

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

Monitor 10 of 2019

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The committee's name was changed on 4 December 2019 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, to more accurately reflect the nature and scope of the committee's work.¹

The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they 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.

Prior to 4 December 2019, Senate standing order 23(3) required the committee to scrutinise each instrument referred to it to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

The instruments recorded in this *Delegated Legislation Monitor 10 of 2019* were registered and tabled before 4 December 2019. Consequently, the committee has scrutinised these instruments in accordance with the above scrutiny principles.

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues which relate primarily to technical legislative scrutiny. The committee does not examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or relevant agency seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern. The committee's

1 The change to the committee's name was one of a number of recommendations made in the committee's inquiry report, *Parliamentary scrutiny of delegated legislation* (June 2019). On 27 November 2019, the Senate agreed to amend standing orders 23 and 25(2)(a) in accordance with the recommendations made by the committee. For further information, see https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Changes_to_committee_standing_orders.

work is supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.²

Publications

The committee's usual practice is to table a report, the *Delegated Legislation Monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable legislative instruments for the preceding period. Disallowable legislative instruments detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.³

Ministerial correspondence

Correspondence relating to matters raised by the committee is published on the committee's website.⁴

Agency correspondence

The committee undertakes informal correspondence with relevant agencies via the committee secretariat to gather information about potential scrutiny concerns, in order to assist the committee to decide whether it is necessary to seek further advice from the relevant minister about those issues. This correspondence is not published; however, a record of the instrument, scrutiny issue and status of the correspondence is included in Appendix A (ongoing matters) and Appendix B (concluded matters) in the monitor.

Guidelines

Guidelines referred to by the committee are published on the committee's website.⁵

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.⁶ The Senate Disallowable Instruments List provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.⁷ The Disallowance Alert records all notices of

2 For further information on the disallowance process and the work of the committee see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

3 *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

4 See www.aph.gov.au/regords_monitor.

5 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

6 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

7 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

motion for the disallowance of instruments, and their progress and eventual outcome.⁸

Instruments considered in this monitor

The committee examined 63 disallowable legislative instruments registered on the Federal Register of Legislation between 1 November 2019 and 20 November 2019. This monitor identifies the instruments registered in this period about which the committee has or had scrutiny concerns. It also identifies instruments registered before this period in relation to which the committee is continuing to engage with the relevant minister or agency, or has concluded its examination.

8 *Disallowance Alert 2019*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

Committee comments

1.1 This chapter details the instruments in relation to which the committee holds the most significant scrutiny concerns, and has resolved to place a notice of motion to disallow the instrument to emphasise those concerns and to provide the Senate with additional time to consider the instrument with the benefit of the committee's comments. Where appropriate, this chapter also details the committee's reasons for withdrawing notices of motion to disallow such instruments.

1.2 The committee is currently seeking to resolve all outstanding scrutiny concerns by correspondence with the relevant minister or agency, and has no matters to draw to the attention of the Senate at this time. Copies of any relevant correspondence are available on the committee's website.¹

1 See www.aph.gov.au/regords_monitor.

Appendix A

Ongoing matters

The committee engages with relevant ministers and agencies to attempt to resolve its concerns about scrutiny issues raised by disallowable legislative instruments. This appendix documents the committee's ongoing scrutiny concerns.

Ministerial engagement

2.1 The committee is engaging with the relevant minister about the scrutiny issues raised by the instruments listed below.

Instrument	Issue	Status
ASIC Corporations (Whistleblower Policies) Instrument 2019/1146 [F2019L01457]	Principle (a) exemption from primary legislation	Seeking advice from the assistant minister.
Broadcasting Services (Transmitter Access) Regulations 2019 [F2019L01248]	Principle (b) personal rights and liberties (privilege against self-incrimination) Principle (d) significant matters in delegated legislation	Seeking advice from the minister.
CASA EX101/19 — Helicopter Aerial Application Endorsements Exemption 2019 [F2019L01132]	Principle (d) continuing exemption	Awaiting implementation of ministerial undertaking made on 07/11/2019 to amend the Civil Aviation Safety Regulations 1998 in 2020.
Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019 [F2019L01196]	Principle (c) merits review	Seeking advice from the assistant minister. 'Protective' notice of motion to disallow instrument placed on 03/12/2019.
Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227]	Principle (a) consultation Principle (c) merits review	Seeking advice from the assistant minister.
Telecommunications (Protecting Australians from Terrorist or Violent Criminal Material) Direction (No. 1) 2019 [F2019L01159]	Principle (a) incorporation	Seeking further advice from the eSafety Commissioner following private briefing on 27/11/2019.

