of these publications is provided below.

Delegated Legislation Monitor¹³

1.24 The Monitor is the regular scrutiny report on the work of the committee. It is generally published in each Senate sitting week. It identifies instruments in relation to which the committee is engaging with the relevant minister or agency or has concluded its examination. The Monitor also lists all the instruments which specify Commonwealth government expenditure that have been registered during the reporting period, as well as instruments that the committee is raising under standing order 23(4) as a matter of interest to the Senate. It also records undertakings that have been made or implemented to address the committee's scrutiny concerns.

Scrutiny News

1.25 The committee secretariat prepares *Scrutiny News* each sitting week. This is a brief publication which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list. *Scrutiny News* highlights recent comments drawn from material in the committee's Monitor and the Scrutiny of Bills Committee's *Scrutiny Digest*, with a particular focus on complex issues. *Scrutiny News* is also used to raise awareness about the committees and their functions.

1.26 Past editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.¹⁴

10 www.aph.gov.au/joint_humanrights.

11 www.aph.gov.au/senate_scrutiny.

12 www.aph.gov.au/senate_sdlc.

13 Monitors for 2020, and for previous years, may be accessed via the committee's webpage. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor

Guidelines

1.27 In February 2020 the committee published new guidelines that reflect the changes to the committee's powers, procedures and scrutiny principles that took effect on 4 December 2019.¹⁵

1.28 The committee's guidelines are set out in four parts:

- *Part I: guidelines on the committee's work practices*, provides general guidance for agencies and departmental liaison officers;
- *Part II: guidelines on the committee's technical scrutiny principles*, sets out each of the committee's scrutiny principles and how they are applied, including specific requirements and examples, as well as an explanatory statement checklist relating to each principle;
- *Part III: guidelines on scrutiny of Commonwealth expenditure*, provides information on the committee's approach to instruments that specify grants and programs on which expenditure is authorised;
- *Part IV: guidelines on matters of interest to the Senate*, sets out the types of matters that the committee may consider to be of interest to the Senate.

1.29 The committee's guidelines are regularly reviewed by the committee's secretariat and will be updated as appropriate.

Index of instruments

1.30 The *Index of Instruments* is an alphabetical list of all instruments about which the committee has raised a scrutiny concern in a particular year.

Disallowance Alert

1.31 The *Disallowance Alert* is a webpage listing all instruments for which a notice of motion for disallowance has been given in either House (whether by the committee or by an individual senator or member). The progress and outcome of all disallowance notices is also recorded.

1.32 From the beginning of 2021, the *Disallowance Alert* will be managed by the Senate Table Office.

14 Parliament of Australia, Senate Standing Committee for the Scrutiny of Bills, Scrutiny News, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News (accessed 21 June 2021).

15 Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines (accessed 21 June 2021).

Other resources

1.33 A number of other resources relevant to the committee can be accessed on the Senate website.¹⁶ A brief overview of these resources is provided below.

Senate Disallowable Instruments List

1.34 The Senate Disallowable Instruments List is a list of all disallowable instruments tabled in the Senate.¹⁷ This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

Guides to Senate Procedure

1.35 The Guides to Senate Procedure are a series of guidance notes designed to provide a practical understanding of the procedures governing the work of the Senate. Of particular relevance to the work of the committee is Brief No. 19 on disallowance.

Odgers' Australian Senate Practice

1.36 *Odgers' Australian Senate Practice* is an authoritative reference work on all aspects of the Senate's powers, procedures and practices.

Acknowledgements

1.37 The committee greatly appreciates the assistance of its secretariat and legal adviser, Associate Professor Andrew Edgar, during the reporting period.

1.38 The committee also wishes to acknowledge the assistance of ministers and agencies during the reporting period. The responsiveness of ministers and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

16 Parliament of Australia, Parliamentary Business, Bills and Legislation, Legislative Instruments, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments (accessed 21 June 2021).

17 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a House of Representatives disallowable instruments list, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/house-dissallowable-instruments.

Chapter 2

Inquiry into the exemption of delegated legislation from parliamentary oversight

Overview

2.1 In 2020 the committee unanimously resolved to undertake an inquiry into the exemption of delegated legislation from parliamentary oversight.

2.2 This chapter provides an overview of the committee's inquiry, including the rationale for undertaking the inquiry, details of the conduct of the inquiry, and a brief description of the committee's interim report, including its recommendations.

Rationale for undertaking an inquiry

2.3 The committee's decision to undertake an inquiry into the exemption of delegated legislation from parliamentary oversight was informed by a number of considerations. These included its 2019 inquiry into parliamentary scrutiny of delegated legislation,¹ the increasing proportion of delegated legislation exempt from disallowance, and the use of delegated legislation to respond to the COVID-19 pandemic.

2.4 The committee raised significant concerns about the increasing exemption of delegated legislation from parliamentary oversight in the 2019 report of its inquiry into parliamentary scrutiny of delegated legislation. The committee commented:

exempting instruments from disallowance raises significant scrutiny concerns... because such exemptions effectively remove Parliament's control of delegated legislation, leaving it to the executive to determine (albeit within the confines of the enabling legislation and the Constitution) the content of the law.²

2.5 The committee considered that such concerns were also likely to be relevant to the exemption of delegated legislation made in response to the COVID-19 pandemic from parliamentary oversight.

2.6 The committee noted that increasingly significant amounts of delegated legislation which were exempt from disallowance had been made in recent years. In particular, the committee was concerned that in 2019, nearly 20 per cent of legislative instruments were exempt from disallowance. The number of instruments exempt from disallowance in 2020 was also likely to be above average due to the

1 Further information about the 2019 inquiry can be found at Senate Standing Committee for the Scrutiny of Delegated Legislation, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/DelegatedLegislation.

2 Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, June 2019, pp. 122-124.

increased number of exempt instruments made in response to the COVID-19 pandemic.

