



20 May 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 6 of 2024 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 **4** bills. It also contains the committee's comments on ministerial responses in relation to **8** bills. The Chair made a [statement](#) corresponding to the tabling of the digest.

Key scrutiny issues: Bills ([Scrutiny Digest 6 of 2024](#))

Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2024

- Undue trespass on rights and liberties/privacy/broad discretionary powers: the committee is seeking advice on the impact on rights and liberties of an expansion of the authority of existing search warrants in relation to the search of digital assets, including its impact on third parties.
- Significant penalties: the committee is seeking advice on an increase in the amount of the Commonwealth penalty unit, which is proposed in addition to the usual indexation process.
- Broad delegation of administrative powers and functions/significant matters in delegated legislation: the committee is seeking advice on the appropriateness of provisions allowing the roles of Communications Access Coordinator and Communications Security Coordinator to be broadly delegated to APS employees in particular departments.

Migration Amendment (Removal and Other Measures) Bill 2024

- Significant matters in delegated legislation – Persons considered to be 'removal pathway non-citizens': the committee is leaving to the Senate the appropriateness of enabling regulations to prescribe additional visas holders for the purposes of removal pathways.

- Undue trespass on rights and liberties – Power to issue written directions to removal pathway non-citizens: while noting that it would be appropriate for the bill to provide individuals are ensured a reasonable amount of time to comply with directions, the committee is ultimately leaving to the Senate the consideration of this matter.
- Undue trespass on rights and liberties – Reasonable excuse defence: the committee is leaving to the Senate the appropriateness of a reasonable excuse defence.
- Undue trespass on rights and liberties – Power to revisit protection findings: the committee draws is leaving to the Senate the appropriateness of the expansion of a provision that facilitates the reopening of protection decisions.
- Significant matters in delegated legislation/exemption from disallowance/broad discretionary powers: the committee is leaving to the Senate the appropriateness of providing for the designation of removal concern countries in non-disallowable legislative instruments.

Parliamentary Business Resources Legislation Amendment (Review Implementation and Other Measures) Bill 2024

- Exemption from disallowance: the committee is leaving to the Senate the appropriateness of the exemption of certain legislative instruments being from disallowance.
- Exemption from disallowance/instruments not subject to an appropriate level of parliamentary oversight: the committee is seeking clarification on the status of written instruments determining resources for former Prime Ministers, including the basis on which they are said to be exempt from disallowance.
- Henry VIII clause: the committee is leaving to the Senate as a whole the appropriateness of delegated legislation which can amend the operation of primary law.
- Standing appropriation: the committee is seeking advice on the necessity and appropriateness of an amendment that seeks to expand the scope of an existing standing appropriation, including whether consideration has been given to the potential for limitation.

Other bills commented on ([Scrutiny Digest 6 of 2024](#))

- **Australian Postal Corporation and Other Legislation Amendment Bill 2024**: the committee sought advice on the appropriateness of a provision that allows delegated legislation to expand the classes of persons able to lawfully open and examine postal articles, including the privacy implications of the provision.
- **Administrative Review Tribunal (Consequential and Transitional Provisions No. 2) Bill 2024**: the committee left to the Senate the appropriateness of excluding from *Administration Decisions (Judicial Review) Act 1977* review decisions made in the intelligence and security jurisdictional area of the Tribunal; and the appropriateness of removing merits review of preventative detention orders.

- **Agriculture (Biosecurity Protection) Charges Bill 2024 and the Agriculture (Biosecurity Protection) Levies Bill 2024:** the committee concluded its consideration of provisions enabling the rate of charges and levies to be set in delegated legislation, as well as provisions that enable regulations to incorporate materials as existing from time to time.
- **Agriculture (Biosecurity Protection) Levies and Charges Collection Bill 2024:** the committee left to the Senate the appropriateness of provisions that reverse the evidential burden of proof, and allow for the automation of decision-making, and concluded its consideration of provisions that enable regulations to incorporate materials as existing from time to time.
- **Australian Research Council Amendment (Review Response) Bill 2023:** the committee concluded its consideration an amendment to the bill agreed to by the Senate that did not require the report of a statutory review to be tabled in the Parliament.
- **Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024:** the committee sought advice on reviews of the provisions by the Parliamentary Joint Committee on Intelligence and Security, and otherwise left to the Senate the appropriateness of the extension by three years of the sunseting of the 'declared areas' offences in the *Criminal Code*.
- **Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024:** the committee concluded its consideration of the fairness of provisions that enable evidence recording hearings for vulnerable persons; and sought further advice on an aspect of provisions that reverse the evidential burden of proof in relation to an offence of publishing matter identifying a vulnerable person.
- **Defence Trade Controls Amendment Bill 2024:** the committee reported on additional information received concerning the broad delegation of powers to APS employees.
- **Digital ID Bill 2024:** the committee welcomed amendments to the bill that addressed the committee's scrutiny concerns relating to immunity from civil liability and to the tabling of documents in the Parliament.
- **Financial Framework (Supplementary Powers) Amendment Bill 2024:** the committee concluded its consideration of the retrospective validation of past instruments made under the Act.
- **Illegal Logging Prohibition Amendment (Strengthening Measures to Prevent Illegal Timber Trade) Bill 2024:** the committee sought advice on: the use of negligence as a fault element for an offence; for a justification for various offence-specific defences (which reverse the evidential burden of proof); whether consideration had been given to alternative avenues to obtain information without abrogating the privilege against self-incrimination; a provision that provides protection for persons from civil proceedings; and instruments that incorporate external materials as existing from time to time.

