

## National Emergency Declaration Bill 2020

<b>Purpose</b>	This bill seeks to establish a legislative framework for the declaration of a national emergency by the Governor-General, on the advice of the Prime Acting Attorney-General
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 3 December 2020
<b>Bill status</b>	Received the Royal Assent on 15 December 2020

### Power for delegated legislation to modify primary legislation (Henry VIII clause)<sup>42</sup>

2.150 The committee initially scrutinised this bill in [Scrutiny Digest 18 of 2020](#) and requested the Attorney-General's advice.<sup>43</sup> The committee considered the Attorney-General's response in [Scrutiny Digest 3 of 2021](#) and reiterated its request for the Attorney-General's further advice as to the appropriateness of amending the *National Emergency Declaration Act 2020* (NED Act) to:

- provide that determinations made under section 15 cease to be in force after three months; and
- provide that before making a determination under section 15, a minister must be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the determination is made.<sup>44</sup>

### Acting Attorney-General's response<sup>45</sup>

2.151 The Acting Attorney-General advised:

In its *Scrutiny Digest 18 of 2020*, the Committee observed that a determination made under section 15 will cease either on the day specified in the determination or may continue while a national emergency declaration is in force (including any extensions of the period in which the declaration is in force). This approach was intended to ensure that Commonwealth support could be provided without interruption and with

42 Clause 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 14-16.

44 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 37-39.

45 The Acting Attorney-General responded to the committee's comments in a letter dated 11 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

certainty in an emergency deemed to be of national significance, including where a declaration is extended because the emergency is ongoing beyond the initial three month period.

In light of the Committee's comments, consideration will be given to whether it is appropriate to amend the NED Act to include further safeguards around the making of determinations under section 15, including through time limitations, while maintaining the policy objective of the provision to empower ministers to reduce 'red tape' requirements in legislation where this would benefit the public, or a section of the public, during or following a national emergency.

### ***Committee comment***

2.152 The committee thanks the Acting Attorney-General for this response. The committee welcomes the Acting Attorney-General's advice that consideration will be given to amending the NED Act to include further safeguards around the making of determinations under section 15, including through time limitations. The committee also notes the Acting Attorney-General's advice that any amendments to the Act will need to take into account the policy objective of the provision to empower ministers to reduce 'red tape' requirements in legislation where this would benefit the public, or a section of the public, during or following a national emergency.

**2.153 The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amending the *National Emergency Declaration Act 2020* to include further safeguards around the making of determinations under section 15.**

**2.154 Noting that the Senate Legal and Constitutional Affairs Legislation Committee is currently undertaking an inquiry into the *National Emergency Declaration Act 2020*, the committee draws the Acting Attorney-General's undertaking to the attention of that committee.**

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### **Tabling of reports<sup>46</sup>**

2.155 The committee initially scrutinised this bill in [Scrutiny Digest 18 of 2020](#) and requested the Attorney-General's advice.<sup>47</sup> The committee considered the Attorney-General's response in [Scrutiny Digest 3 of 2021](#) and requested the Attorney-General's further advice as to:

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46 Clause 17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

47 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 16-18.

- the appropriateness of amending paragraph 17(4)(a) of the *National Emergency Declaration Act 2020* to provide that reports on the exercise of powers and the performance of functions in relation to a national emergency declaration must be given to the minister responsible for administering the National Emergency Declaration Act as soon as practicable, and in any case not later than 14 days after the national emergency declaration ceases to be in force;
- the appropriateness of amending subsection 17(5) of the *National Emergency Declaration Act 2020* to provide that:
  - the above reports must be tabled in each House of the Parliament as soon as practicable, and in any case not later than 14 days after the Minister receives the reports; and
  - that the reports are to be presented in accordance with procedures in each House for the presentation of documents out of sitting in circumstances where the reports are ready for presentation, but the relevant House is not sitting.<sup>48</sup>

### ***Acting Attorney-General's response***

2.156 The Acting Attorney-General advised:

As noted by the Committee, section 17 of the NED Act includes requirements for relevant Ministers to report on the exercise of powers or the performance of functions under national emergency laws, and provides timeframes and presentation requirements for those reports. These reporting requirements were included as an important safeguard to ensure that national emergency declarations and the powers and functions that may be used once a declaration is in force are effective, proportionate and subject to appropriate oversight.

In light of the Committee's comments, consideration will be given to the appropriateness of amending the NED Act to provide for more specific requirements around the tabling and presentation of reports to ensure that there is appropriate Parliamentary accountability, particularly outside of sitting periods.

### ***Committee comment***

2.157 The committee thanks the Acting Attorney-General for this response. The committee welcomes the Acting Attorney-General's advice that consideration will be given to amending the NED Act to provide for more specific requirements around the tabling and presentation of reports to ensure that there is appropriate Parliamentary accountability, particularly outside of sitting periods.

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48 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 39-40.