2.7 Indeed, in 2020, 17.4 per cent of delegated legislation made was exempt from disallowance.

2.8 Table 1 below sets out the percentage of disallowable instruments and instruments exempt from disallowance registered in each calendar year since 2013.

Table 1: Instruments exempt from disallowance 2013-2020

Year	Exempt	Disallowable	Total	Percentage exempt
2020	299	1416	1715	17.4%
2019	330	1345	1675	19.7%
2018	256	1630	1886	13.6%
2017	265	1436	1701	15.6%
2016	347	1698	2045	17.0%
2015	361	1840	2201	16.4%
2014	277	1609	1886	14.7%
2013	639	3086	3725	17.2%

2.9 Noting the trend which indicates that a higher proportion of exempt instruments are being registered each year, the committee will continue to monitor this issue into the future.

2.10 The committee also noted the extensive use of delegated legislation, made under both existing primary legislation and new legislation passed in the early months of the COVID-19 pandemic. The committee considered that the increased use of delegated legislation in this context reduced opportunities for parliamentary oversight.

Commencement of the inquiry

2.11 Senate standing order 23(12) provides that the committee may inquire into and report on any matter related to the technical scrutiny of delegated legislation.³

2.12 In April 2020, the committee resolved, under standing order 23(12), to inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to:

3 Standing order 23 was amended to include this power in accordance with the recommendations made by the committee in its 2019 inquiry report on parliamentary scrutiny of delegated legislation.

-
- a. the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:
 - i. the amount and nature of delegated legislation currently exempt from parliamentary oversight;
 - ii. the grounds upon which delegated legislation is currently made exempt from parliamentary oversight;
 - iii. the manner in which delegated legislation is currently made exempt from parliamentary oversight; and
 - iv. the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
 - b. whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how, including:
 - i. the grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and
 - ii. the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

2.13 As the inquiry was self-referred, the committee established its own reporting timelines; resolving to table an interim report in December 2020, and the final inquiry report in March 2021.

Conduct of the inquiry

Submissions

2.14 The committee invited submissions directly from scrutiny committees in other jurisdictions, Commonwealth departments and agencies, academics, and other relevant experts and organisations. The closing date for submissions was 25 June 2020, however, submissions continued to be received after this date. The committee also distributed information about the inquiry via the Department of the Senate website and Twitter account as well as through its publication *Scrutiny News*.

2.15 The committee received 30 public submissions which can viewed on the committee's website.⁴

4 Parliament of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, Exemption of delegated legislation from parliamentary oversight, Submissions, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Submissions (accessed 21 June 2021).

Public hearings

2.16 As part of the inquiry, the committee held its first public hearings since the establishment of the committee as the Standing Committee on Regulations and Ordinances in 1932.

2.17 Three public hearings were held in Canberra on 27 August, 31 August, and 3 September 2020. The committee heard evidence from academics, organisations and government departments. The Hansard transcripts of the hearings are available on the committee's website.⁵

Interim report

2.18 The committee presented its interim report to the Senate on 2 December 2020.⁶ The focus of the interim report is the exemption of delegated legislation made during times of emergency from parliamentary oversight. It particularly addresses the issues raised in evidence received by the committee relevant to terms of reference (a)(iv) and (b)(ii):

- the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
- the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

2.19 The committee's report is divided into two parts. *Part I – Background* includes an introduction to the inquiry and into the committee's role and addresses the Commonwealth legislative framework for making COVID-19 delegated legislation. *Part II – Systemic factors contributing to the exemption of emergency delegated legislation from parliamentary oversight* considers the mechanisms that constitute parliamentary oversight of delegated legislation during times of emergency.

2.20 In addition to the evidence received by the committee, through submissions and public hearings, the committee conducted its own analysis of delegated legislation made in response to COVID-19 registered on the Federal Register of Legislation between 1 January and 31 July 2020. This included both disallowable and non-disallowable legislative instruments. In addition, the committee considered

5 Parliament of Australia, Senate Standing Committee for the Scrutiny of Delegated Legislation, Exemption of delegated legislation from parliamentary oversight, Public hearings, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Public_Hearings (accessed 21 June 2021).

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the Exemption of delegated legislation from parliamentary oversight, Interim report, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report (accessed 19 April 2021).

notifiable instruments made in response to COVID-19 and registered within the same period.

2.21 The interim report focuses on delegated legislation made in times of emergency, as the final report of the inquiry addresses the other terms of reference and broader systemic issues in relation to the exemption of delegated legislation from parliamentary oversight.

Recommendations

2.22 The committee made 18 recommendations in its interim report to improve parliamentary oversight of delegated legislation in times of emergency. In making these recommendations, the committee noted that its concerns about parliamentary oversight of delegated legislation made during emergencies are not limited to the COVID-19 emergency, nor the actions of any particular government. Rather, the committee considers that Parliament and governments of all political persuasions have contributed to a system of laws, procedures, and practices which diminish Parliament's capacity to oversee executive law-making.

2.23 The committee further highlighted that the delegated legislation made during COVID-19 is just one case study of a much broader issue; and called on all parliamentarians to carefully consider their responsibilities, as lawmakers and representatives of the people, to ensure rigorous oversight of delegated legislation made in times of emergency, particularly where it limits personal rights and liberties or overrides law made by the Parliament.

2.24 The 18 recommendations made in the interim report may be split into four general categories: recommendations to the Parliament, recommendations to the government, recommendations to the Senate, and recommendations relating specifically to the *Biosecurity Act 2015* (Biosecurity Act).

