



4 September 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](#).

## 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 1 September 2020, 278 legislative instruments have been made, of which 16.5% are exempt from disallowance and scrutiny by the committee.

## Highlights

On 3 September 2020 the Scrutiny of Delegated Legislation Committee held its third [public hearing](#) to inform its [inquiry](#) into the exemption of delegated legislation from parliamentary oversight. A recording of the hearing may be viewed [here](#), and transcripts of all past hearings will be available [here](#).

## Key scrutiny issues: Bills ([Scrutiny Digest 11 of 2020](#))

### Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

- [Personal rights and liberties](#): the committee leaves to the Senate the appropriateness of broadly extending powers for the search and seizure of items in immigration detention facilities.
- [Significant matters in delegated legislation](#): the committee leaves to the Senate the appropriateness of allowing the minister to determine, by legislative instrument, what things are to be prohibited in immigration detention facilities.
- [Broad discretionary power](#): the committee leaves to the Senate the appropriateness of providing the minister with broad discretionary powers to require an authorised officer to exercise seizure powers via non-disallowable legislative instrument.

- *Delegation of administrative powers*: the committee leaves to the Senate the appropriateness of allowing authorised officers and authorised officer’s assistants to exercise coercive powers in circumstances where there is no legislative guidance requiring such persons to have the appropriate qualifications and expertise.

### **Key scrutiny issues: Legislative instruments** (*Delegated Legislation Monitor 10 of 2020*)

#### **Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00579]**

- *Adequacy of consultation*: the committee draws the Senate’s attention to the lack of consultation undertaken with persons likely to be affected by the instrument. Based on the minister’s *advice* that consultation will be undertaken in a future review of the instrument, the committee has resolved to give a notice of motion to disallow the instrument on the last day notice can be given, and to request updates from the minister on the progress of that consultation, to assist the committee in deciding whether to proceed with the motion.

#### **Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]**

- *Clarity of drafting; significant penalties in delegated legislation*: the committee draws the Senate’s attention to its significant scrutiny concerns about the imposition of significant civil penalties for failure to act in accordance with a term undefined in the written law (‘good faith’). Noting that this is a complex, systemic issue, the committee has resolved to withdraw its notice of motion to disallow the instrument, following the Attorney-General’s *undertaking* to further inquire into this issue across Commonwealth legislation. The committee has also resolved to draw its scrutiny concerns to the attention of the Australian Competition and Consumer Commission.

#### **Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [F2020L00572]**

- *Modification of primary legislation; parliamentary oversight*: the committee draws the Senate’s attention to the use of delegated legislation to extend the sunset dates for the cashless debit card trials, where previous extensions have appropriately been made through primary legislation. Based on the *reasons* provided by the minister for the delay in bringing the relevant *bill* to extend the sunset dates before the Senate, the committee has resolved to postpone consideration of its disallowance motion until 8 October 2020, pending further updates from the minister about progress made in scheduling the bill for debate in the Senate.

### **Other bills commented on** (*Scrutiny Digest 11 of 2020*)

- **Civil Aviation Amendment (Unmanned Aircraft Levy Collection and Payment) Bill 2020**: the committee is seeking advice regarding the appropriateness of leaving the circumstances in which the proposed unmanned aircraft levy is payable to delegated legislation.

- **Civil Aviation (Unmanned Aircraft Levy) Bill 2020:** the committee leaves to the Senate the appropriateness of allowing the amount of unmanned aircraft levy to be prescribed in delegated legislation.
- **Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020:** the committee is seeking advice regarding the appropriateness of leaving criteria for which investments can be funded from the Grid Reliability Fund to non-disallowable delegated legislation.
- **Coronavirus Economic Package (Jobkeeper Payments) Amendment Bill 2020:** the committee reiterates its previous scrutiny concerns regarding the leaving of significant matters relating to the JobKeeper scheme to delegated legislation.
- **Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020:** the committee is seeking advice regarding the appropriateness of leaving significant elements of the tuition protection scheme to delegated legislation.
- **Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020:** the committee is seeking advice on the type of documents that it is envisaged may be applied, adopted or incorporated by reference and whether they will be freely available.
- **Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020:** the committee is seeking advice regarding the appropriateness of providing the minister with a broad discretionary power to exempt providers from paying aspects of the up-front payments tuition protection levy, and leaves to the Senate the appropriateness of allowing core elements of the levy to be determined in delegated legislation.

### Other legislative instruments commented on ([Delegated Legislation Monitor 10 of 2020](#))

The Scrutiny of Delegated Legislation committee considered 155 disallowable legislative instruments registered on the Federal Register of Legislation between 19 June 2020 and 22 July 2020. The committee is continuing to engage with ministers and agencies in relation to 31 instruments, and has concluded its consideration of 2 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 2 September 2020, the Senate Scrutiny of Delegated Legislation Committee resolved to **place** a notice of motion to disallow the following instrument:

- Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations 2020 [[F2020L00579](#)]

At its private meeting on Tuesday 1 September 2020, the Senate Scrutiny of Delegated Legislation Committee resolved to **withdraw** the notice of motion to disallow the following instrument:

- Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [[F2019L01610](#)]

At its private meeting on Tuesday 1 September 2020, the Senate Scrutiny of Delegated Legislation Committee resolved to **postpone** consideration of the notice of motion to disallow the following instrument to 8 October 2020:

- Coronavirus Economic Response Package (Deferral of Sunsetting—Income Management and Cashless Welfare Arrangements) Determination 2020 [[F2020L00572](#)]

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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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