Agency engagement

2.2 The committee is engaging with the relevant agencies via its secretariat to seek further information about potential scrutiny concerns raised by the instruments listed below.

Instrument	Issue	Status
AusCheck Legislation Amendment (Major National Events) Regulations 2019 [F2019L01410]	Principle (b) procedural fairness	Seeking advice from the agency.
Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Regulations 2019 [F2019L01397]	Principle (a) compliance with authorising legislation Principle (b) privacy	Seeking advice from the agency.
Narcotic Drugs Amendment (Review Recommendations) Regulations 2019 [F2019L01485]	Principle (a) consultation	Seeking advice from the agency.
Telecommunications (Interception and Access) (Emergency Service Facilities - Victoria) Amendment Instrument 2019 [F2019L01453]	Principle (b) privacy	Seeking advice from the agency.
Veterans’ Affairs Pharmaceutical Benefits Schemes (Electronic Prescriptions and Active Ingredient Prescribing) Amendment Instrument 2019 [F2019L01387]	Principle (a) consultation Principle (b) privacy	Seeking advice from the agency.

Appendix B

Concluded matters

3.1 This appendix records the instruments in relation to which the committee has concluded its inquiries, following correspondence with the relevant minister or agency. Copies of the relevant ministerial correspondence are available on the committee's website.¹

Ministerial engagement

3.2 The committee has concluded its examination of the instruments listed below following correspondence with the relevant minister.

Instrument	Issue	Status
ASIC Corporations (Unclaimed Superannuation—Former Temporary Residents) Instrument 2019/873 [F2019L01213]	Principle (d) continuing exemption	Concluded following response from the assistant minister on 27/11/2019.
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Cities and Regional Development Measures No. 1) Regulations 2019 [F2019L01344]	Principle (a) constitutional validity	Concluded following further consideration of the instrument by the committee at its private meeting on 04/12/2019.
Social Security (Reasonable Excuse – Student Payments) Determination 2019 [F2019L01287]	Principle (d) significant matters in delegated legislation	Concluded following response from the minister on 27/11/2019.

¹ See www.aph.gov.au/regords_monitor.

Agency engagement

3.3 The committee has concluded its examination of the instruments listed below following informal correspondence with the relevant agencies via its secretariat.

Instrument	Issue	Status
CASA EX70/19 — Implementation of Drug and Alcohol Management Plans (Non-DAMP Organisations) Instrument 2019 [F2019L01414]	Principle (a) in accordance with statute	Concluded following advice from the agency on 27/11/2019. The agency undertook to amend the instrument, in response to the committee's concerns.
National Health (Claims and under co-payment data) Amendment (Electronic Prescriptions) Rules 2019 [F2019L01383]	Principle (a) consultation	Concluded following advice from the agency on 28/11/2019. The agency undertook to amend the explanatory statement to the instrument.
Therapeutic Goods (Permissible Indications) Determination (No. 2) 2019 [F2019L01455]	Principle (a) drafting	Drawing the instrument to the attention of the agency.

Appendix C

Undertakings

4.1 From time to time, a minister or agency may make an undertaking to address the committee's concerns. These may include, for example, an undertaking to amend a legislative instrument or an explanatory statement, or to review an Act or a departmental practice. The committee expects that, when a minister or agency has made an undertaking, it will be implemented in a timely manner. Accordingly, this appendix records outstanding ministerial and agency undertakings, and the undertakings implemented since the committee's last meeting.

Outstanding undertakings

4.2 The following table records undertakings that remain outstanding, from oldest to newest. The committee draws these undertakings to the attention of the Senate.