2.25 The recommendations to the Parliament are aimed at ensuring appropriate parliamentary oversight during times of emergency, noting the Parliament's role in scrutinising bills which include enabling provisions for the making of delegated legislation, as well as the importance of parliamentary sittings in facilitating the use of parliamentary oversight mechanisms.⁷

2.26 The committee made eight recommendations to government to ensure greater parliamentary oversight of delegated legislation during times of emergency.⁸ In particular, the committee made recommendations relating to:

- Advances to the Finance Minister;
- the duration of emergency-related delegated legislation;
- the inclusion of exemptions from disallowance in primary legislation;

7 See recommendations 1 and 3 of the Interim report.

8 See recommendations 4, 10–15 and 17 of the Interim report.

- explanatory statements to delegated legislation; and
- the allocation of sufficient resources to parliamentary departments to ensure that parliamentary committees may effectively perform their scrutiny roles, particularly during times of emergency.

2.27 The committee made two recommendations to the Senate. One recommended that the Senate amend Senate standing order 23 to refer all delegated legislation made during times of emergency to the committee. The other recommended that the Senate establish a select committee during times of national emergency to consider the policy merits of delegated legislation made in response to the emergency.⁹

2.28 The committee made five recommendations proposing specific amendments to the Biosecurity Act, including in relation to:

- entry and exit determinations;
- the exercise of human biosecurity order powers in Part 3 of Chapter 2 of the Act;
- human health response zone determinations;
- human biosecurity emergency requirements and directions made under sections 477 and 478 of the Act.¹⁰

2.29 Finally, the committee recommended that the Senate Standing Committee for the Scrutiny of Bills, or another independent body, conduct a review of the appropriateness of the delegation of legislative powers in the Biosecurity Act.¹¹

2.30 The committee notes that, at the time of writing, the government's response to the interim report is overdue by several months. This is contrary to Senate procedural resolution 44, which requires the government to table a response to committee reports in the Senate within three months of the tabling of a committee report.

2.31 The committee intends to discuss the implementation of the above recommendations as well as the implementation of recommendations from the committee's final report, tabled in March 2021, in its 2021 Annual Report.

9 See recommendations 16 and 18 of the Interim report.

10 See recommendations 5–9 of the Interim report.

11 See recommendation 2 of the Interim report.

Chapter 3

Scrutiny work of the committee in 2020

Overview

3.1 This chapter provides information about the work of the committee in 2020, including relevant statistics relating to the instruments considered by the committee during the 2020 reporting period.

3.2 As noted in chapter 1, the committee began scrutinising instruments in accordance with its new scrutiny principles, as set out in standing order 23, for instruments registered on or after 4 December 2019. Due to this shift, some statistics for 2020 will not be directly comparable to those recorded in previous years. However, where possible, this chapter will discuss any changes in the relative outcomes of the committee's work.

3.3 In addition, the instruments scrutinised in the first *Delegated Legislation Monitor* of 2020 were registered between 21 November and 3 December 2019, and accordingly were scrutinised in line with the committee's old scrutiny principles. The information and statistics related to that report therefore do align with that contained in the other *Delegated Legislation Monitors* for 2020.

Meetings, Monitors and instruments considered by the committee

3.4 The committee held 21 private meetings in 2020. Of these, 14 private meetings related to the regular scrutiny of instruments to be included in the committee's 14 *Delegated Legislation Monitors* tabled in 2020.¹

3.5 The committee also held five private meetings in relation to its inquiry into the exemption of delegated legislation from parliamentary oversight and other scrutiny-related matters.

3.6 Finally, the committee held two private briefings in 2020. These informal meetings with ministers or senior departmental officers enable the committee to obtain further information about certain legislative instruments that raise scrutiny concerns. The first private briefing was held on 5 March 2020 in relation to the Taxation Administration (Private Ancillary Fund) Guidelines 2019; the second, held on 12 June 2020, was in relation to the Competition and Consumer (Industry Codes—Dairy) Regulations 2019. More detail in relation to the committee's consideration of these instruments is provided in chapter 4.

1 *Delegated Legislation Monitor* No. 1 of 2020, tabled on 5 February 2020 to *Delegated Legislation Monitor* No. 14 of 2020, tabled on 9 December 2020. See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor/mon2020/index.

3.7 As noted in chapter 2, further to these private meetings the committee held three public hearings for its inquiry into the exemption of delegated legislation from parliamentary oversight.

3.8 Across the 14 *Delegated Legislation Monitors* tabled in 2020, the committee considered 1194 disallowable legislative instruments. These instruments were registered between 21 November 2019 and 29 September 2020.

3.9 The statistics included in this chapter relate to the scrutiny of these 1194 disallowable legislative instruments.

3.10 In addition to the 1194 instruments examined, the committee also examined 68 replacement or supplementary explanatory statements to instruments in 2020.

COVID-19 instruments

3.11 The committee began monitoring all instruments registered on the Federal Register of Legislation in 2020 which purported to be made in response to the COVID-19 pandemic. To facilitate public scrutiny of COVID-19 related delegated legislation the committee lists all such instruments on its website.²

3.12 Between 21 November 2019 and 29 September 2020, there were 327 instruments related to COVID-19 registered on the Federal Register of Legislation. Of these 327 instruments, 59 were exempt from disallowance, which is approximately 18 per cent.

3.13 More information in relation to the scrutiny of COVID-19 instruments is included in chapter 4.

Scrutiny of instruments

3.14 Of the disallowable instruments examined by the committee in the reporting period,³ a total of 240 instruments were identified by the committee as raising one or more scrutiny concerns which required a response from the relevant agency or minister, or else were drawn to the attention of the Senate.⁴

3.15 The 240 instruments raised during the 2020 reporting period can be broken down into the following distinct categories:

- 154 instruments raised general scrutiny concerns; and

2 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments.

3 The committee scrutinises all Commonwealth disallowable legislative instruments. The Monitor may also include comment on instruments which are exempt from disallowance in cases where these were initially misclassified as disallowable.

4 Details of these instruments may be found on the 'Index of Instruments' webpage at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/Index_2020.

