



29 February 2024

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 3 of 2024 reports on the committee's consideration of **20** bills which were introduced into the Parliament during recent sitting weeks as well as amendments introduced in relation to **4** bills. It also contains the committee's comments on ministerial responses in relation to **5** bills.

Key scrutiny issues: Bills (*Scrutiny Digest 3 of 2024*)

Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024

- Limitation of judicial review: the committee is seeking advice on the exclusion of *Administrative Decisions (Judicial Review) Act 1977* review from decisions of the ART's intelligence and security jurisdictional area.
- Availability of independent merits review: the committee is seeking advice as to whether the ART's power to order remedies for preventative detention orders can be retained and why the removal of these powers is required.
- Limitation of merits review: the committee is seeking advice as to why some application timeframes for the ART are being limited by the bill.

Appropriation Bill (No. 3) 2023-2024; Appropriation Bill (No. 4) 2023-2024

- Parliamentary scrutiny – ordinary annual services of the government: the committee draws to the attention of senators the matter of initial expenditure in relation to certain items potentially being inappropriately classified as ordinary annual services (and therefore inappropriately included in Appropriation Bill (No. 3) 2023-2024).

- Parliamentary scrutiny – appropriations determined by the Finance Minister: the committee reiterates its concerns in relation to Advance to the Finance Minister provisions contained in the annual Appropriation Acts, which allow the Finance Minister to determine the purposes for which additional funds may be allocated in legislative instruments that are not subject to disallowance.
- Parliamentary scrutiny – measures marked as ‘not for publication’: the committee is seeking advice on: whether future Department of Finance guides on preparing portfolio budget or additional estimates statements can include guidance that, where a measure is marked as nfp, as much detail should be provided as is necessary to substantiate the decision to not publish the financial details of the measure to the public interest; and the basis on which the financial details of particular measures have been marked as nfp.
- Parliamentary scrutiny – section 96 grants to the states: the committee leaves to the Senate the appropriateness of allowing minister to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

Autonomous Sanctions Amendment Bill 2024

- Retrospective validation: the committee is seeking advice on the appropriateness of retrospectively validating instruments which sanctioned entities and individuals, and how the validity issues came to light.

Financial Framework (Supplementary Powers) Amendment Bill 2024

- Insufficient parliamentary scrutiny; inappropriate delegation of legislative powers: the committee is seeking advice on why it is necessary and appropriate to delegate to the Executive the power to authorise the expenditure of public money; whether consideration can be given to alternative approval or disallowance mechanisms for regulations made under section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the Act) or any other possible options to provide for additional parliamentary scrutiny of such matters, and if not, why not. The committee also leaves to the Senate the appropriateness of specifying, via regulation, the companies through which the Commonwealth may pursue its objectives in section 39B of the Act.
- Retrospective validation: the committee is seeking advice on whether any persons are likely to be detrimentally affected by the retrospective validation; the necessity of the amendments and circumstances by which it became apparent they may be necessary; why it is appropriate to apply retrospectively; the number of instances in which the Commonwealth made, varied or administered an arrangement or grant under existing section 32B of the Act in instances where, but for the retrospective validation, the Commonwealth did not have the power to do so; and the detail of how much money was spent pursuant to such exercises of power as are proposed to be retrospectively validated by the bill.

Treasury Laws Amendment (Foreign Investment) Bill 2024

- *Retrospective application*: the committee is seeking advice as to whether any persons are likely to be detrimentally affected by the retrospective application of the collection of particular taxes since 1 January 2018 and, if so, to what extent their interests are likely to be affected. The committee is also seeking advice as to why it is considered necessary and appropriate for the amendment to apply retrospectively.

Other bills commented on (*Scrutiny Digest 3 of 2024*)

- **Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024**: the committee is seeking advice on why key elements of the scheme are being left to delegated legislation, and a justification for the exclusion of merits review from specific decisions made under the bill.
- **Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024**: the committee is seeking advice on whether evidence recorded hearings for victim survivors and witnesses may limit the procedural fairness rights of an accused, and a justification for five defences which reverse the evidential burden of proof.
- **Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024**: the committee leaves to the Senate the appropriateness of setting amounts of tax in delegated legislation, limited by a high cap of \$7,000,000.
- **National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024**: the committee is seeking advice on whether the bill can be amended to provide that legislative instruments made are subject to appropriate parliamentary oversight through the usual disallowance process, and further information in relation to the privacy of personal information included in audit and compliance audit reports.
- **Social Services and Other Legislation Amendment (Military Invalidation Payments Means Testing) Bill 2024**: the committee is seeking advice on whether any persons are likely to be detrimentally affected by the retrospective application of the legislation and if so, to what extent their interests are likely to be affected.

For any comments or questions, please contact:

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Scrutiny of Delegated Legislation Committee

Key scrutiny issues: Legislative instruments (*Delegated Legislation Monitor 2 of 2024*)

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024 [F2024L00088]

- Exemption from the operation of primary legislation; parliamentary oversight: the committee is requesting the Attorney-General's advice as to whether the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* can be amended to include relevant exemptions, and if not, why it is considered necessary and appropriate to use delegated legislation to include exemptions from this Act, and whether amends can be made to provide that these measures are time-limited or at least subject to sunseting.

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023 [F2023L01417]

- Availability of merits review; adequacy of explanatory materials: the committee previously welcomed the Attorney-General's justification as to why excluding merits review was appropriate and requested the minister's advice as to whether the explanatory statement could be amended to include this justification. The minister undertook to issue a replacement explanatory statement and this undertaking was implemented on 21 February 2024. The committee concluded its examination of this instrument and withdrew the notice of motion to disallow this instrument.

Migration Amendment (Biosecurity Contravention) Regulations 2023 [F2023L01443]

- Adequacy of consultation: the committee requested the minister's advice as to what consultation was undertaken with the public. The minister advised that the Department of Agriculture, Fisheries and Forestry was consulted and that the potential for visa cancellation at the border for biosecurity breaches is well understood by international travellers. The committee reiterates its expectation that consultation is conducted with affected persons prior to the making of an instrument to ensure the instrument is fit-for-purpose and is seeking the minister's further advice as to:
 - whether public consultation can now be undertaken with members of the public, peak bodies and industry stakeholders, noting this should ordinarily have occurred prior to making the instrument; and
 - whether, following this consultation, the minister will consider if it is appropriate for this additional ground for visa cancellation to remain in force or if further amendments to the Migration Regulations 1994 are required, taking into account feedback received through consultation.
- The committee is also requesting the minister's advice as to what is the expected impact of the instrument on each class of visa that may be cancelled, taking into account an assessment of biosecurity risk and risk profile of international travellers under each visa class.

- Delegation of discretionary powers; availability of independent merits review: the committee requested the minister's advice as to why it is necessary and appropriate to delegate the powers or functions in the instrument, who these powers or functions would be delegated to and what safeguards or limitations applied to the exercise of these powers. The minister advised that the power to cancel visa on the grounds of a biosecurity breach would be delegated to Australian Border Force officers who have completed comprehensive training, that merits review is not applicable to this decision, and that natural justice will be provided. The committee is seeking the minister's further justification as to why it is not appropriate to provide independent merits review in relation to this decision with reference to the Administrative Review Council's guidance documents, *What decisions should be subject to merits review?*

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee **withdrew** a notice of motion to disallow the following instrument on 29 February 2024:

- Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023 [F2023L01417]

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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