Instrument	Undertaking	Date of Undertaking
Hearing Services Program (Voucher) Instrument 2019 [F2019L00969]	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	23/08/2019
Crimes Legislation Amendment (2019 Measures No. 1) Regulations 2019 [F2019L01004]	The Attorney-General's Department undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	03/09/2019
Telecommunications (Carrier Licence Exemption - Trial Network Units) Determination 2019 [F2019L00317] Telecommunications (Carrier Licence Exemption – Supply of Carriage Services to Visitors) Determination 2019 [F2019L00318]	The Department of Communications and the Arts undertook to amend the explanatory statements to the instruments in response to the committee's concerns.	03/09/2019
Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]	The Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management undertook to progress amendments to the <i>Water Act 2007</i> in response to the committee's concerns.	11/09/2019

Instrument	Undertaking	Date of Undertaking
Amendment of List of Exempt Native Specimens – Commonwealth Eastern Tuna and Billfish Fishery and Commission for the Conservation of Antarctic Marine Living Resources Ross Sea Exploratory Toothfish Fishery, August 2019 [F2019L01078]	The Department of the Environment and Energy undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	19/09/2019
Financial Framework (Supplementary Powers) Amendment (Education Measures No. 2) Regulations 2019 [F2019L01156]	The Department of Finance undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	02/10/2019
ASIC Corporations (Amendment) Instrument 2019/784 [F2019L01206]	The Australian Securities and Investment Corporation undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	16/10/2019
National Museum of Australia Regulations 2019 [F2019L01273]	The Department of Communications and the Arts undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	01/11/2019
Other Grants Guidelines (Education) Amendment (No.1) 2019 [F2019L01333]	The Department of Education undertook to amend the instrument and the explanatory statement to the amending instrument in response to the committee's concerns.	06/11/2019
CASA EX101/19 – Helicopter Aerial Application Endorsements Exemption 2019 [F2019L01132]	The Minister for Infrastructure, Transport and Regional Development undertook to amend the Civil Aviation Safety Regulations 1998 in 2020 in response to the committee's concerns.	07/11/2019
Quality of Care Amendment (Minimising Use of Restraints) Principles 2019 [F2019L00511]	The Minister for Aged Care and Senior Australians undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	23/08/2019
	The Minister for Aged Care and Senior Australians undertook to conduct a review of the operation of the provisions inserted into the Quality of Care Principles 2014 by the instrument after they have been in force for 12 months.	20/11/2019
CASA EX70/19 – Implementation of Drug and Alcohol Management Plans (Non-DAMP Organisations) Instrument 2019 [F2019L01414]	The Civil Aviation Safety Authority undertook to amend the instrument in response to the committee's concerns.	27/11/2019

Instrument	Undertaking	Date of Undertaking
National Health (Claims and under co-payment data) Amendment (Electronic Prescriptions) Rules 2019 [F2019L01383]	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	28/11/2019

Implemented undertakings

4.3 The following table records undertakings that have been implemented since the committee's last *Delegated Legislation Monitor*.

Instrument	Undertaking	Date implemented
Greenhouse and Energy Minimum Standards (Air Conditioners up to 65kW) Determination 2019 [F2019L00490]	The Department of the Environment and Energy undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	22/11/2019
Greenhouse and Energy Minimum Standards (Household Refrigerating Appliances) Determination 2019 [F2019L01066]	The Department of the Environment and Energy undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	22/11/2019
Greenhouse and Energy Minimum Standards (Refrigerated Cabinets) Determination 2019 [F2019L01067]	The Department of the Environment and Energy undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	22/11/2019
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10) [F2018L01646]	The Minister for Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns. The committee was notified of the minister's implemented undertaking on 03/12/2019.	03/12/2019
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019) [F2019L00081]	The Minister for Health undertook to amend the explanatory statement to the instrument in response to the committee's concerns. The committee was notified of the minister's implemented undertaking on 03/12/2019.	03/12/2019

Appendix D

Instruments specifying Commonwealth expenditure

5.1 The *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act) and the *Industry Research and Development Act 1986* (Industry Act) authorise the Commonwealth to spend public money on policies, programs and schemes specified in instruments made under those Acts. The scrutiny of such instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.¹

5.2 To facilitate such scrutiny, this Appendix draws the Senate's attention to the nature and extent of Commonwealth expenditure that is specified by delegated legislation.

5.3 The table below lists the expenditure specified by legislative instruments registered between 1 November 2019 and 20 November 2019.

Instrument	Program	Amount
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 5) Regulations 2019 [F2019L01462]	National Orphanage Museum	\$2 million one-off grant in 2019-20.
Industry Research and Development (Australian Made Export Campaign Program) Instrument 2019 [F2019L01420]	Australian Made Export Campaign Program	\$5 million one-off grant in 2019-20.

