



15 July 2021

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 10 of 2021](#))

Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021

- **Strict liability**: the committee leaves to the Senate the appropriateness of including a strict liability offence in the bill with a maximum penalty of 120 penalty units.
- **Reverse evidential burden**: the committee is seeking advice on the reversal of the evidential burden of proof.
- **Significant matters in delegated legislation**: the committee is seeking advice on the appropriateness of providing the minister with a broad discretion to create an enforceable Code of Ethics by legislative instrument, without any guidance on the face of the bill as to the matters that may be included in the Code.
- **No invalidity clause**: the committee is seeking advice on the inclusion of a no-invalidity clause in relation to requirements for notifying providers about instruments made against them.

Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021

- **Instruments not subject to parliamentary disallowance**: the committee is seeking advice on whether the bill could be amended to provide that certain instruments are disallowable to ensure that they are subject to appropriate parliamentary oversight.
- **Section 96 grants to the states/broad discretionary power**: the committee leaves to the Senate the appropriateness of conferring on the Employment Secretary a broad power to make arrangements and grants and not including a requirement that written agreements with the states and territories be tabled in the Parliament.

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 10 of 2021*)

Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]

- *Parliamentary oversight*: the committee is seeking further advice as to whether the modifications made by the instrument to the definition of 'reportable incident' in the *Aged Care Act 1997* could be set out in primary, rather than delegated, legislation.

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]

- *Conferral of discretionary powers/clarity of drafting*: the committee is seeking advice about the appropriateness of delegating discretionary powers to the ACNC Commissioner to determine whether charities have failed to comply with governance standards through engaging in, or promoting, unlawful conduct.
- *Implied freedom of political communication*: the committee is seeking advice as to how the instrument complies with the implied freedom of political communication.

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021 [F2021L00290]

- *Parliamentary oversight*: the committee is seeking advice regarding the appropriateness of setting out significant elements of Commonwealth disability support policy in delegated, rather than primary, legislation.

Scrutiny of COVID-19 related legislations

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 July 2021, 518 legislative instruments have been made, of which 17.4% are exempt from disallowance and scrutiny by the committee.

Other bills commented on (*Scrutiny Digest 10 of 2021*)

- **Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021**: the committee is seeking advice in relation to provisions in the bill which allow delegated legislation to modify the operation of the *Legislation Act 2003*.
- **Education Services for Overseas Students (Registration Charges) Amendment Bill 2021**: the committee is seeking advice in relation to provisions in the bill which provide the minister with broad discretionary powers to exempt providers from a charge in delegated legislation.
- **Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021**: the committee welcomes amendments to the bill which provide for the sunset of first national environmental standards made under proposed section 65C of the bill.
- **Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021**: the committee is seeking advice in relation to provisions in the bill which allow delegated

legislation to modify the operation of the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999*.

- **Financial Regulator Assessment Authority Bill 2021:** the committee expressed its scrutiny concerns in relation to the appropriateness of not providing for reports to be tabled in Parliament and provisions which reverse the evidential burden of proof.
- **Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021:** the committee expressed its scrutiny concerns in relation to provisions which reverse the evidential burden of proof.
- **Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021:** the committee is seeking advice as to whether the bill could be amended to prescribe a newly created FIFA entity as an event body for the FIFA Women's World Cup Australia New Zealand 2023.
- **National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021:** the committee leaves to the Senate the appropriateness of provisions which confer a broad discretionary power to make banning orders and the inclusion of significant matters in delegated legislation.
- **Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021:** the committee leaves to the Senate the appropriateness of provisions which allow for fees to be prescribed in delegated legislation, without any guidance on the face of the bill as to how these fees will be calculated.
- **Ransomware Payments Bill 2021:** the committee leaves to the Senate the appropriateness of provisions which reverse the evidential burden of proof.
- **Treasury Laws Amendment (2021 Measures No. 5) Bill 2021:** the committee is seeking advice in relation to provisions which reverse the evidential burden of proof. The committee leaves to the Senate the appropriateness of provisions which retrospectively amend requirements relating to tax offsets provided under the *Income Tax Assessment Act 1997*.
- **Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021:** the committee expressed its continuing scrutiny concerns in relation to provisions which reverse the evidential burden of proof (including through the inclusion of a defence of reasonable excuse), the appropriateness of not providing for reports to be tabled in Parliament, and the inclusion of significant matters in delegated legislation.

Other legislative instruments commented on ([Delegated Legislation Monitor 10 of 2021](#))

- The Scrutiny of Delegated Legislation committee considered 153 disallowable legislative instruments registered on the Federal Register of Legislation between 10 April 2021 and 21 May 2021. The committee is continuing to engage with ministers and agencies in relation to 25 instruments and has concluded its consideration of 18 instruments.
- All legislative instruments subject to a notice of motion for disallowance in either House of Parliament are listed in the [Disallowance Alert](#).

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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