



22 March 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 (see Senate Standing Orders 23 and 24).

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

Highlights

On 16 March 2021, the Senate Scrutiny of Delegated Legislation Committee tabled the [final report](#) of its inquiry into the exemption of delegated legislation from parliamentary oversight. The report makes 11 recommendations to improve parliamentary oversight of delegated legislation. The final report is accompanied by a [media release](#). Further information is available on the [inquiry home page](#).

Key scrutiny issues: Bills ([Scrutiny Digest 5 of 2021](#))

Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

- *[Adequacy of judicial review and significant matters in delegated legislation](#)*: the committee leaves to the Senate the appropriateness of the proposed framework for the disclosure of protected information in proceedings for the review of certain migration and citizenship decisions. The committee is also of the view that the specification by non-disallowable gazette notice of the exceptionally broad list of bodies who may provide confidential information for the purposes of the bill is an inappropriate delegation of the Parliament's legislative power.
- *[Parliamentary scrutiny](#)*: the committee leaves to the Senate the appropriateness of the prohibition on the production or giving of confidential gazetted agency information to 'a parliament or parliamentary committee'.
- *[Evidentiary certificates and natural justice](#)*: the committee leaves to the Senate the appropriateness of the use of evidentiary certificates and restricting the rules of natural justice in relation to disclosures of information and the review of decisions by the Administrative Appeals Tribunal.

- Significant matters in delegated legislation: the committee leaves to the Senate the appropriateness of leaving the prescription of additional matters relevant to the court's determination of whether to disclose information in judicial review proceedings to delegated legislation.

Online Safety Bill 2021

- Broad discretionary powers and merits review: the committee is seeking advice on the broad discretion of the Commissioner in relation to treatment of complaints and the proposed new online content scheme, and in relation to merits review of preliminary decisions relating to consideration of complaints.
- Significant matters in delegated legislation: the committee is seeking advice on a wide range of matters proposed to be prescribed in delegated legislation, some of which is exempt from disallowance.
- Other scrutiny matters: the committee is seeking advice in relation to exclusion of liability, procedural fairness, section 96 grants to the states, reversal of the evidential burden of proof, incorporation of external materials as in force from time to time and a broad delegation of administrative powers.

Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020

- Authorisation of coercive powers and privacy: the committee leaves to the Senate the appropriateness of a range of scrutiny concerns with respect to the authorisation of coercive powers, including the category of persons empowered to issue warrants and not requiring, in relation to all warrants, that the issuing authority consider the extent of interference with privacy.
- Use of coercive powers without a warrant and privacy: the committee leaves to the Senate the appropriateness of the use of emergency authorisations to disrupt data or undertake account takeover activities and of enabling law enforcement agencies to undertake activities to conceal any thing done under a warrant after the warrant has ceased to be in force. The committee also leaves to the Senate the appropriates of a broad delegation of administrative powers in relation to members of staff of the Australian Criminal Intelligence Commission who may issue emergency authorisations.
- Impact of coercive powers on the privacy of innocent third parties: the committee leaves to the Senate the appropriateness of not specifically requiring consideration of the privacy implications for third parties when authorising coercive powers in relation to two warrants, the grounds for granting assistance orders, and broad definitions used in relation to network activity warrants.
- Evidentiary certificates: the committee leaves to the Senate the appropriateness of the use of evidentiary certificates in relation to things done in connection with warrants established by the bill.

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 5 of 2021*)

ASIC Corporations (Amendment) Instrument 2020/1064 [F2020L01571] and ASIC Corporations (Amendment) Instrument 2020/1065 [F2020L01572]

- *Modifications to the operation of primary legislation*: the committee is seeking advice as to why it is considered necessary and appropriate to use delegated legislation to amend the operation of primary legislation in relation to time-sharing schemes, noting that such modifications have been in force since 1993.

Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020 [F2020L01506]

- *Matters more appropriate for parliamentary enactment*: the committee is seeking further advice about the use of delegated legislation to significantly expand the jurisdiction of ACLEI, in light of the fact that primary legislation is planned to establish the Commonwealth Integrity Commission.

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 15 March 2021, 438 legislative instruments have been made, of which 17.35% are exempt from disallowance and scrutiny by the committee.

Other bills commented on (*Scrutiny Digest 5 of 2021*)

- **Data Availability and Transparency Bill 2020**: the committee leaves to the Senate the appropriateness of leaving guidelines on aspects of the data sharing scheme that are relevant to the application and operation of privacy safeguards to non-legislative instruments that are not subject to parliamentary scrutiny or disallowance.
- **Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021**: the committee is seeking advice in relation to significant matters in delegated legislation, exemption from disallowance, incorporation of external materials existing from time to time, tabling of reports in Parliament and privacy.
- **Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020**: the committee leaves to the Senate the appropriateness of leaving significant matters to delegated legislation and the retrospective application of items in the bill.
- **Family Assistance Legislation Amendment (Early Childhood Education and Care Coronavirus Response and Other Measures) Bill 2021**: the committee received information about matters included in delegated legislation, retrospective validation, and a broad delegation of administrative powers.
- **Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020**: the committee received information about reversals of the evidential burden of proof and has requested that the explanatory memorandum be updated to include this information.

- **National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020:** the committee received information about the inclusion of significant matters in delegated legislation, and leaves to the Senate the appropriateness reversals of legal and evidential burdens of proof, and a broad delegation of legislative power.
- **National Emergency Declaration Bill 2020 and National Emergency Declaration (Consequential Amendments) Bill 2020:** The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amendments suggested in relation to these bills and draws these undertakings to the attention of the Senate Legal and Constitutional Affairs Legislation Committee.
- **Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021:** the committee is seeking advice in relation to parliamentary scrutiny (section 96 grants to the states) and a broad discretionary power.
- **Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021:** the committee leaves to the Senate the appropriateness of a justification for increasing maximum penalties for using a carriage service to menace, harass or cause offence.
- **Private Health Insurance Legislation Amendment (Age of Dependents) Bill 2021:** the committee is seeking advice in relation to significant matters in delegated legislation.
- **Security Legislation Amendment (Critical Infrastructure) Bill 2020:** the committee leaves to the Senate the appropriateness of leaving a range of significant matters to delegated legislation, and the incorporation of external materials as in force from time to time.

Other legislative instruments commented on ([Delegated Legislation Monitor 5 of 2021](#))

- The Scrutiny of Delegated Legislation committee considered 100 disallowable legislative instruments registered on the Federal Register of Legislation between 10 and 21 December 2020. The committee is continuing to engage with ministers and agencies in relation to 24 instruments, and has concluded its consideration of 7 instruments.
- All legislative instruments subject to a notice of motion for disallowance in either House of Parliament are listed in the [Disallowance Alert](#).

Notices of motion to disallow

The Senate Scrutiny of Delegated Legislation Committee **gave** a notice of motion to disallow the following instrument on 17 February 2021:

- Norfolk Island Employment Rules 2020 [F2020L01536].

The Senate Scrutiny of Delegated Legislation Committee **withdrew** notices of motions to disallow the following instruments on 18 February 2021:

- ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835 [F2020L01261]
- ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834 [F2020L01259].

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

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