



10 December 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](#).

Key scrutiny issues: Bills ([Scrutiny Digest 18 of 2020](#))

National Emergency Declaration Bill 2020

- **Broad discretionary power**: the committee is seeking advice on why it is necessary and appropriate for the bill to provide a broad discretionary power to declare a national emergency in circumstances where key terms of the bill including 'emergency' and 'Commonwealth interest' are undefined, and whether the bill can be amended to include definitions or guidance on these concepts.
- **Exemption from disallowance**: the committee is seeking advice on why it is necessary and appropriate for national emergency declarations and variations to extend a declaration to be exempt from disallowance, and whether the bill can be amended to make emergency declarations and variations subject to disallowance.
- **Power for delegated legislation to modify primary legislation (Henry VIII clause)**: the committee is seeking advice on whether the bill can be amended to ensure that delegated legislation which modifies primary legislation ceases to be in force after three months, and that a minister is satisfied before making such delegated legislation that Parliament is not sitting and is not likely to sit within two weeks.
- **Tabling of reports**: the committee is seeking advice on whether the bill can be amended to provide that reports on the exercise of powers and the performance of functions in relation to national emergency declarations must tabled in the Parliament as soon as practicable, and in any case not later than 14 days after the minister the receives the reports.
- **Significant matters in delegated legislation**: the committee is seeking advice on why it is necessary and appropriate to leave the specification of information that must not be included in a report on the exercise of powers and functions during a national emergency to

delegated legislation, and whether the bill can be amended to remove this power or provide for high level guidance on these matters on the face of the bill.

National Emergency Declaration (Consequential Amendments) Bill 2020

- Limitation on judicial review: the committee leaves to the Senate as a whole the appropriateness of the bill excluding decisions made under Part 2 of the National Emergency Declaration Bill 2020 from judicial review under the *Administrative Decisions (Judicial Review Act) 1977*.
- Significant matters in non-disallowable instruments/privacy: the committee is seeking advice on why it is necessary and appropriate to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments which are not subject to parliamentary scrutiny.
- Significant matters in non-disallowable instruments: the committee is seeking advice on whether the bill can be amended to provide that emergency declarations made for the purposes of the *Telecommunications Act 1997* are subject to disallowance, and for the bill to provide high level guidance in relation to when such an emergency may be declared.
- Significant matters in non-disallowable instruments/exclusion from tabling: the committee is seeking advice on why it is necessary and appropriate for the bill to provide for the modification of the *Therapeutic Goods Act 1989* by non-legislative instruments which are not subject to disallowance, and why it is necessary and appropriate for some of these non-legislative instruments to be exempt from tabling in the Parliament.

Key scrutiny issues: Legislative instruments ([*Delegated Legislation Monitor 14 of 2020*](#))

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

- Consultation with persons affected: the committee has concluded its examination of the instrument and resolved to withdraw the notice of motion to disallow the instrument in light of the minister's advice that consultation with a wide range of relevant stakeholders and consumers has commenced, and the minister's undertaking to advise the committee of the outcomes of the ongoing review of the temporary arrangements.

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

- Compliance with Legislation Act 2003 – consultation: the committee has concluded its examination of the instrument and resolved to withdraw the notice of motion to disallow the instrument, following the Attorney-General's implemented undertaking to amend the explanatory statement to the instrument to ensure it complies with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*.

Other bills commented on ([Scrutiny Digest 18 of 2020](#))

- **Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020:** the committee is seeking advice on significant matters in delegated legislation and the broad delegation of administrative powers.
- **Australia's Foreign Relations (State and Territory Arrangements) Bill 2020:** the committee reiterates its scrutiny concerns about broad discretionary powers, procedural fairness, the broad delegation of legislative powers, and the inclusion of significant matters in delegated legislation. The committee welcomes the amendments to the bill in relation to the definition of foreign universities that lack institutional autonomy.
- **Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020:** the committee is seeking advice on a provision which specifies that certain instruments are not subject to parliamentary disallowance.
- **Environmental Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020:** the committee reiterates its request for the minister to table an addendum to the explanatory memorandum to clarify a provision which allows the incorporation of external materials as in force from time to time.
- **Export Market Development Grants Legislation Amendment Bill 2020:** the committee welcomes the tabling of an addendum to the explanatory memorandum setting out key information in relation to the inclusion of significant matters in delegated legislation and the availability of merits review.
- **Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020:** the committee draws the attention of senators to its scrutiny concerns in relation to the appropriateness of allowing rates of fees, which are imposed as taxes, to be set in delegated legislation.
- **Foreign Investment Reform (Protecting Australia's National Security) Bill 2020:** the committee draws the attention of senators to the inclusion of significant matters in delegated legislation and broad discretionary powers in the bill.
- **National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2020:** the committee reiterates scrutiny concerns raised in relation to an identical bill in [Scrutiny Digest 13 of 2018](#).
- **Treasury Laws Amendment (2020 Measures No. 6) Bill 2020:** the committee is seeking advice in relation to a no-invalidity clause and a provision which reverses the evidential burden of proof.

Other legislative instruments commented on ([Delegated Legislation Monitor 14 of 2020](#))

- The Scrutiny of Delegated Legislation committee considered 19 disallowable legislative instruments registered on the Federal Register of Legislation between 28 and 29 September 2020. The committee is continuing to engage with ministers and agencies in relation to 27 instruments, and has concluded its consideration of 6 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

On 9 December 2020, the Chair of the Senate Scrutiny of Delegated Legislation Committee gave notice of her intention to **withdraw** notices of motions to disallow the following instruments on 10 December 2020:

- Australian Postal Corporation (Performance Standards) Amendment (2020 Measures No. 1) Regulations [F2020L00579];
- Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 [F2020L00702]; and
- Reserve Bank of Australia Head Office, 65 Martin Place, Sydney Heritage Management Plan 2020 [F2020L01031].

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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