- 131 instruments raised under standing order 23(4); of which:
 - 69 instruments related to matters of interest to the Senate;⁵ and
 - 62 instruments related to Commonwealth expenditure.⁶

3.16 The committee also concluded its examination of 166 instruments.⁷

3.17 The Chair gave six tabling statements when tabling *Delegated Legislation Monitors* in 2020 to draw the Senate's attention to particular instruments or issues that raised significant scrutiny concerns.⁸

Scrutiny principles engaged

3.18 As noted previously, the committee identified one or more general scrutiny concerns in 154 instruments during the 2020 reporting period. The issues raised in relation to the instruments correspond with the committee's 11 scrutiny principles, as shown in Table 2 below.⁹

Table 2: Issues identified by the committee in 2020

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) ¹⁰											Total
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	
Ministerial	12	0	5	4	2	2	2	5	9	51	26	118
Agency	33	1	0	34	10	26	15	20	22	12	4	177
Total	45	1	5	38	12	28	17	25	31	63	30	295

- 5 *Delegated Legislation Monitor 1 of 2020* did not report on matters of interest to the Senate under standing order 23(4), as the instruments it reported on were scrutinised in accordance with the old scrutiny principles.
- 6 The breakdown of numbers at paragraph 3.14 shows a total of 285 instruments raised, however, some instruments were raised simultaneously due to general scrutiny concerns as well as under standing order 23(4). In the 2020 reporting period, 45 instruments were raised under both categories. 240 is therefore the total number of unique instruments raised by the committee.
- 7 The discrepancy between the number of responses and the number of concluded entries arises because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period.
- 8 The Chair made tabling statements for Monitors 2, 8, 9, 10, 12 and 14 of 2020. These can be viewed on the committee's website. See https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor/mon2020/index
- 9 Table 2 represents only those scrutiny principles raised in Monitors 2 to 14 of 2020. As noted previously, the committee's scrutiny principles changed on 4 December 2019. Instruments raised in *Monitor 1 of 2020* were scrutinised against the committee's old principles, whereas all instrument raised in *Monitors 2 to 14 of 2020* were scrutinised against the new scrutiny principles.
- 10 On occasion, a comment may refer to more than one scrutiny principle.

3.19 As set out in Table 2, significantly more scrutiny concerns were raised at the agency level than at the ministerial level in 2020. The committee began seeking information directly from agencies in mid-2019 in order to assess whether it was necessary to address the issue with the relevant minister. This change has enabled the committee to focus its attention on the most significant scrutiny issues, raised at the ministerial level.

Scrutiny concerns raised at the ministerial level

3.20 As set out in Table 2, near half of all scrutiny concerns raised at the ministerial level related to principle (j) *matters more appropriate for parliamentary enactment*. This principle is underpinned by the concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight, rather than in delegated legislation. Significant matters may include, for example, instances where an instrument:

- establishes significant elements of a regulatory scheme;
- imposes significant penalties;
- imposes taxes or levies;
- modifies the operation of or provides an exemption to primary legislation; or
- has a serious impact on personal rights and liberties.¹¹

3.21 During the 2020 reporting period, the committee raised several instruments under principle (j) as they modified the operation of or provided an exemption to primary legislation. Many of those instruments which raised this particular concern were made under the Treasury portfolio. These instruments are discussed further in chapter 4.

3.22 Scrutiny principle (k) *other technical scrutiny grounds* accounted for approximately 22 per cent of concerns raised by the committee at the ministerial level.

3.23 The scope of scrutiny concerns that may be raised under principle (k) is broad, however, each is underpinned by the protection and promotion of fundamental rule of law principles, including:

- access to justice;
- equality before the law;
- legal certainty;
- parliamentary sovereignty;
- procedural fairness;

11 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020, p. 29.

-
- protection of personal rights and liberties;
 - separation of powers; and
 - transparency and accountability.¹²

3.24 No scrutiny concerns were raised at the ministerial level in relation to principle (b) *constitutional validity*. This principle requires the committee to scrutinise each instrument as to whether it appears to be supported by a constitutional head of legislative power. The committee's view is that questions of legal validity are ultimately a question for the courts to determine. In light of this, the committee generally takes the view that instruments are constitutionally valid if they are made in accordance with their enabling Act and will therefore only raise this matter in exceptional circumstances.

3.25 The remaining scrutiny principles made up just under 35 per cent of all scrutiny concerns raised at the ministerial level. More information on each of the committee's scrutiny principles is available in the committee's *Guidelines*.¹³

Scrutiny concerns raised at the agency level

3.26 As set out in Table 2, the scrutiny issues raised at the agency level were quite evenly spread across the committee's 11 scrutiny principles, with one exception—no scrutiny issues were raised under principle (c) *scope of administrative powers*.

3.27 Scrutiny principle (c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers, and will be concerned with provisions which:

- broadly delegate administrative powers and functions;
- confer broad discretionary powers; or
- confer coercive powers on 'persons assisting' authorised officers.¹⁴

3.28 Concerns relating to principle (c) are often raised at the ministerial level, rather than at the agency level, due to the nature of the clarification being sought by the committee.

3.29 Scrutiny principle (d) *adequacy of consultation* made up the largest portion of the committee's scrutiny concerns at over 19 per cent of the total issues raised at the agency level. This scrutiny principle requires the committee to consider:

12 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020, p. 32.

13 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020.

14 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020, p. 13.

- whether consultation occurred in relation to the specific instrument;
- whether persons likely to be affected by the instrument were consulted; and
- whether persons with expertise were consulted.¹⁵

3.30 In corresponding with agencies in relation to the adequacy of consultation the most common outcome is that the agency responds to advise that consultation was undertaken and provides a description of such consultation. The secretariat, on behalf of the committee, in turn responds, requesting that the information provided by the agency be included in an updated version of the explanatory statement to an instrument.

