



25 October 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 set out in Senate standing orders 23 and 24.

For more detail and discussion of these matters see the committees' [Scrutiny Digests](#) and [Delegated Legislation Monitors](#).

Guidelines

The Senate Scrutiny of Bills Committee has prepared [guidelines](#) setting out the committee's expectations in relation to its technical scrutiny principles.

The committee has now published the [final guideline](#) on its approach to applying scrutiny principle (iii) – inadequate review of decisions.

Key scrutiny issues: Bills ([Scrutiny Digest 16 of 2021](#))

Bioresecurity Amendment (Enhanced Risk Management) Bill 2021

- Coercive powers/instruments not subject to parliamentary disallowance: the committee is seeking further advice as to whether the bill can be amended to include high-level guidance in relation to mandatory examinations and the collection of body samples, and to require that information about human biosecurity group directions be included in the department's annual report.
- Significant matters in delegated legislation: the committee leaves to the Senate the appropriateness of leaving notification requirements in relation to a human biosecurity group direction and the taking, storing and use of body samples to delegated legislation.
- Broad discretionary power/grants to the states under section 96 of the Constitution: the committee leaves to the Senate the appropriateness of conferring a broad power to make arrangements and grants in circumstances where there is limited guidance as to how the power is to be exercised on the face of the bill. The committee also welcomes the minister's intention to progress amendments to the bill to increase parliamentary oversight of grants to the states and territories.

COAG Legislation Amendment Bill 2021

- Freedom of information/parliamentary scrutiny: the committee is seeking advice as to why it is considered necessary and appropriate to broadly exempt National Cabinet documents from disclosure under a number of Acts.
- Retrospective application: the committee is seeking advice on the necessity of the retrospective application of amendments to the *Freedom of Information Act 1982*.

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 15 of 2021*)

Australian Renewable Energy Agency (General Funding Strategy) Determination 2021 [F2021L01191]

- Exemption from disallowance: the committee noted that exempting this instrument from disallowance limits parliamentary oversight of how public money will be invested by the ARENA and is seeking advice as to why it is considered necessary and appropriate for the instrument to be exempt from disallowance.
- Compliance with authorising legislation: the committee considers that the measures in the instrument may go beyond the power of its authorising legislation and draws these scrutiny concerns to the attention of senators.

Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232]

- Exemption from disallowance: the committee is seeking advice as to why it is considered necessary and appropriate for the instrument, which extends the human biosecurity emergency period for the sixth time (to 17 December 2021), to be exempt from disallowance.

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 15 October 2021, 578 legislative instruments have been made, of which 16.3% are exempt from disallowance.

Other bills commented on (*Scrutiny Digest 16 of 2021*)

- **Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021**: the committee leaves to the Senate the appropriateness of including a no-invalidity clause in the bill, leaving significant matters to delegated legislation (including instruments that are not subject to disallowance), and not requiring certain reports to be tabled in Parliament.
- **Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021**: the committee is seeking advice in relation to broad delegation of administrative powers, instruments not subject to disallowance, the inclusion of significant matters in delegated legislation, broad discretionary powers, and the reversal of the evidential burden of proof.

- **Appropriation Bill (No. 1) 2021-2022 and Appropriation Bill (No. 2) 2021-2022:** the committee is seeking further advice in relation to parliamentary scrutiny of Budget measures marked as 'not for publication' in the Budget papers which accompany appropriation bills.
- **Commonwealth Electoral Amendment (Integrity of Elections) Bill 2021:** the committee leaves to the Senate the appropriateness of leaving key elements of how community identity documents would be issued to delegated legislation.
- **Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021:** the committee welcomes the minister's undertaking to progress government amendments to the bill in relation to the reversal of the evidential burden of proof and a strict liability offence.
- **Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020:** the committee leaves to the Senate the appropriateness of the court-only evidence provisions of the bill.
- **Crimes Amendment (Remissions of Sentences) Bill 2021:** the committee leaves to the Senate the appropriateness of, in effect, retrospectively depriving prisoners of already accrued remission days.
- **Defence Legislation Amendment (Discipline Reform) Bill 2021:** the committee welcomes the minister's undertaking to amend the bill in relation to a broadly framed offence provision. However, the committee leaves to the Senate outstanding scrutiny concerns in relation to this provision, as well as the appropriateness of leaving significant matters to delegation legislation and providing an offence-specific defence of 'reasonable excuse'.
- **Investment Funds Legislation Amendment Bill 2021:** the committee leaves to the Senate the appropriateness of the exemption of the Future Fund Management Agency Code of Conduct and Agency Values from disallowance and the lack of guidance as to the terms and conditions on which financial assistance relating to medical research may be granted.
- **Offshore Electricity Infrastructure Bill 2021:** the committee is seeking advice in relation to the reversal of the evidential and legal burden of proof, evidentiary certificates, strict liability offences, exemptions from disallowance, the inclusion of significant matters in delegated legislation, the power for delegated legislation to modify the operation of primary legislation, the tabling of documents in Parliament and the availability of merits review.
- **Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021:** the committee is seeking advice in relation to the inclusion of significant elements of the proposed offshore electricity infrastructure levy in delegated legislation.
- **Social Security Legislation Amendment (Remote Engagement Program) Bill 2021:** the committee leaves to the Senate the appropriateness of leaving matters relating to when

a person will be eligible or ineligible for the remote engagement program payment to delegated legislation.

- **Treasury Laws Amendments (2021 Measures No. 6) Bill 2021:** the committee expressed its scrutiny concerns in relation to provisions which leave significant matters to delegated legislation and provisions which retrospectively validate industry codes prescribed under the *Competition and Consumer Act 2010*.

Other legislative instruments commented on ([Delegated Legislation Monitor 15 of 2021](#))

The Scrutiny of Delegated Legislation Committee considered 123 disallowable legislative instruments and 13 instruments exempt from disallowance registered on the Federal Register of Legislation between 14 August 2021 and 10 September 2021. The committee is continuing to engage with ministers and agencies in relation to 36 instruments and has concluded its consideration of 10 instruments.

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee **gave** notice of motions to disallow the following instruments in the sitting week commencing 18 October 2021:

- Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 [F2021L00923]
- Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]
- Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043]
- Civil Dispute Resolution Regulations 2021 [F2021L01031]
- Education Services for Overseas Students (Exempt Courses) Instrument 2021 [F2021L00877]
- Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 [F2021L00843]
- Industry Research and Development (Regional Decentralisation Agenda—Securing Raw Materials Program) Instrument 2021 [F2021L00973]
- Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00859]
- Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030]

The Scrutiny of Delegated Legislation Committee **withdrew** notices of motions to disallow the following instruments in the sitting week commencing 18 October 2021:

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

- Aviation Transport Security Amendment (Screening Information) Regulations 2021 [F2021L00736]
- 21 listings instruments made under Part 4 of the Charter of the United Nations Act 1945
- Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021 [F2021L00290]
- High Court of Australia (Building and Precincts – Regulating the Conduct of Persons) Directions 2021 [F2021L00391]
- Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 [F2021L00277]

All legislative instruments subject to a notice of motion for disallowance in either House of the 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).

For any comments or questions, please contact:

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