



22 May 2020

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

Inquiry into exemption of delegated legislation from parliamentary oversight

Pursuant to Senate standing order 23(12), the Senate Scrutiny of Delegated Legislation Committee unanimously resolved to establish an own-motion inquiry into the exemption of delegated legislation from parliamentary oversight, with a particular focus on:

- the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight; and
- whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how.

The closing date for submissions is **25 June 2020**. Further information about the inquiry is contained in the committee's recent [media release](#) about the inquiry and the [inquiry homepage](#).

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 21 May 2020, 148 legislative instruments have been made, of which 23.6% are exempt from disallowance and scrutiny by the committee.
- The Scrutiny of Bills Committee has reported on all of the COVID-19 related bills passed by the Parliament on 23 March and 8 April 2020 in its [Scrutiny Digest 5 of 2020](#) and [Scrutiny Digest 6 of 2020](#).

Key scrutiny issues: Bills ([Scrutiny Digest 6 of 2020](#))

Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020

- *Broad discretionary powers*: the committee is seeking advice on the appropriateness of providing the minister with a broad power to exempt employers from provisions of the bill.
- *Henry VIII clauses*: the committee reiterated its general scrutiny concerns regarding provisions which enable ministers to use delegated legislation to amend the operation of primary legislation.

Coronavirus Economic Response Package (Payments and Benefits) Bill 2020

- *Broad delegation of legislative power*: the committee considers that some of the matters that are to be provided for in the rules (delegated legislation) should have been included in the primary legislation.
- *Sub-delegation of powers*: the committee considers that further guidance as to the administrative and legislative powers that may be sub-delegated to the Commissioner of Taxation should have been included in the primary legislation.
- *Incorporation of external materials*: the committee is seeking advice regarding a provision which would allow the incorporation of external materials into delegated legislation made under the bill.

Key scrutiny issues: Legislative instruments ([Delegated Legislation Monitor 6 of 2020](#))

Matters of interest to the Senate

The Scrutiny of Delegated Legislation Committee draws the following instruments to the attention of the Senate, as they appear to contain significant policy matters relating to the Commonwealth Government's response to the COVID-19 pandemic:

- **Coronavirus Economic Response Package (Payments and Benefits) Rules 2020** [[F2020L00419](#)];
- **Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020** [[F2020L00432](#)];
- **Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020** [[F2020L00435](#)];
- **Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Rules 2020** [[F2020L00413](#)];
- **National Consumer Credit Protection Amendment (Coronavirus Economic Response Package) Regulations 2020** [[F2020L00386](#)];
- **Social Security (Coronavirus Economic Response—2020 Measures No. 3) Determination 2020** [[F2020L00338](#)];
- **Social Security (Coronavirus Economic Response—2020 Measures No. 8) Determination 2020** [[F2020L00428](#)]; and

- **Social Security (Coronavirus Economic Response—2020 Measures No. 9) Determination 2020 [F2020L00440].**

A summary of the purpose of each instrument is published on the committee's [website](#) and in Chapter 2 of *Delegated Legislation Monitor 6 of 2020*.

Scrutiny of Commonwealth expenditure

- The committee draws the attention of the Senate and relevant legislation committees to 5 instruments registered between 27 March and 22 April 2020, which, in combination with their enabling Acts, authorise the Commonwealth to spend a total of over \$60.6 million on various grants and programs. These instruments are listed on the committee's [website](#) and in Chapter 3 of *Delegated Legislation Monitor 6 of 2020*.

Technical scrutiny matters

- **Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]:** the committee has requested a private briefing with senior departmental officials to discuss the appropriateness of imposing significant civil penalties for failing to comply with a phrase which is not defined in the written law.
- **National Health (Take Home Naloxone Pilot) Special Arrangement 2019 (PB 97 of 2019) [F2019L01542]:** the committee has written to the minister to request that the *National Health Act 1953* be amended to expressly provide for the authorisation of private third parties to perform all of the secretary's powers and functions in administering special arrangements.

Other bills commented on ([Scrutiny Digest 6 of 2020](#))

- **Appropriation Bill (No. 6) 2019-2020:** the committee leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the purposes for which up to \$40 billion in additional funds may be allocated in legislative instruments not subject to disallowance.
- **Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020:** the committee draws the various resources for scrutinising payments made under the bill to the attention of senators and the Senate Select Committee on COVID-19.
- **Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020:** the committee considers that some of the matters that are to be left to the Fund's investment mandate should have been included on the face of the primary legislation.
- **Coronavirus Economic Response Package Omnibus Bill 2020:** the committee considers that if the Parliament is sitting, changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament rather than relying on the use of a Henry VIII clause.
- **Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020:** the committee received advice regarding the

retrospective commencement of provisions of the bill, and requested that the explanatory memorandum to the bill be updated.

- **Health Insurance Amendment (General Practitioners and Quality Assurance) Bill 2020:** the committee received advice regarding retrospective validation, and requested that the explanatory memorandum to the bill be updated.
- **National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020:** the committee leaves to the Senate as a whole the appropriateness of leaving a number of significant matters to delegated legislation and excluding aspects of procedural fairness.
- **Structured Finance Support (Coronavirus Economic Response Package) Bill 2020:** the committee considers that the matters relating to the operation of the Fund that have been set out in non-disallowable and disallowable instruments should have been included on the face of the primary legislation.
- **Therapeutic Goods Amendment (2020 Measures No. 1) Bill 2020:** the committee received advice regarding the incorporation of external materials into medical device standards orders.

Other legislative instruments commented on (*Delegated Legislation Monitor 6 of 2020*)

- The Senate Scrutiny of Delegated Legislation Committee considered 114 disallowable legislative instruments registered on the Federal Register of Legislation between 27 March 2020 and 22 April 2020. The committee is continuing to engage with ministers and agencies in relation to 15 instruments, and has concluded its consideration of 17 instruments.
- All legislative instruments subject to a notice of motion for disallowance in either House of the Parliament are listed in the [Disallowance Alert](#).

Notices of motion to disallow

At its private meeting on Wednesday 20 May 2020, the Senate Scrutiny of Delegated Legislation Committee resolved to **withdraw** the notice of motion to disallow the following instrument:

- Export Control (Sheepmeat and Goatmeat Export to the European Union Tariff Rate Quotas) Order 2019 [[F2019L01564](#)]

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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