



18 October 2023

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](#).

Scrutiny of Bills Committee

Scrutiny Digest 12 of 2023 reports on the committee's consideration of 15 bills which were introduced into the Parliament during recent sitting weeks as well as amendments introduced in relation to 8 bills.

Key scrutiny issues: Bills (*Scrutiny Digest 12 of 2023*)

Water Amendment (Restoring Our Rivers) Bill 2023

- Significant matters in delegated legislation; privacy; broad delegation of administrative powers: the committee is requesting the minister's advice as to:
 - why it is considered appropriate to leave the content of the Water Market Intermediaries Code (the Code) to regulation;
 - why it is considered necessary and appropriate to confer various functions and powers in the Code to any person or body;
 - whether persons upon whom functions or powers are conferred will be required to possess appropriate training, qualifications, skills or training, and what safeguards are in place to ensure functions and powers are only exercised by appropriate persons;
 - whether the *Privacy Act 1988* applies to any information collected, stored and disclosed under the Code; and
 - whether other safeguards exist to protect an individual's personal information.
- Procedural fairness: the committee is requesting the minister's advice as to whether procedural fairness exists in relation to the issuing of a public warning notice.

- *Significant penalties in primary legislation*: the committee is drawing its scrutiny concerns to the attention of senators and leaving to the Senate the appropriateness of reversing the evidential burden of proof in relation to matters that appear not to be peculiarly within the defendant's knowledge.

Identity Verification Services Bill 2023

- *Privacy*: the committee is drawing its scrutiny concerns to the attention of senators and leaving to the Senate as a whole the appropriateness of enabling the extensive sharing of personal information for a broad range of purposes and to a broad range of agencies.
- *Reversal of the evidential burden of proof*: the committee is requesting the minister's advice as to why it is proposed to use offence-specific defences which reverse the evidential burden of proof. The committee also suggests it may be appropriate for the bill to be amended to provide that these matters are specified as offence elements.

Other bills commented on (*Scrutiny Digest 12 of 2023*)

- **Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023**: the committee is seeking the minister's advice as to:
 - whether the bill can be amended to require reasons for a decision to be disclosed where the minister's belief as to a change in circumstances relates to considerations that are unique or personal to an individual;
 - why it is necessary and appropriate to provide that the minister is taken to have affirmed a reviewable decision if the minister does not give the applicant written notice to affirm, vary or revoke the decision within 90 days; and
 - what consideration was given to the impact of a subsection on an individual's procedural fairness rights. The committee is also drawing its concerns in relation to reversing the evidential burden of proof to the attention of senators and leaving the appropriateness of this matter to the Senate.
- **Disability Services and Inclusion Bill 2023**: the committee is seeking the minister's advice as to: why it is necessary for the secretary to have the power to specify further purposes in determinations; why it is proposed to use offence-specific defences which reverse the evidential burden of proof; and advice regarding the exclusion of merits review for decisions made under various clauses. The committee has also noted concerns relating to the incorporation of extrinsic material and has drawn this to the attention of the Scrutiny of Delegated Legislation Committee.
- **Identity Verification Services (Consequential Amendments) Bill 2023**: the committee is seeking the minister's advice as to: why it is necessary and appropriate to expand the classes of personal information that may be disclosed by ministerial determination; whether high-level guidance about this can be provided on the face of the bill; and what safeguards are in place to protect the disclosure of personal information.
- **Interactive Gambling Amendment (Credit and Other Measures) Bill 2023**: the committee is seeking the Attorney-General's justification as to why it is proposed to

use offence-specific defences which reverse the evidential burden of proof and is requesting further guidance as to the operation of the defence.

- **Public Health (Tobacco and Other Products) Bill 2023:** the committee is seeking the minister's advice as to why it is considered necessary and appropriate to confer an immunity from civil liability on certain protected persons. The committee is also seeking justifications as to the use of offence-specific defences, some of which reverse the evidential burden of proof and some of which reverse the legal burden of proof. Finally, the committee is seeking advice as to why it is necessary and appropriate to confer monitoring and investigation powers on any person to assist an authorised officer, and what qualifications, training or experience they will be required to hold.
- **Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023:** the committee is seeking the minister's advice as to the penalty amount that will be set out in delegated legislation in relation to certain provisions and as to any further guidance as to how these penalties will be formulated can be provided on the face of the bill.

Scrutiny of Delegated Legislation Committee

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 12 of 2023*)

National Anti-Corruption Commission Regulations 2023 [F2023L00759]

- Conferral of discretionary powers; adequacy of explanatory materials: the committee is concluding its examination of this issue following the Attorney-General's advice regarding limitations, safeguards, and factors to be considered in exercising discretionary powers, and his undertaking to amend the instrument's explanatory statement to include additional detail to address the committee's concerns.
- Availability of independent merits review; adequacy of explanatory materials: in light of the Attorney-General's advice regarding the availability of review the application of the *Commonwealth Guidelines for Legal Financial Assistance 2012*; and an undertaking to amend the instrument's explanatory statement, the committee is concluding its examination of this issue and resolved to withdraw the notice of motion to disallow the instrument.

Competition and Consumer (Gas Market Code Regulations 2023) [F2023L00994]

- Significant penalties in delegated legislation: the committee is seeking the minister's further advice as to whether the significant penalties in this instrument can be moved into primary legislation and, if not, whether further justification can be provided for the inclusion of such significant penalties in delegated legislation.
- Availability of independent merits review, judicial review, and no-invalidity clauses: the committee is seeking the minister's further advice as to the justifications for excluding decisions from merits review on the basis of policy decisions of a high political content. Additionally, advice is sought on whether the instrument's explanatory statement can be

amended to include the justification provided for exclusion of merits review in relation to decisions that are preliminary or procedural in nature and why the no-invalidity clauses are necessary and appropriate.

- *Strict liability offences*: the committee is concluding its examination of this issue following advice from the minister that the offence provisions in this instrument are civil penalty provisions, rather than strict liability offences.
- *Privacy, conferral of discretionary powers and adequacy of explanatory materials*: the committee is seeking further advice from the minister as to whether the explanatory statement can be updated to include additional information on the factors to be considered when determining what is 'contrary to the public interest'. Further, the committee is concluding its examination of the privacy issue following advice that any personal information collected will be dealt with in accordance with the *Privacy Act 1988*.

Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 [F2023L00998]

- *Availability of independent merits review*: the committee is concluding its examination of this issue, noting that a policy review of the environmental management regulatory regime for offshore petroleum and greenhouse gas storage activities has been announced, which will consider the availability of merits review under the instrument.
- *Availability of judicial review*: the committee is seeking further advice as to whether the no-invalidity clauses in the instrument can be removed, noting there are existing provisions in the instrument that allow NOPSEMA to extend the time they have to make certain decisions; or if this is not possible, further justifications as to the necessity of the no-invalidity clauses.
- *Strict liability and significant penalties*: the committee is concluding its examination of the instrument in relation to this issue following the minister's advice as to why the significant penalties in the instrument are necessary and appropriate for inclusion in delegated legislation.
- *Legal certainty and clarity of drafting*: the committee is seeking the minister's advice as to whether the instrument's explanatory statement can be amended to include further detail about the how the fees in the instrument will be calculated and the availability of internal review.

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee withdrew the notices of motion to disallow the following instruments on 19 October 2023:

- Insurance Exemption Determination No. 1 of 2023 [F2023L00971]
- National Anti-Corruption Commission Regulations 2023 [F2023L00759]

All legislative instruments subject to a notice of motion for disallowance in either House of the Parliament are listed in the [Disallowance Alert](#).

For any comments or questions, please contact:

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