



30 September 2021

Introduction

This newsletter highlights key aspects of the work of the Senate Scrutiny of Bills Committee and the Senate Scrutiny of Delegated Legislation Committee. It has a particular focus on information that may be useful while bills are under consideration and legislative instruments are subject to disallowance and seeks to raise awareness about the committees' scrutiny principles set out in Senate standing orders 23 and 24.

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated Legislation Monitors](#).

Please note that this edition of Scrutiny News relates only to the work of the Senate Scrutiny of Delegated Legislation Committee, as the Senate Scrutiny of Bills Committee did not meet in the week beginning 20 September 2021.

Key scrutiny issues: Legislative instruments ([Delegated Legislation Monitor 14 of 2021](#))

Aged Care Legislation Amendment (Royal Commission Response No.1) Principles 2021 [F2021L00923]

- Clarity of drafting/conferral of discretionary powers: the committee is seeking advice as to the specific training and experience delegates of the Aged Care Commissioner are required to possess in exercising relevant powers and functions under the instrument, and whether the enabling Act and instrument could be amended to clarify certain drafting matters identified by the committee.

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]

- Conferral of discretionary powers/implied freedom of political communication: the committee retains significant scrutiny concerns regarding the conferral of broad discretionary powers on the ACNC Commissioner and the impact of the instrument on the implied constitutional freedom of political communication. Due to its significant technical scrutiny concerns, the committee recommends that the Senate disallow this instrument.

Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043]

- Significant matters in delegated legislation/compliance with authorising legislation: the committee retains significant scrutiny concerns regarding the inclusion of significant

matters in delegated legislation and the compliance of the instrument with its authorising legislation. Due to its significant technical scrutiny concerns, the committee recommends that the Senate disallow this instrument.

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068]

- Exemption from disallowance: the committee is seeking advice about why it is appropriate for the instrument to be exempt from disallowance, noting that it removes an automatic exemption to the overseas travel ban, and whether the government can ensure that any determinations setting out emergency requirements in the future will be subject to disallowance.
- Freedom of movement: the committee is seeking advice about the expected impact of the measures implemented by the instrument on the freedom of movement of Australian citizens and permanent residents who ordinarily reside in another country, including the number of individuals who may be affected by the amendments.
- Matters for appropriate for parliamentary enactment/modification of the operation of primary legislation: the committee is seeking advice about why it is appropriate for the measures to override any other Australian law, and the appropriateness of including such significant measures, which may limit the freedom of movement of a broad class of Australian citizens and permanent residents, in delegated legislation. The committee is also seeking advice as to whether the government can ensure that any future variations to extend a human biosecurity emergency period will be subject to disallowance.
- Conferral of discretionary powers: the committee is seeking advice about whether the instrument expands the class of persons for whom discretionary powers may be exercised, and if so, the factors that must be considered in exercising this discretion, including guidance as to the 'exceptional circumstances' in which an exemption may be granted from the overseas travel ban.
- Adequacy of consultation: the committee is seeking advice about whether any consultation was undertaken in relation to the instrument with individuals likely to be impacted by the measures.

Charter of the United Nations Listings (21 instruments)

- Compliance with Legislation Act 2003—registration of instruments/adequacy of explanatory materials: the committee welcomes the Minister for Foreign Affairs' undertaking to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]

- Exemptions from the operation of primary legislation/parliamentary oversight: the committee is seeking advice about the appropriateness of including the measures in this instrument in delegated legislation, rather than primary legislation, and whether

amendments can be made to provide that the exceptions set out in the instrument cease to operate within three years after they commence to ensure a minimum degree of regular parliamentary oversight.

Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]

- *Exemption from disallowance*: the committee is seeking advice about why it is appropriate for the instrument to be exempt from disallowance, noting that it includes significant matters relating to the operation of the \$5 billion Northern Australia Infrastructure Facility.

Scrutiny of COVID-19 related legislation

The Scrutiny of Delegated Legislation Committee has continued to list all delegated legislation made in response to COVID-19 on its [website](#). As of 23 September 2021, 570 legislative instruments have been made, of which 16.3% are exempt from disallowance.

Other legislative instruments commented on (*Delegated Legislation Monitor 14 of 2021*)

- The Scrutiny of Delegated Legislation Committee considered 160 disallowable legislative instruments and 21 instruments exempt from disallowance registered on the Federal Register of Legislation between 1 July 2021 and 13 August 2021. The committee is continuing to engage with ministers and agencies in relation to 24 instruments and has concluded its consideration of 34 instruments.

This document contains a very brief summary of some recent comments made by the Senate Scrutiny of Delegated Legislation Committee (Chair: Senator the Hon Concetta Fierravanti-Wells and Deputy Chair: Senator the Hon Kim Carr).

For any comments or questions, please contact:
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