



11 November 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 13 of 2023 reports on the committee's consideration of 14 bills which were introduced into the Parliament during recent sitting weeks as well as amendments introduced in relation to 1 bill. It also contains the committee's comments on ministerial responses in relation to 5 bills.

Key scrutiny issues: Bills (*Scrutiny Digest 13 of 2023*)

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

- **Exemption from disallowance**: the committee is seeking the minister's advice as to the appropriateness and necessity of the exemption from disallowance for various legislative instruments made by the Fair Work Commission.
- **Retrospective application**: the committee is seeking the minister's advice as to the necessity and appropriateness of anti-avoidance provisions applying retrospectively; whether it is likely to have a detrimental effect, and the extent of the detriment this may have on affected individuals.
- **Significant penalties; strict liability offence; absolute liability offence**: the committee is requesting the minister's advice as to the necessity and appropriateness of imposing absolute liability on the offence of wage theft. The committee notes that the offence carries a maximum penalty of up to 10 years imprisonment and strict liability on the offence of industrial manslaughter, and that the offence carries a penalty of up to 25 years imprisonment.
- **Abrogation of privilege against self-incrimination**: the committee is requesting the minister's advice as to why it is necessary and appropriate to remove use immunity and

derivative use immunity for certain proposed subsections in relation to employee payslips and records.

- *Incorporation of external materials as existing from time to time*: the committee is seeking the minister's advice as to what documents may be applied, adopted or incorporated by reference; whether they will be made freely available; and why they are applied as in force or existing from time to time rather than when the instrument is first made.
- *Availability of merits review*: the committee is seeking the minister's advice as to decisions for which internal merits review may not be considered appropriate; and whether consideration was given to the bill providing that internal merits review should be provided for these decisions. The committee is also drawing this matter to the attention of the Scrutiny of Delegated Legislation Committee.
- *Significant matters in delegated legislation*: the committee is seeking the minister's advice as to the necessity and appropriateness of leaving certain significant matters to delegated legislation.
- *Fees in delegated legislation*: the committee is seeking the minister's advice as to whether consideration has been given to providing greater legislative guidance as to how the fee amount (which is often left to delegated legislation) is to be determined.
- *Procedural fairness*: the committee is seeking the minister's advice as to why it is necessary and appropriate to provide that costs orders can be made against representatives who encouraged claims for unfair deactivation of termination which had no reasonable prospects of success.

Other bills commented on (*Scrutiny Digest 13 of 2023*)

- **Primary Industries (Services) Levies Bill 2023, Primary Industries (Excise) Levies Bill 2023 and Primary Industries (Customs) Charges Bill 2023**: the committee is leaving to the Senate as a whole the appropriateness of allowing the rates of levies and charges under these bills to be worked out in accordance with the regulations.
- **Primary Industries Levies and Charges Collection Bill 2023**: the committee is requesting the minister's advice as to:
 - the necessity and appropriateness of conferring monitoring and investigative powers on any APS employee and whether a bill amendment is possible to clarify a requirement for appropriate skills, qualifications or experience in relation to this;
 - what personal information may be collected, used and disclosed under the bill;
 - why it is appropriate to use an offence-specific defence in relation to an offence in the bill;
 - the necessity and appropriateness of permitting the Secretary to arrange for automated decision-making in relation to any decision specified in the rules, and

- whether consideration has been given to prohibiting certain discretionary decisions from being subject to automated decision-making;
 - the rationale for imposing vicarious liability in certain clauses; and
 - whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill.
- **Primary Industries Levies and Charges Disbursement Bill 2023:** the committee is seeking the minister's advice as to whether the bill can be amended to include a requirement for consultation in relation to declarations of bodies as declared recipients; why it is considered appropriate to impose a significant penalty of 12 months imprisonment in relation to certain offences; why it is necessary and appropriate to use offence-specific defences that reverse the evidential burden of proof and; whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill.

Scrutiny of Delegated Legislation Committee

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 13 of 2023*)

National Portrait Gallery of Australia Regulations 2023 [F2023L01184]

- Coercive powers: the committee is requesting the minister's advice as to whether the information provided about the Gallery's incident management policies and the limitations and safeguards that apply to the exercise of an authorised officer's powers can be added to the explanatory statement.
- Conferral of discretionary powers: the committee is requesting the minister's advice as to whether the explanatory statement can be amended to include the factors an authorised officer should consider when determining whether a person's conduct will or is likely to cause offence.
- Strict liability: the committee is requesting the minister's advice as to whether the explanatory statement can be amended to correct a possible drafting error to provide the correct penalty unit and the justifications for the strict liability offence provided by the minister in his response.

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

- Availability of independent merits review; availability of judicial review; no-invalidity clauses: the committee is requesting the minister's advice as to whether the instrument's explanatory statement can be amended to include the information about the exclusion of merits review for policy decisions of a high political content.
- Privacy; conferral of discretionary powers; adequacy of explanatory materials: following the minister's undertaking to amend the instrument's explanatory statement to include

additional information regarding the factors to be considered when determining what is 'contrary to the public interest', the committee concludes its examination of this issue.

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee **will give** notice of motion to disallow the following instrument on 10 November 2023:

- National Portrait Gallery of Australia Regulations 2023 [F2023L01184]

The Scrutiny of Delegated Legislation Committee will give notice of its intention to **withdraw** notices of motions to disallow the following instruments on 10 November 2023:

- Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 [F2023L00998]
- Australian Education Regulations 2023 [F2023L01020]
- Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023 [F2023L00983]

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:
Fattimah Imtoul, Secretary (A/g)
Senate Scrutiny of Bills Committee
02 6277 3050 | scrutiny.sen@aph.gov.au
Senate Scrutiny of Delegated Legislation Committee
02 6277 3066 | sdlc.sen@aph.gov.au