



9 February 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 2 of 2021](#))

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

- **Significant matters in delegated legislation**: the committee is seeking advice on why it is considered necessary and appropriate to leave to delegated legislation the prescription of the model NES interaction term, the prescription of matters relating to the content or form of, and manner of providing to employees, a Casual Employment Information Statement, and other purposes for which additional agreed hours are to be treated as ordinary hours of work.
- **Significant matters in non-disallowable legislative instruments**: the committee leaves to the Senate the appropriateness of proposed subsection 23B(5) which provides that a declaration by the minister that a project is a major project is exempt from parliamentary disallowance.
- **Procedural fairness—right to a fair hearing**: the committee is seeking advice on the justification for amendments removing the requirement for the consent of parties to conduct an appeal or review of a decision by the Fair Work Commission without a hearing.
- **Retrospective application**: the committee is seeking advice on the necessity of retrospective application for matters set out in clauses 45 and 46 and the extent to which this retrospective effect may have any adverse impact on individuals.

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 2 of 2021*)

ASIC Corporations – various instruments [F2020L00962] [F2020L01045] [F2020L01064] [F2020L01066] [F2020L01069]

- *Modification of primary legislation/parliamentary oversight*: the committee has raised ongoing and systemic scrutiny concerns in relation to the duration of five ASIC instruments which modify primary legislation, and is seeking the Treasurer's advice as to whether each instrument can be amended to limit their duration to ensure a minimum degree of regular parliamentary oversight of the measures in the instruments.

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 3 February 2021, 423 legislative instruments have been made, of which 17.5% are exempt from disallowance and scrutiny by the committee.

Other bills commented on (*Scrutiny Digest 2 of 2021*)

- **Corporations Amendment (Corporate Insolvency Reforms) Bill 2020**: the committee received information about reverse evidential burdens of proof, a strict liability offence, and significant matters in delegated legislation.
- **Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020**: the committee reiterates its scrutiny concerns that call out orders and directions relating to the provision of Defence assistance are not subject to disallowance or tabling in the Parliament. The committee also received advice about a provision providing immunity from civil and criminal liability.
- **Industrial Chemicals Environmental Management (Register) Bill 2020**: the committee is seeking advice in relation to including significant matters in non-disallowable delegated legislation.
- **Industrial Chemicals Environmental Management (Register) Charge (Customs) Bill 2020; Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020; Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020**: the committee is seeking advice as to whether the bills can be amended to prescribe limits on the amount of charges that may be imposed.
- **Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020**: the committee is seeking advice about a provision that reverses the evidential burden of proof.
- **Financial Sector Reform (Hayne Royal Commission Response) Bill 2020**: the committee received advice about significant matters in delegated legislation, significant matters in non-disallowable delegated legislation and privacy.
- **National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020**: the committee is seeking advice in relation to significant matters in delegated

legislation, provisions which reverse the legal or evidential burden of proof, and the broad delegation of legislative power.

- **Security Legislation Amendment (Critical Infrastructure) Bill 2020:** the committee leaves to the Senate the appropriateness of a limitation on judicial review and is seeking advice about significant matters in delegated legislation, the incorporation of external materials and a broad delegation of administrative power.
- **Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020:** the committee received advice about a power for delegated legislation to modify primary legislation (akin to Henry VIII clause), retrospective application and significant matters in delegated legislation.
- **Territories Legislation Amendment Bill 2020:** the committee reiterates its scrutiny concerns that the minister will be able to create exemptions from the requirements of the Privacy Act in delegated legislation without specific consultation requirements set out on the face of the bill or elsewhere in the Privacy Act.
- **Treasury Laws Amendment (2020 Measures No. 6) Bill 2020:** the committee received advice about a no-invalidity clause and a provision that reverses the evidential burden of proof.

Other legislative instruments commented on ([Delegated Legislation Monitor 2 of 2020](#))

- The Scrutiny of Delegated Legislation committee considered 115 disallowable legislative instruments registered on the Federal Register of Legislation between 14 October 2020 and 17 November 2020. The committee is continuing to engage with ministers and agencies in relation to 20 instruments, and has concluded its consideration of 5 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** notices of motions to disallow the following instruments on 15 February 2021:

- Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020 [F2020L01334];
- Family Law Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01361];
- Federal Circuit Court Amendment (Notice of Child Abuse, Family Violence or Risk) Rules 2020 [F2020L01362];
- Industry Research and Development (Supporting Agricultural Shows and Field Days Program) Instrument 2020 [F2020L01401];

- Legislation (Deferral of Sunsetting—Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination) Certificate 2020 [F2020L01301];
- Part 138 (Aerial Work Operations) Manual of Standards 2020 [F2020L01402];
- Radiocommunications (Police Forces – Disruption of Unmanned Aircraft) Exemption Determination 2020 [F2020L01296]; and
- Tax Agent Services (Specified BAS Services No. 2) Instrument 2020 [F2020L01406].

On 4 February 2021, the Chair of the Senate Scrutiny of Delegated Legislation Committee gave notice of her intention to **withdraw** notices of motion to disallow the following instruments on 15 February 2021:

- Australian Prudential Regulation Authority (confidentiality) determination No. 1 of 2020 [F2020L00945];
- Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]; and
- Telecommunications (Superfast Broadband Network Class Exemption) Determination 2020 [F2020L01061].

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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