



10 March 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 2 of 2023 reports on the committee's consideration of **18** bills which were introduced into the Parliament during recent sitting weeks as well as amendments introduced in relation to **3** bills. It also contains the committee's comments on ministerial responses in relation to **12** bills.

Key scrutiny issues: Bills (*Scrutiny Digest 2 of 2023*)

Migration Amendment (Aggregate Sentences) Bill 2023

- Retrospective validation: the committee is seeking advice on what alternative approaches were available to respond to the Federal Court case *Pearson v Minister for Home Affairs* [2022] FCAFC 203, why these alternative approaches could not have been implemented noting the impact of retrospective validation on the rule of law and on individuals, and how the retrospective validation of decisions is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted.

Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023

- Significant matters in delegated legislation; automated decision-making: the committee is seeking advice on why so much of the detail of the operation of the proposed visa pre-application process is being left to delegated legislation, what safeguards are in place to ensure automated decisions made under that scheme will be made appropriately, whether safeguards can be included in the bill to ensure transparency and integrity of any automated system used, and why it is considered necessary to provide for a general power to create visa pre-application processes in relation to any category of visa.

Other bills commented on (*Scrutiny Digest 2 of 2023*)

- **Criminal Code Amendment (Inciting Illegal Disruptive Activities) Bill 2023:** the committee notes that this private senator's bill may raise scrutiny concerns in relation to significant penalties which have not been adequately justified and the reversal of the legal burden of proof.
- **Export Control Amendment (Streamlining Administrative Processes) Bill 2022:** the committee continues to have concerns, and has sought further advice on, the exercise of broadly drafted information disclosure powers which are exercisable by non-Commonwealth employees.
- **Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022:** the committee leaves to the Senate the appropriateness of not providing that an investment plan is required to be tabled in each House of the Parliament, and reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.
- **Housing Australia Future Fund Bill 2023 and Treasury Laws Amendment (Housing Measures No. 1) Bill 2023:** the committee is seeking advice on provisions which provide a broad power to make grants of financial assistance to the states and to credit funds to the Housing Australia Future Fund Special Account, provisions which allow for non-disallowable delegated legislation, and provisions which may provide insufficient tabling requirements.
- **Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022:** the committee leaves to the Senate the appropriateness of abrogating the privilege against self-incrimination and providing broad delegation powers.
- **Migration Amendment (Strengthening the Character Test) Bill 2023:** the committee notes that this private member's bill may raise scrutiny concerns in relation to trespass on personal rights and liberties and the inclusion of broad discretionary powers.
- **National Reconstruction Fund Corporation Bill 2022:** the committee leaves to the Senate the appropriateness of conferring broad powers to make grants to the states, providing broad discretionary powers to make non-disallowable legislative instruments, and providing broad delegation powers.
- **Northern Territory Safe Measures Bill 2023:** the committee notes that this private senator's bill may raise scrutiny concerns in relation to the reversal of the legal burden of proof and significant penalties.
- **Private Health Insurance Legislation Amendment (Medical Device and Human Tissue Product List and Cost Recovery) Bill 2022:** the committee welcomes the minister's undertaking to amend the bill in response to scrutiny issues raised in *Scrutiny Digest 1 of 2023*.
- **Public Interest Disclosure Amendment (Review) Bill 2022:** the committee welcomes the Attorney-General's undertaking to update the explanatory memorandum for the bill and

leaves to the Senate the appropriateness of reversing the evidential burden of proof and providing for broad delegation of powers. The committee requests that an addendum to the explanatory memorandum be tabled containing further information on immunities from civil liability.

- **Referendum (Machinery Provisions) Amendment Bill 2022:** the committee leaves to the Senate the appropriateness of reversing the evidential burden of proof, allowing delegated legislation to modify the operation of the *Referendum (Machinery Provisions) Act 1984*, providing the minister with a broad discretionary power to define 'Commonwealth emergency law' in delegated legislation, and providing the Electoral Commissioner with a broad discretionary power to declare that a person is a 'designated elector'.
- **Safeguard Mechanism (Crediting) Amendment Bill 2022:** the committee leaves to the Senate the appropriateness of leaving key details in relation to the Safeguard Mechanism Framework to delegated legislation and requests that an addendum to the explanatory memorandum be tabled containing further information.
- **Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022:** the committee welcomes the minister's undertaking to update the explanatory memorandum for the bill in response to scrutiny issues raised in *Scrutiny Digest 1 of 2023*.
- **Therapeutic Goods Amendment (2022 Measures No. 1) Bill 2022:** the committee leaves to the Senate the appropriateness of reversing the evidential burden of proof and relying upon the defence of reasonable excuse, and the appropriateness of excluding procedural fairness in relation to a decision to release information.
- **Treasury Laws Amendment (2023 Measures No.1) Bill 2023:** the committee is seeking advice on the use of automated decision-making processes by ASIC in relation to the registration of relevant providers of financial services.
- **Treasury Laws Amendment (Modernising Business Communications and other Measures) Bill 2022:** the committee requests that an addendum to the explanatory memorandum be tabled containing information about the impact of the retrospective application of the bill.
- **Work Health and Safety Amendment Bill 2022:** the committee requests that an addendum to the explanatory memorandum be tabled containing information about the inclusion of negligence as an additional fault element and leaves to the Senate the appropriateness of reversing the evidential burden of proof.

Scrutiny of Delegated Legislation Committee

[*Delegated Legislation Monitor 3 of 2023*](#) reports on the Scrutiny of Delegated Legislation Committee's consideration of **40** disallowable legislative instruments and **14** instruments

exempt from disallowance registered on the Federal Register of Legislation between 1 February and 20 February 2023.

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 3 of 2023*)

Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457]

- Conferral of discretionary powers; adequacy of explanatory materials: the committee is requesting the minister's further advice as to whether section 23BE of the instrument and the explanatory statement can be amended to expressly state that it is limited to actions that are available under the relevant Act and rules.

Corporations Amendment (Litigation Funding) Regulations 2022 [F2022L01614]

- Exemption from the operation of primary legislation; parliamentary oversight: the committee is requesting the Assistant Treasurer's further advice, including as to why the exemptions are required and whether they can be included in the Corporations Act. The committee is also seeking advice regarding the differences between this instrument and the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 and further information as to what is meant by his advice to the committee that exemptions should fit within 'existing legal hierarchies'.

Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022 [F2022L01333]

- Adequacy of explanatory materials; parliamentary oversight: the committee is requesting the minister's further advice as to whether the instrument can be amended to enable the minister to specify and expand the class of disclosable information by legislative instrument rather than notifiable instrument, and whether the explanatory statement can be amended to include the additional information the minister provided regarding applicable safeguards.

Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 [F2022L01629]

- Exemption from the operation of primary legislation; parliamentary oversight: the committee is requesting the Assistant Treasurer's further advice, including as to why it is considered appropriate for this instrument to move ASIC exemptions currently in time-limited individual instruments into principal regulations that are exempt from sunset, whether the Corporations Act could be amended to include the relevant exemptions and whether the principal regulations could be amended to sunset. The committee also seeks the Assistant Treasurer's advice as to what is meant by his advice to the committee that exemptions should fit within 'existing legal hierarchies'.

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee **did not give** any notices of motion to disallow instruments or **withdraw** or give notice of its intention to withdraw any instruments on 8 March 2023.

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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