



18 June 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](#).

Adoption of resolutions relating to parliamentary oversight of delegated legislation

On 16 June 2021, the Senate [adopted three recommendations](#) of the final report of the Senate Scrutiny of Delegated Legislation Committee's inquiry into the exemption of delegated legislation from parliamentary oversight. These resolutions:

- emphasise the importance of the disallowance mechanism to parliamentary scrutiny;
- require the Attorney-General to table a statement in the Senate setting out the rationale for current exemptions from disallowance; and
- amend Senate standing orders to allow the committee to scrutinise instruments that are exempt from disallowance.

Key scrutiny issues: Bills ([Scrutiny Digest 8 of 2021](#))

Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021

- [Broad discretionary powers/significant matters in delegated legislation](#): the committee is seeking advice as to why it is considered necessary and appropriate to include details of when restrictive practices can be used in an aged care setting to delegated legislation, and whether the bill can be amended to provide more guidance in relation to these practices, including providing a definition of 'emergency'.

Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2021-2022

- [Parliamentary scrutiny](#): the committee leaves to the Senate the appropriateness of:
 - the classification of items in the appropriation bills as 'ordinary annual services of the government';

- allowing the Finance Minister to determine the purposes for which up to \$5 billion in funds may be allocated in non-disallowable legislative instruments; and
- parliamentary oversight of grants to the States under section 96 of the Constitution.
- Parliamentary scrutiny: the committee is seeking advice on:
 - transparency measures applying to Advance to the Finance Minister determinations;
 - whether any of the measures marked as 'not for publication' in the portfolio budget statements are included in the appropriation items in the bills; and
 - the level of expected expenditure for general purpose financial assistance to the States and national partnership payments to the States in 2021-22.

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

- Exemption from disallowance: the committee re-iterated its request that the bill be amended so that the first national environmental standards are subject to appropriate parliamentary scrutiny. The committee repeated its view that amendments may be made to provide certainty in relation to the standards without exempting the first standards from disallowance.
- Incorporation of external material: the committee re-iterated its request that the explanatory memorandum be updated to include information in relation to the incorporation of external material as in force from time to time.

Treasury Laws Amendment (2021 Measures No. 3) Bill 2021

- Exemption from disallowance: the committee is seeking advice in relation to why it is considered necessary and appropriate to leave nearly all of the elements of the proposed Family Home Guarantee to non-disallowable delegated legislation.

Key scrutiny issues: Legislative instruments ([Delegated Legislation Monitor 8 of 2021](#))

Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]

- Compliance with authorising legislation: the committee is seeking advice as to how the *Australian Renewable Energy Agency Act 2011* authorises regulations to extend the jurisdiction of the Australian Renewable Energy Agency (ARENA) to include functions that relate to the non-renewable energy technologies.
- Significant matters in delegated legislation: the committee is seeking advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to expand the remit of ARENA to include non-renewable energy technologies.

- *Consultation with persons affected*: the committee is seeking advice as to whether consultation was undertaken in relation to the instrument with relevant stakeholders and experts outside of government.

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

- *Matters more appropriate for parliamentary enactment*: the committee thanks the Attorney-General for providing further advice on the use of delegated legislation to expand the jurisdiction of the Australian Commission for Law Enforcement Integrity to include the ACCC, APRA, ASIC and the ATO and welcomes the undertaking to amend the regulations to provide that the measures will cease by 2024.

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 10 June 2021, 491 legislative instruments have been made, of which 17.5 per cent are exempt from disallowance.

Other bills commented on ([Scrutiny Digest 8 of 2021](#))

- **Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021**: the committee leaves to the Senate the appropriateness of including significant penalties in infringement notices.
- **Financial Regulator Assessment Authority Bill 2021**: the committee is seeking advice in relation to the appropriateness of not providing for reports to be tabled in Parliament, provisions which reverse the evidential burden of proof, provisions which provide immunity from liability, the abrogation of legal professional privilege, and the broad delegation of administrative powers.
- **Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021**: the committee is seeking advice in relation to provisions which reverse the evidential burden of proof.
- **Fuel Security Bill 2021**: the committee is seeking advice in relation to the inclusion of significant matters in delegated legislation, including the inclusion of fee-making powers in delegated legislation.
- **Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021**: the committee requested that the explanatory memorandum be updated to include information relating to significant matters in delegated legislation and provisions with retrospective effect.
- **Independent Office of Animal Welfare Bill 2021**: the committee leaves to the Senate the appropriateness of the broad delegation of administrative powers.
- **Liability for Climate Change Damage (Make the Polluters Pay) Bill 2021**: the committee leaves to the Senate the appropriateness of provisions with retrospective effect.
- **Migration Amendment (Clarifying International Obligations for Removal) Bill 2021**: the committee reiterated its scrutiny concerns in relation to the trespass on personal rights

and liberties by way of indefinite detention of individuals, and on the inclusion of significant matters in delegated legislation.

- **Migration Amendment (Tabling Notice of Certain Character Decisions) Bill 2021:** the committee is seeking advice as to why certain decisions are exempt from the new tabling requirements introduced by the bill.
- **Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021:** the committee leaves to the Senate the appropriateness of the inclusion of significant matters in delegated legislation and the incorporation of external material into the law.
- **Mutual Recognition Amendment Bill 2021:** the committee leaves to the Senate the appropriateness of providing State ministers with the power to make Commonwealth legislative instruments which are exempt from disallowance and effective parliamentary oversight at either the Commonwealth or State level.
- **National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021:** the committee is seeking advice in relation to provisions which confer a broad discretionary power to make banning orders, the inclusion of significant penalties, the abrogation of the right to privacy, and the inclusion of significant matters in delegated legislation.
- **Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021:** the committee is seeking advice as to whether the bill can be amended to provide at least high-level guidance regarding how fees will be calculated.
- **Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021:** the committee is seeking advice in relation to a power to make instruments that are not subject to parliamentary disallowance, provisions which confer broad discretionary powers to make arrangements and grants, and parliamentary oversight of grants to the States under section 96 of the Constitution.
- **Sydney Harbour Federation Trust Amendment Bill 2021:** the committee leaves to the Senate the appropriateness of the inclusion of significant matters in delegated legislation.
- **Tertiary Education Quality and Standards Agency (Charges) Bill 2021:** the committee is seeking advice in relation to a broad discretionary power to provide for exemptions in delegated legislation.
- **Tertiary Education Quality and Standards Agency Amendment (Cost Recovery) Bill 2021:** the committee is seeking advice in relation to the inclusion of significant matters in delegated legislation.
- **Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021:** the committee is seeking advice in relation to provisions which confer immunity from liability, the reversal of the evidential burden of proof, the appropriateness of not providing for reports to be tabled in Parliament, the broad delegation of administrative powers, the inclusion of significant matters in delegated

legislation, the incorporation of external material as in force from time to time, and powers to make instruments which are not subject to parliamentary disallowance.

Other legislative instruments commented on (*Delegated Legislation Monitor 8 of 2021*)

- The Senate Scrutiny of Delegated Legislation Committee considered 93 disallowable legislative instruments registered on the Federal Register of Legislation between 20 and 30 March 2021. The committee is continuing to engage with ministers and agencies in relation to 25 instruments and has concluded its consideration of 10 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 **withdrew** notices of motion to disallow the following instruments on 17 June 2021:

- Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020 [F2020L01688]
- Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020 [F2020L01506]
- National Health (Data-matching) Principles 2020 [F2021L00006]
- Telecommunications (Fibre-ready Facilities — Exempt Real Estate Development Projects) Instrument 2021 [F2021L00105].

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).

For any comments or questions, please contact:

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