1 For further information about instruments specifying Commonwealth expenditure see Chapter 7 of the report of the committee's inquiry, [Parliamentary scrutiny of delegated legislation](#).

List of instruments in current monitor

Instrument	FRL No	Page
Amendment of List of Exempt Native Specimens – Commonwealth Eastern Tuna and Billfish Fishery and Commission for the Conservation of Antarctic Marine Living Resources Ross Sea Exploratory Toothfish Fishery, August 2019	[F2019L01078]	8
ASIC Corporations (Amendment) Instrument 2019/784	[F2019L01206]	8
ASIC Corporations (Changing Scheme Constitutions) Instrument 2019/700	[F2019L01185]	10
ASIC Corporations (Unclaimed Superannuation—Former Temporary Residents) Instrument 2019/873	[F2019L01213]	5
ASIC Corporations (Whistleblower Policies) Instrument 2019/1146	[F2019L01457]	3
AusCheck Legislation Amendment (Major National Events) Regulations 2019	[F2019L01410]	4
Broadcasting Services (Transmitter Access) Regulations 2019	[F2019L01248]	3
CASA EX101/19 — Helicopter Aerial Application Endorsements Exemption 2019	[F2019L01132]	3, 8
CASA EX70/19 — Implementation of Drug and Alcohol Management Plans (Non-DAMP Organisations) Instrument 2019	[F2019L01414]	6, 8
Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Regulations 2019	[F2019L01397]	4
Crimes Legislation Amendment (2019 Measures No. 1) Regulations 2019	[F2019L01004]	7
Financial Framework (Supplementary Powers) Amendment (Education Measures No. 2) Regulations 2019	[F2019L01156]	8
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Cities and Regional Development Measures No. 1) Regulations 2019	[F2019L01344]	5

Instrument	FRL No	Page
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 5) Regulations 2019	[F2019L01462]	11
Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2019	[F2019L01196]	3
Greenhouse and Energy Minimum Standards (Air Conditioners up to 65kW) Determination 2019	[F2019L00490]	10
Greenhouse and Energy Minimum Standards (Household Refrigerating Appliances) Determination 2019	[F2019L01066]	10
Greenhouse and Energy Minimum Standards (Refrigerated Cabinets) Determination 2019	[F2019L01067]	10
Hearing Services Program (Voucher) Instrument 2019	[F2019L00969]	7
Industry Research and Development (Australian Made Export Campaign Program) Instrument 2019	[F2019L01420]	11
Narcotic Drugs Amendment (Review Recommendations) Regulations 2019	[F2019L01485]	4
National Health (Claims and under co-payment data) Amendment (Electronic Prescriptions) Rules 2019	[F2019L01383]	6, 9
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2018 (No. 10)	[F2018L01646]	10
National Health (Highly specialised drugs program) Special Arrangement Amendment Instrument 2019 (No. 1) (PB 3 of 2019)	[F2019L00081]	10
National Museum of Australia Regulations 2019	[F2019L01273]	8
Other Grants Guidelines (Education) Amendment (No.1) 2019	[F2019L01333]	8
Quality of Care Amendment (Minimising Use of Restraints) Principles 2019	[F2019L00511]	8
Social Security (Reasonable Excuse – Student Payments) Determination 2019	[F2019L01287]	5
Taxation Administration (Private Ancillary Fund) Guidelines 2019	[F2019L01227]	3

Instrument	FRL No	Page
Telecommunications (Carrier Licence Exemption - Trial Network Units) Determination 2019	[F2019L00317]	7
Telecommunications (Carrier Licence Exemption – Supply of Carriage Services to Visitors) Determination 2019	[F2019L00318]	7
Telecommunications (Interception and Access) (Emergency Service Facilities - Victoria) Amendment Instrument 2019	[F2019L01453]	4
Telecommunications (Protecting Australians from Terrorist or Violent Criminal Material) Direction (No. 1) 2019	[F2019L01159]	3
Therapeutic Goods (Permissible Indications) Determination (No. 2) 2019	[F2019L01455]	6
Veterans’ Affairs Pharmaceutical Benefits Schemes (Electronic Prescriptions and Active Ingredient Prescribing) Amendment Instrument 2019	[F2019L01387]	4
Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018	[F2018L01674]	7

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