- **National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024:** the committee sought advice concerning: a broad exemption from sunseting for significant aspects of the legislative scheme that are to be left to delegated legislation; the appropriateness of provisions that allow for a broad delegation of the CEO's powers in light of an expansion in the types of decisions that may be made under the bill, and the availability of merits review with respect to those decisions; and instruments that may incorporate external materials as existing from time to time.
- **Net Zero Economy Authority Bill 2024:** the committee sought advice on the appropriateness of exempting ministerial directions to the Board of the Authority from disallowance; and provisions that do not require reports of various reviews to be tabled in the Parliament.
- **New Vehicle Efficiency Standard Bill 2024:** the committee sought advice: on the appropriateness of the content of two offences' being left to delegated legislation; and in relation to the privacy implications of various provisions that provide for the sharing of information.
- **Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Safety and Other Measures) Bill 2024:** the committee sought the minister's advice relating to amendments to the bill agreed to by the House of Representatives that include a no-invalidity clause with respect to procedural obligations imposed on the Minister prior to the making of certain legislative instruments.
- **Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023:** the committee left to the Senate the appropriateness of various provisions in the bill that would enable delegated legislation to modify the operation of primary legislation.
- **Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Bill 2024:** the committee concluded its consideration of provisions that leave to delegated legislation the definitions of a 'unit' and the 'commercial quantity' of vaping goods; that empower the forfeiture of seized things; and that enable the secretary to delegate their powers.

For any comments or questions, please contact:
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Scrutiny of Delegated Legislation Committee

Delegated Legislation Monitor 5 of 2024 reports on the committee's consideration of 164 legislative instruments which were registered between 28 February and 25 March 2024. It includes the committee's comments on 1 new instrument and ministerial responses in relation to 3 instruments.

Key scrutiny issues: Legislative instruments ([*Delegated Legislation Monitor 5 of 2024*](#))

Jervis Bay Territory Rural Fires Rules 2024

- *Conferral of discretionary powers*: the committee seeks the minister's advice as to why it is considered necessary and appropriate for the minister to have broad discretionary powers under the instrument; and the factors the minister may consider when exercising such discretion, including when determining that a person is not, or is no longer, 'fit and proper' and when conditions may be imposed on a person's listing in the brigade register.
- *Compliance with the Legislation Act 2003 - incorporation; incorporated materials freely accessible; adequacy of explanatory materials*: The committee seeks the minister's advice on which specific Service Standards have been incorporated into the instrument and whether the explanatory statement can be amended to include this information.
- *Privacy*: the committee seeks the minister's advice as to the nature and scope of the information that may be collected, used or disclosed under the instrument, whether this is likely to include personal information, and if any safeguards apply, such as the *Privacy Act 1988*.
- *Procedural fairness; clarity of drafting; adequacy of explanatory materials*: the committee seeks the minister's advice as to whether procedural fairness is provided for in relation to decisions to take disciplinary action and, if not, why its exclusion is considered necessary and appropriate and whether any other safeguards apply to relevant decisions under the instrument.

Migration Amendment (Bridging Visa Conditions) Regulations 2023

- *Significant matters in delegated legislation*: the committee previously requested the minister's advice as to why it was considered necessary and appropriate to further amend the relevant framework by delegated legislation. Based on the minister's advice, including the consistent practice of governments in relation to visa criteria and conditions, the committee concludes its examination of the instrument in relation to this issue. However, the committee draws its concerns about the additional amendments made by delegated legislation to the attention of the Senate under standing order 23(4).

- *Conferral of discretionary powers; availability of independent merits review*: the committee previously requested the minister's advice on factors to be taken into account in, and safeguards on, the exercise of the minister's powers or functions, including the availability of independent merits review. The committee is now requesting the minister's further advice so to whether the explanatory statement can be amended to include the additional information provided in the minister's response about these matters.
- *Consultation with persons affected*: the committee previously requested the minister's advice in relation to consultation. The minister provided information on consultation with Commonwealth agencies in developing and drafting the instrument, and stakeholder roundtable discussions following its commencement. The committee is now seeking the minister's further advice on the outcomes of the roundtable discussions, and whether the minister would consider further amendments to the Migration Regulations 1994 to implement stakeholder feedback provided as part of that process.

Biosecurity (Electronic Decisions) Determination 2023

- *Automated decision making; conferral of discretionary powers*: the committee previously requested the minister's advice regarding safeguards on automated decision-making under the instrument, including specific factors biosecurity officers consider before exercising discretionary powers and detail on the auditing of automated decisions. The committee is now seeking the minister's further advice as to whether the explanatory statement can be amended with the additional details provided by the minister, in response to this request, on the safeguards that apply to automated decisions made under the instrument.
- *Availability of independent merits review; consultation with persons affected*: the committee concludes its examination of the instrument in relation to these issues, noting the minister's undertakings to amend the explanatory statement to include the additional details requested by the committee, which the minister has advised his department is in the process of implementing.

Notices of motion to disallow

The Scrutiny of Delegated Legislation Committee **gave** notice of motion to disallow the following instruments on 15 May 2024:

- Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629];
- Biosecurity (Electronic Decisions) Determination 2023 [F2023L01672]

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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