3.31 Scrutiny principle (a) *compliance with legislative requirements* made up the second largest percentage of scrutiny concerns raised with agencies at 18.6 per cent. Principle (a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act, and otherwise complies with all legislative requirements, including those set out in the *Legislation Act 2003* Legislation Act.¹⁶

3.32 In practice, a significant number of issues raised under principle (a) relate to compliance with the Legislation Act. This includes compliance with paragraph 15J(2)(c) of the Legislation Act that the explanatory statement to an instrument that incorporates a document contains a description of that document, including the manner in which it is incorporated and how it may be obtained.

3.33 Similarly to those concerns raised under principle (d), correspondence with agencies in relation to incorporation under principle (a) is often resolved following the agency's response as to whether a document is incorporated in the instrument and the provision of relevant information if that is the case; and the secretariat's request to include this information in the explanatory statement to the instrument.

3.34 As noted previously, the ability of the secretariat to seek information directly from agencies in order to assess whether it is necessary to address the issue with the relevant minister, has enabled the committee to focus its attention on the most significant scrutiny issues, raised at the ministerial level.

Ministerial and agency responses

3.35 In the 2020 reporting period, the committee received 69 responses from ministers. Ministerial correspondence is published alongside the relevant *Delegated Legislation Monitor* on the committee's website.¹⁷

15 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020, p. 15.

16 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 1st Edition, February 2020, p. 9.

17 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

3.36 In addition, the committee received 128 responses from agencies. The committee does not publish the content of any correspondence received from an agency. However, the committee publishes a concise record of the instruments in relation to which it is engaging with an agency in its *Delegated Legislation Monitor*. This record includes the name of the instrument and the relevant scrutiny principle. The committee also records any undertakings that an agency makes to address committee concerns in the *Delegated Legislation Monitor*.

Disallowance notices

3.37 The Chair, on behalf of the committee, gave 22 notices of motion to disallow an instrument in the 2020 reporting period.

3.38 In cases where the 15 sitting days available for giving notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.¹⁸

3.39 The committee may otherwise give notice of a motion to disallow an instrument where it considers that the instrument raises serious, unresolved scrutiny concerns, and should be drawn to the Senate's attention or disallowed.

3.40 All but nine of the notices given by the Chair in 2020 were withdrawn that year, generally following the receipt of a satisfactory ministerial or agency response or an undertaking that addressed the committee's concerns. The nine unresolved notices were subsequently withdrawn in 2021.

3.41 Details of all disallowance motions given during the reporting period are available on the *Disallowance Alert* webpage for 2020.¹⁹ As noted in chapter 1, the *Disallowance Alert* will be managed by the Senate Table Office from the beginning of 2021.

Undertakings

3.42 From 30 June 2019, the committee recommenced its past practice of reporting on outstanding undertakings that had been made in response to its concerns.

3.43 There are three types of undertakings that the committee generally requests of ministers and agencies: amendments to explanatory statements, amendment or revocation of an instrument, and amendment of an Act.

3.44 The committee expects that, when a minister or agency has made an undertaking, it will be implemented in a timely manner. Accordingly, the committee

18 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 438.

19 See Parliament of Australia, *Disallowance Alert 2020*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Alerts/alert2020.

records outstanding ministerial and agency undertakings in its *Delegated Legislation Monitor*. It also records the undertakings implemented since the committee's last *Delegated Legislation Monitor*.

3.45 Table 3 below outlines the number of undertakings that have been implemented during 2020, as well as those that remained outstanding at the end of the reporting period.

Table 3: Undertakings addressing the committee's concerns

Status	Type of undertaking			Total
	Amend ES	Amend/revoke instrument	Amend Act or enabling legislation	
Implemented	44	15	0	59
Outstanding	14	6	3	23
TOTAL	58	21	3	82

3.46 A total of 44 replacement explanatory statements were tabled in response to the committee's scrutiny concerns. Notably, this represents 65 per cent of the 68 replacement explanatory statements that were scrutinised by the committee in 2020.²⁰

3.47 In 2020, 15 undertakings to amend or revoke instruments were implemented which is a threefold increase on the previous year when only five such undertakings were implemented.

3.48 At the end of the reporting period none of the three undertakings to amend an Act had been implemented. However, at the time of writing, each of these undertakings have since been implemented and will be reported on in 2021 annual report.

3.49 Examples of significant undertakings made and implemented in 2020 are discussed in chapter 4.

Other aspects of the scrutiny process

3.50 In addition to the committee's influence resulting from its engagement with ministers and agencies on scrutiny issues about particular instruments, the committee's work also contributed to more informed consideration of relevant issues in other parliamentary committees' reports, and more informed debate relating to delegated legislation in Parliament more broadly.

20 Of the 68 replacement or supplementary explanatory statements that the committee scrutinised during 2020, 44 were for instruments that the committee had raised concerns with the relevant agency or minister.

3.51 The committee's influence is also reflected in formal guidance available to departments and agencies as part of the legislative drafting process. In particular, the Office of Parliament Counsel's *Instruments Handbook* draws attention to the committee's long-standing scrutiny concerns.²¹

21 Office of Parliamentary Counsel, *Instruments Handbook*, reissued May 2019, available from <http://www.opc.gov.au/about/documents.htm>. See also Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate Legislation* (June 2020), available from <https://www.opc.gov.au/drafting-resources/drafting-directions>.

Chapter 4

Significant scrutiny issues

Overview

4.1 This chapter outlines the most significant scrutiny issues that the committee identified in 2020. It focuses on:

- significant case studies related to the committee's role in promoting compliance with its scrutiny principles; and
- key ongoing scrutiny concerns that the committee will continue to monitor in the future, including the use of delegated legislation to respond to the COVID-19 pandemic.

Significant case studies and implemented undertakings

4.2 The following section outlines the most significant undertakings implemented during 2020 to address the committee's scrutiny concerns. The examples provided illustrate the committee's approach to its scrutiny role and identify significant issues as assessed against the scrutiny principles outlined in Senate standing order 23(3).

