



9 October 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 8 October 2020, 331 legislative instruments have been made, of which 17.2% are exempt from disallowance and scrutiny by the committee.

## Key scrutiny issues: Bills ([Scrutiny Digest 13 of 2020](#))

### Crimes Legislation Amendment (Economic Disruption) Bill 2020

- ***Significant penalties***: the committee is seeking advice on the justification for the maximum penalties imposed by proposed offences in Schedule 1 to the bill.
- ***Absolute liability offences***: the committee leaves to the Senate the appropriateness of applying absolute liability to two proposed new offences.
- ***Reverse legal burdens***: the committee is seeking advice on why it is proposed to reverse the legal burden of proof where a defendant seeks to rely on an exception to proposed new offences.
- ***Privilege against self-incrimination***: the committee leaves to the Senate the appropriateness of removing a derivative use immunity.
- ***Parliamentary scrutiny***: the committee is seeking advice regarding whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance to the states may be granted.

### Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

- ***Parliamentary scrutiny***: the committee is seeking advice regarding the scope of powers that may be exercised by reservists subject to a call out order and protected persons

subject to a direction relating to the provision of Defence assistance and why these orders and directions are not subject to any form of parliamentary scrutiny.

- Immunity from liability: the committee is seeking advice regarding why it is considered appropriate to provide protected persons with both civil *and* criminal immunity.

### **Key scrutiny issues: Legislative instruments** (*Delegated Legislation Monitor 11 of 2020*)

#### **Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]**

- Significant matters in delegated legislation: the committee is seeking [advice](#) about the appropriateness of setting out a key element of the government's policy response to COVID-19 in delegated legislation, rather than primary legislation.
- Parliamentary oversight: the committee is seeking advice about the appropriateness of setting out significant elements of the disaster leave payment grants program, including the eligibility criteria, in non-statutory guidelines, which are not subject to any form of parliamentary oversight.
- Availability of independent merits review: the committee is seeking advice about the rationale for not providing for merits review of discretionary decisions made under the instrument.
- Consultation: the committee is seeking advice about whether persons likely to be affected by the instrument were consulted.

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

- Modification of primary legislation; parliamentary oversight: the committee [previously](#) drew 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. On 7 October 2020, the committee postponed consideration of its notice of motion to disallow the instrument to 12 November 2020, following [advice](#) from the minister that the government intends to introduce a new bill into the House of Representatives which would, if passed, support the operation of the Cashless Debit Card as an ongoing measure.

### **Other bills commented on** (*Scrutiny Digest 13 of 2020*)

- **Civil Aviation (Unmanned Aircraft Levy Collection and Payment) Bill 2020**: the committee leaves to the Senate the appropriateness of leaving virtually all of the details of the operation of the proposed unmanned aircraft levy scheme to delegated legislation.
- **Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020**: the committee leaves to the Senate the appropriateness of leaving criteria for which investments can be funded from the Grid Reliability Fund to be determined in non-disallowable delegated legislation.

- **Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2020:** the committee reiterates scrutiny concerns raised about an identical bill in *Scrutiny Digest 12 of 2017*.
- **Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020:** the committee leaves to the Senate the appropriateness of leaving significant elements of the up-front payments tuition protection scheme to be set out in delegated legislation.
- **Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020:** the committee is seeking advice as to whether the bill can be amended to require that incorporated documents must be made freely available.
- **Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020:** the committee is seeking advice regarding why it is considered appropriate to leave certain standards, which are central to the regulation and reputation of the higher education sector, to delegated legislation.
- **Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020:** the committee leaves to the Senate the appropriateness of providing the minister with a broad discretionary power to exempt providers from paying aspects of the upfront payments tuition protection levy in delegated legislation.

### Other legislative instruments commented on ([Delegated Legislation Monitor 11 of 2020](#))

- The Senate Scrutiny of Delegated Legislation Committee considered 85 disallowable legislative instruments registered on the Federal Register of Legislation between 23 July 2020 and 18 August 2020. The committee is continuing to engage with ministers and agencies in relation to 34 instruments, and has concluded its consideration of 15 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 has resolved to **place** a notice of motion to disallow the following instrument on 10 November 2020:

- Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702].

On 8 October 2020, the Senate Scrutiny of Delegated Legislation Committee **withdrew** notices of motions to disallow the following instruments:

- ASIC Corporations (Foreign Financial Services Providers–Foreign AFS Licensees) Instrument 2020/198 [F2020L00237]; and

- ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199 [F2020L00238].

On 7 October 2020, the Senate Scrutiny of Delegated Legislation Committee **postponed** consideration of a notice of motion to disallow the following instrument to 12 November 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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