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**2.158** The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amending the *National Emergency Declaration Act 2020* to provide for more specific requirements around the tabling and presentation of reports to ensure that there is appropriate Parliamentary accountability, particularly outside of sitting periods.

**2.159** Noting that the Senate Legal and Constitutional Affairs Legislation Committee is currently undertaking an inquiry into the National Emergency Declaration Act 2020, the committee draws the Acting Attorney-General's undertaking to the attention of that committee.

## National Emergency Declaration (Consequential Amendments) Bill 2020

<b>Purpose</b>	This bill seeks to amend various Acts and Regulations that contain powers used by the Commonwealth when responding to, or supporting the recovery from, emergencies to enable the use of alternative or simplified statutory tests to streamline the exercise of those powers where a national emergency has been declared
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives on 3 December 2020
<b>Bill status</b>	Received the Royal Assent on 15 December 2020

### Significant matters in non-disallowable legislative instruments<sup>49</sup>

2.160 The committee initially scrutinised this bill in [Scrutiny Digest 18 of 2020](#) and requested the Attorney-General's advice.<sup>50</sup> The committee considered the Attorney-General's response in [Scrutiny Digest 3 of 2021](#) and reiterated its request for the Attorney General's advice as to the appropriateness of amending the *Telecommunications Act 1997* to:

- provide that an emergency declaration made under subsection 313(4D) is subject to parliamentary disallowance; and
- set out at least high-level guidance in relation to when an emergency may be declared under subsection 313(4D).<sup>51</sup>

### Acting Attorney-General's response<sup>52</sup>

2.161 The Acting Attorney-General advised:

The intention of the amendments to the *Telecommunications Act 1997* (as amended by the Consequential Amendments Act) is to provide a clear legislative basis for requiring telecommunications providers to give the

<sup>49</sup> Schedule 1, item 55, proposed subsections 313(4A) – (4H). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

<sup>50</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2020*, pp. 22-24.

<sup>51</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 44-46.

<sup>52</sup> The Acting Attorney-General responded to the committee's comments in a letter dated 11 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 5 of 2021* available at: [www.aph.gov.au/senate\\_scrutiny\\_digest](http://www.aph.gov.au/senate_scrutiny_digest).

Commonwealth, states and territories such help as is reasonably necessary during emergencies. These amendments provide industry with a clear legislative basis for providing assistance and ensure they do not incur civil liability while doing so.

Subsection 313(4D) is intended to allow the Minister to declare emergencies where, in all of the circumstances, it is appropriate that industry participants be subject to a duty to give such help as is reasonably necessary for the purposes of preparing for, responding to or recovering from the emergency. Section 313(4D) would enable the Minister to act rapidly in unforeseen emergencies that, while serious, are not subject to a national declaration or state or territory emergency or disaster declaration, where the Minister would not otherwise be able to leverage the capability of carriers.

As noted by the Committee, subsection 313(4F) of the NED Act provides that while a section 313(4D) declaration is a legislative instrument, it is not subject to disallowance. This exemption from disallowance is intended to provide certainty and ensure that telecommunications providers can act expeditiously and with confidence that their assistance will not incur civil liability where circumstances are rapidly evolving.

Further consideration will also be given to whether high-level guidance could be provided in relation to when an emergency may be declared under subsection 313(4D) to provide additional certainty to the Parliament as well as carriers, carriage service providers and carriage service intermediaries about circumstances in which authorities may assistance.

### ***Committee comment***

2.162 The committee thanks the Acting Attorney-General for this response. The committee notes the Acting Attorney-General's advice that the amendments provided for in the bill are intended to provide industry with a clear legislative basis for providing assistance and ensure they do not incur civil liability while doing so.

2.163 The committee also notes the Acting Attorney-General's advice that section 313(4D) would enable the Minister to act rapidly in unforeseen emergencies that, while serious, are not subject to a national declaration or state or territory emergency or disaster declaration, where the Minister would not otherwise be able to leverage the capability of carriers. The Acting Attorney-General further advised that the exemption from disallowance is intended to provide certainty and ensure that telecommunications providers can act expeditiously and with confidence that their assistance will not incur civil liability where circumstances are rapidly evolving.

2.164 The committee welcomes the Acting Attorney-General's advice that further consideration will also be given to whether high-level guidance could be provided in relation to when an emergency may be declared under subsection 313(4D) to provide additional certainty to the Parliament as well as carriers, carriage service providers and

carriage service intermediaries about circumstances in which authorities may provide assistance.

**2.165** The committee welcomes the Acting Attorney-General's undertaking that consideration will be given to amendments to provide high-level guidance in relation to when an emergency may be declared under subsection 313(4D) of the *Telecommunications Act 1997*.

**2.166** Noting that the Senate Legal and Constitutional Affairs Legislation Committee is currently undertaking an inquiry into the *National Emergency Declaration Act 2020*, the committee draws the Acting Attorney-General's undertaking to the attention of that committee.