4.3 The relevant scrutiny principle is identified in relation to each case study.

Contenance Aids Payment Scheme 2020 [F2020L00758]

Scrutiny principle (i): independent merits review

4.4 The committee corresponded with the Minister for Aged Care and Senior Australians between October and December 2020 in relation to concerns about the availability of independent merits review of certain decisions made by the secretary under the instrument under the Contenance Aids Payment Scheme.¹ The committee was concerned that these decisions are discretionary in nature and may affect the rights and interests of individuals in relation to payments for the provision of continence aids.

4.5 In response the minister advised that as the enabling legislation, the *National Health Act 1953*, did not expressly provide for access to review by the Administrative Appeals Tribunal for these decisions, it was not appropriate for the instrument to otherwise confer this power. However, the committee reiterated its concerns, expressing its view that the lack of an express power providing for merits review in an Act does not preclude an instrument from providing for merits review.

1 The consolidated correspondence can be found on the committee's website, under the heading 'Index of Instruments 2020', available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/Index_2020.

4.6 As a result of the committee's engagement, the minister agreed to amend both the instrument and its enabling Act to provide for independent merits review of these decisions. In this regard, the committee thanks the minister for introducing the National Health Amendment (Decisions under the Continence Aids Payment Scheme) Bill 2021 into the Senate on 16 June 2021 to provide express support for the Continence Aids Payment Scheme to confer merits review functions on the Administrative Appeals Tribunal.

Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435]

Scrutiny principle (h) retrospective application

Scrutiny principle (k) parliamentary oversight

4.7 The committee raised concerns with the Treasurer that the instrument was intended to provide for temporary measures in response to COVID-19 but had no specified cessation.² The instrument amends the Foreign Acquisitions and Takeovers Regulation 2015 to set the monetary thresholds for particular significant actions and notifiable actions to nil. In effect, this meant that the majority of actions relating to the acquisition of interests in Australian business or land would require notification to the Treasurer. Under the *Foreign Acquisitions and Takeovers Act 1975*, the Treasurer may impose conditions on significant actions, and may refuse to allow an action to proceed if it is deemed contrary to the national interest.

4.8 In the committee's view, an end date was necessary to ensure an appropriate level of regular parliamentary oversight, and to guard against the risk that temporary measures enacted in response to COVID-19 become an ongoing part of the law without appropriate parliamentary scrutiny and debate. In light of these scrutiny concerns the committee considered that it would be appropriate to amend the instrument to specify a date on which the measures cease.

4.9 After several rounds of correspondence with the committee which are summarised in *Delegated Legislation Monitor 12 of 2020*, the Treasurer advised regulations had been made to reinstate the monetary thresholds where a foreign person is renewing a lease over non-sensitive commercial property, and that between 18 September and 2 October 2020 draft amendments to the Foreign Acquisition and Takeovers Regulation 2015 were released for consultation. These draft amendments proposed to reinstate the other monetary thresholds from 1 January 2021 as indexed at the rates the thresholds would have been if not for the measures made in response to COVID-19. The Treasurer also advised that the final

2 This instrument amended the Foreign Acquisitions and Takeovers Regulation 2015 (Principal Regulations). The instrument itself was therefore subject to the self-repeal provisions under Division 1 of Part 3 of Chapter 3 of the *Legislation Act 2003*. However, no end to date to the changes made by this instrument once inserted into the Principal Regulations was specified, although the changes are subject to the sunseting of the Principal Regulations.

decision on whether the other monetary thresholds will be reinstated from 1 January 2021 will depend on the economic impact of COVID-19 and whether foreign investment could be at ongoing risk of detrimentally affecting the national interest.

Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]

Principle (e) unclear drafting

Principle (j) significant penalties

Principle (k) parliamentary oversight

4.10 This instrument prescribes a Dairy Code of Conduct (Dairy Code), a mandatory code which sets enforceable minimum standards of conduct for business practices between dairy farmers and corporations that purchase and sell milk.

4.11 The committee engaged extensively with the government in relation to its scrutiny concerns about this instrument. The concerns focused on section 11 of the instrument, which imposed an obligation on processors and farmers to act in good faith in the supply of milk 'within the meaning of the unwritten law as it exists from time to time'. The section provided a non-exhaustive list of factors which 'may' be taken into account in determining whether a processor or farmer has acted in good faith, but no further guidance as to the meaning of the term. Failure to comply with the good faith obligations attracts significant civil penalties.

4.12 The committee considered that the imposition of significant penalties for non-compliance with a term undefined by the written law raises significant technical scrutiny concerns under Senate standing orders 23(3)(e), clarity of drafting and 23(3)(j), significant penalties in delegated legislation.

4.13 The committee engaged with the Minister for Agriculture, Drought and Emergency Management between February and September of 2020. As part of this engagement, the committee requested to meet with officials from the Department of Agriculture, Water and Environment, and the Treasury, to provide committee members with an opportunity to be briefed on the relevant issues and ask questions relating to its scrutiny concerns. The private briefing took place on 12 June 2020.

4.14 The committee considers that the scrutiny concerns which came to light in this instrument are emblematic of a more complex, systemic issue relevant to both delegated and primary legislation. As such, the committee requested that the Attorney-General refer the codification of good faith obligations in Commonwealth legislation to the Australian Law Reform Commission (ALRC) for inquiry, with particular reference to:

- the importance of balancing legal clarity and certainty with regulatory flexibility; and

- how potential divergence between common law concepts of good faith and concepts used in statute could be resolved without compromising legal clarity and certainty.

4.15 The committee is of the view that the Attorney-General undertook in response to refer this matter to the ALRC.³ However, the Attorney-General further advised the committee that while the ALRC does not have the current capacity to conduct this inquiry, the department will undertake an examination of the issues including with targeted research, public consultation and a final report. Regardless, the committee remains of the view that the Attorney-General undertook to refer this matter to the ALRC and intends to pursue this undertaking.

4.16 The committee's engagement with the Attorney-General in this regard is ongoing at time of writing.

National Health (Take Home Naloxone Pilot) Special Arrangement 2019 (PB 97 of 2019) [F2019L01542]

Principle (c) delegation of administrative powers⁴

Principle (a) compliance with authorising legislation

4.17 This instrument creates a special arrangement to support the establishment of a Pharmaceutical Benefits Scheme subsidised pilot program to supply naloxone to people in New South Wales, Western Australia and South Australia who are at risk of an opioid overdose, and to persons who are likely to be able to assist such persons.

4.18 The committee's scrutiny concerns centred on section 25 of the instrument, which provided that the secretary may authorise persons having suitable qualifications and experience to perform any of the secretary's functions, or exercise any of the secretary's powers, under this instrument on behalf of the secretary.

4.19 Between February and August 2020, the committee engaged with the Minister for Health to seek advice on a range of scrutiny concerns it identified with this section. The committee was primarily concerned with whether section 25 of the instrument was authorised by section 100 of the *National Health Act 1953* and whether there were appropriate accountability safeguards over the actions of third-party administrators.

4.20 The committee considered that the authorisation of private third parties to perform the functions and exercise the powers of a public office holder is a significant matter that requires express authority in primary legislation. As a result of

3 See correspondence between the committee and then-Attorney General the Hon Christian Porter MP, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/Index_2020.

4 The scrutiny of this instrument was commenced in 2019, therefore the initial correspondence in relation to this instrument raises this concern as principle (d) *sub-delegation*.

the committee's engagement on this matter, the minister instructed his department to amend section 25 of the instrument to expressly define the powers and functions which the secretary may authorise the third party administrator to perform, and provided for internal review of such decisions, which the committee considered a satisfactory resolution to its concerns.

Taxation Administration (Private Ancillary Fund) Guidelines 2019

Principle (a) consultation

Principle (c) merits review

4.21 The guidelines remake the Private Ancillary Fund Guidelines 2009 which were due to sunset on 1 October 2019; and set out the rules a private ancillary fund and its trustee must comply with in order for the fund to be endorsed, and remain endorsed, as a deductible gift recipient, as well as set minimum standards for the governance and conduct of private ancillary funds and their trustees.

4.22 The committee raised concerns with the Assistant Minister for Finance, Charities and Electoral Matters about the availability of independent merits review for decisions made by the Commissioner of Taxation under the instrument.

4.23 Following several rounds of correspondence,⁵ the committee requested to meet with departmental officials, to provide committee members with an opportunity to be briefed on the relevant issues and ask questions relating to its scrutiny concerns.

4.24 Subsequently, the Assistant Minister undertook to progress amendments to primary legislation that would enable merits review of decisions made under the instrument (and other similar instruments), within the framework provided for in the *Taxation Administration Act 1953*.

4.25 On 17 December 2020, the Treasury Laws Amendment (2020 Measures No. 6) Bill 2020 received the Royal Assent, giving effect to the provision of merits review for decisions made under such instruments. The committee thanks the Assistant Minister for his constructive engagement with the committee to resolve this matter.

Significant ongoing scrutiny concerns

4.26 In 2020, the committee noted a number of ongoing issues which it will continue to monitor in the future. The following sections outline the most significant ongoing issues that the committee has identified.

5 The consolidated correspondence relating to the Taxation Administration (Private Ancillary Fund) Guidelines 2019 can be accessed on the committee's website via the following link: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index/-/media/FC79D3B101A4429A8B71C38D369CAA9D.ashx

Exemptions or modifications to primary legislation in the Treasury portfolio

Principle (j) exemption from primary legislation

Principle (k) parliamentary oversight

4.27 From October 2020 the committee began engaging with the Treasurer in relation to the significant number of Treasury portfolio instruments, particularly instruments made by the Australian Securities and Investments Commission (ASIC), which modify or exempt persons or entities from the operation of primary legislation, predominantly the *Corporations Act 2001*. Of concern to the committee was the duration of these instruments which modified the operation of parliamentary enactments, as the instruments generally appeared to be subject to the standard sunseting regime under the *Legislation Act 2003*. This meant that they will typically remain in force for ten years.

4.28 At the time of writing, the committee has raised these systemic concerns in relation to a substantive amount of Treasury portfolio instruments.

4.29 The committee's detailed views in this regard are set out in Chapter 1 of *Delegated Legislation Monitor 2 of 2021* and *Delegated Legislation Monitor 4 of 2021*. These views are also set out in the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight, tabled in March 2021.⁶

4.30 During correspondence with the committee, the Treasurer proposed a list of principles which he considers should be considered when determining the appropriate duration of legislative instruments which modify or exempt persons or entities from the operation of primary legislation. Specifically, the Treasurer advised that he considers that a 10-year sunseting period will generally be more appropriate where the following principles are met:

- Principle A: the instrument is made under a specifically delegated power which is set out in the primary legislation and is intended to complement the requirements or objectives in the primary legislation;
- Principle B: there would be appreciable business uncertainty about the treatment of, or framework for, business activities giving rise to significant commercial risks and/or costs if the sunseting period was shorter (for example, uncertainty which impacts investment in compliance systems, or the effective operation of a market, are examples where this principle may apply);
- Principle C: the instrument deals with confined or unique circumstances affecting a particular class of entities or products which do not fit within the strict operation of the primary law but would result in anomalous or

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight: Final Report*, March 2021, pp. 120–121.

inconsistent outcomes given the intent of the primary legislation as set by Parliament; and

- Principle D: the instrument makes minor and technical changes which support the practical operation of the legislative regime.

4.31 Where these principles are not met, the Treasurer considers that ASIC instruments may appropriately be in force for a shorter duration, generally of five years (but possibly three years depending on circumstances).

4.32 Whilst acknowledging the Treasurer's considered approach to finding a way forward to ensure more regular parliamentary oversight of Treasury portfolio instruments, the committee remained strongly of the view that instruments which modify or exempt persons or entities from the operation of primary legislation should not continue in force for more than three years. The committee's expectation about such instruments is informed by its longstanding view that delegated legislation should not continue in force for such a period as to act as a de facto amendment to primary legislation. The committee informed the Treasurer that its views have been formalised in the committee's guidelines since February 2020.

4.33 The committee acknowledged that there are circumstances where it may be appropriate for ASIC to quickly address anomalous or inconsistent outcomes in the application of primary legislation by delegated legislation when authorised to do so by the Parliament. However, the committee considers that generally a three year timeframe for such instruments is appropriate as it allows for ASIC to rapidly address such issues, while providing a significant period of time while the instrument is in force to consider whether the modification or exemption provided by the instrument will be required for a longer period. If it is determined that a modification or exemption is required for a longer period, the committee considers that certainty for business and the market can be best provided by incorporating the modification or exemption onto the face of the primary legislation. However, if this is not considered appropriate in the circumstances, the committee considers that the Parliament should at least be given a regular opportunity to review and scrutinise modifications or exemptions to primary legislation that it has enacted.

4.34 As part of this correspondence, the Treasurer proposed to engage with the committee on an ongoing and good-faith basis to resolve the committee's systemic concerns. As a result, the committee held a private briefing with officials from the Treasury, ASIC and the Treasurer's office on 28 April 2021.

4.35 While this engagement remains ongoing at time of writing, the committee appreciates the genuine and responsive nature of the Treasurer's commitment to resolving this issue of serious scrutiny concern to the committee.

Incorporation of Australian Standards

4.36 In 2020 the committee raised 28 scrutiny concerns in relation to principle (f) *access and use*, which predominantly centred on the committee's expectation that

free access is provided to external documents which are incorporated by reference in legislative instruments.

4.37 While raising these concerns in 2020 the committee noted systemic issues with the incorporation of Australian Standards into legislative instruments. The committee identified that of the issues which engaged scrutiny principle (f), a substantive proportion incorporated Australian Standards but did not provide for free access to the document, as Standards Australia generally requires a fee for access. This was not a new concern to the committee as this issue was previously identified and raised with Standards Australia.

4.38 In July 2019, the committee drew its concerns to the attention of Standards Australia in a joint submission with the Scrutiny of Bills Committee to Standards Australia's discussion paper, *Distribution and Licensing Policy Framework*. At that time, the committees requested that Standards Australia provide regular updates to the committees on its progress in making regulated standards (that is, standards incorporated into primary and delegated legislation) freely available. Since then, the committee understands that Standards Australia has been working to ensure that Australian Standards are freely available for personal, domestic or household use by no later than December 2023. The committee is keen to monitor the progress of this crucial initiative as its implementation is important to ensuring equality of access to the law, including standards incorporated into it.

COVID-19 instruments

4.39 The committee began monitoring all instruments registered on the Federal Register of Legislation in 2020 which purported to be made in response to the COVID-19 pandemic. To facilitate public scrutiny of COVID-19 related delegated legislation the committee lists all such instruments on its website.⁷

4.40 Between 21 November 2019 and 29 September 2020, there were 327 instruments related to COVID-19 registered on the Federal Register of Legislation. Of these 327 instruments, 59 were exempt from disallowance, which is approximately 18 per cent. The committee's experience has been that the most significant delegated legislation made in response to COVID-19, such as the overseas travel ban for Australian citizens, were made exempt from disallowance.

7 The committee publishes its list of COVID-19 instruments on its website under the 'Scrutiny of COVID-19 instruments' heading, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments.

4.41 The committee also referred instruments of significance to the government's response to COVID-19 to the Senate Select Committee on COVID-19 for consideration.

4.42 As discussed in chapter 2, the prevalence of delegated legislation made in response to COVID-19, and the significance of the measures contained in these laws, contributed to the committee's decision to commence an own-motion inquiry into the exemption of delegated legislation from parliamentary oversight.

4.43 The interim inquiry report focused on delegated legislation made in times of emergency, particularly during the COVID-19 pandemic. The committee found that the reliance on delegated legislation during the pandemic which is exempt from parliamentary disallowance and other forms of scrutiny shone a light on systemic issues that diminish the Parliament's ability to effectively scrutinise such legislation.

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]

Principle (d) consultation with persons affected

Principle (i) availability of independent merits review

Principle (j) significant matters in delegated legislation

Principle (k) parliamentary oversight

4.44 The committee raised a number of scrutiny concerns with the Minister for Finance in relation to this instrument which provided the government with the legislative authority to make pandemic leave disaster payments in response to COVID-19.

4.45 Amongst these concerns, the committee was primarily focused on the issue of the limited parliamentary oversight afforded to the measures in the instrument. The instrument provided for the broad purposes of the pandemic leave disaster payments program but did not provide any detail as to how the program would operate in practice. The committee was also concerned that the explanatory statement to the instrument only provided high level guidance as to how the program would operate along with the explanation that the eligibility criteria for the disaster payments would be set out in grant guidelines. In the committee's view, the inclusion of the eligibility criteria in non-legislative policy guidance, rather than on the face of the instrument, would enable the criteria to be changed without any form of parliamentary oversight. The committee noted that this in fact happened when the program was extended beyond individuals in Victoria to those in other States.

4.46 After corresponding with the committee, the minister amended the explanatory statement to the instrument to provide clarity as to the funding provided under the program. However, while the committee appreciated this amendment, it remained concerned that the eligibility criteria for such a significant COVID-19 response measure was not set out in primary legislation or at least on the face of the instrument.

4.47 The committee therefore continued to pursue this issue until the minister agreed in late 2020 to amend the instrument to provide the eligibility criteria on the face of the instrument.

Senator the Hon Concetta Fierravanti-Wells
Chair