

National Emergency Declaration Bill 2020

Purpose	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 Minister
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020

Broad discretionary power¹⁷

1.23 Clause 11 of the bill sets out conditions for making a national emergency declaration. These include that an emergency has recently occurred, is occurring or is likely to occur (whether in or outside Australia), the emergency has caused or is likely to cause nationally significant harm in Australia or in an Australian offshore area, and any one of circumstances listed in subparagraphs 11(1)(c)(i) to (iv) apply, including that the emergency has affected, is affecting or is likely to affect Commonwealth interests. The conditions for extending a national emergency declaration under clause 12 of the bill mirror those set out in clause 11.

1.24 Clause 10 of the bill provides a number of definitions, however, key terms relevant to conditions that must be satisfied before a national emergency can be declared including 'emergency' and 'Commonwealth interest' are not defined. The committee considers that, by leaving such key terms undefined, the bill provides a broad discretionary power to the executive to declare a national emergency.

1.25 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, in relation to leaving the terms 'emergency' and 'Commonwealth interest' undefined in the bill, the explanatory memorandum states:

Emergency is not defined, and instead takes its natural and ordinary meaning, which supports the 'all hazards' approach adopted in the national emergency declaration framework. This is important so as not to limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies. The Macquarie Dictionary defines emergency as an unforeseen occurrence; a sudden and urgent occasion for action. The term 'emergency' is not intended to include predictable, ongoing or recurring events such as drought or the effect of long term coastal erosion.

17 Clauses 11 and 12. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

The term 'emergency' is not intended to be limited to a single incident or disaster. It is intended that multiple concurrent or successive incidents or disasters, or incidents and disasters that occur in a particular set of circumstances, may together constitute an emergency...¹⁸

'Commonwealth interests' is not defined and is intended to reflect the full extent of the Commonwealth's constitutional interests and power, and may include, for example, the protection of Commonwealth property or facilities (such as Parliament House or Defence facilities across the nation), the protection of Commonwealth public officials as well as visiting foreign dignitaries or heads of State, and major events like the Commonwealth Games or G20. The ability for the Governor-General to declare a national emergency in such circumstances, without a request from one or more State or Territory governments, is in recognition of the fact that it is the Commonwealth's responsibility to protect the Commonwealth's interests.¹⁹

1.26 The committee notes the explanation provided in the explanatory memorandum and acknowledges the 'all-hazards approach' adopted in the framework established by the bill. However, the committee has scrutiny concerns about the breadth of the discretionary power provided to the Governor-General to declare and extend an emergency in circumstances where neither 'emergency' nor 'Commonwealth interests' are defined in primary legislation.

1.27 The committee's scrutiny concerns about this broad discretionary power are heightened a number of factors, including that the declaration of a national emergency is a precondition to the operation of clause 15, which allows ministers to make determinations overriding primary legislation.

1.28 The committee's scrutiny concerns are further heightened by:

- the exemption from disallowance of the initial national emergency declaration, and subsequent extensions of the period for which the national emergency declaration is in force; and
- subclause 12(4) which provides that, while the period of an extension must not exceed 3 months, such extensions may be made more than once, with no limit on the number of extensions.

1.29 The committee therefore requests the Attorney-General's more detailed advice as to:

- **why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined; and**

18 Explanatory memorandum, p. 13.

19 Explanatory memorandum, p. 15.

- **whether the bill can be amended to include inclusive definitions of ‘emergency’ and ‘Commonwealth interest’, or, at minimum, additional guidance on the exercise of the power in relation to these concepts on the face of the primary legislation.**
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Exemption from disallowance²⁰

1.30 The bill seeks to provide for the declaration of national emergencies, including through providing a consolidated list of existing emergency powers to provide greater visibility to decision-makers of the full range of powers available in a national emergency.

1.31 Clause 11 sets out the conditions for making a national emergency declaration. Subclause 11(1) provides that the Governor-General may make a national emergency declaration if the Prime Minister is satisfied in relation to matters set out in paragraphs 11(1)(a) through (d). Subclause 11(6) provides that a national emergency declaration is a legislative instrument but is not subject to disallowance. Similarly, subclause 12(5) provides that an extension of a national emergency declaration made under subclause 12(1) is a legislative instrument that is not subject to disallowance.

1.32 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance the explanatory memorandum states:

A core objective of the declaration is to clearly signal to the Australian community the severity of the emergency event, and provide certainty about the Commonwealth’s role, and the statutory powers that are available, in respect of a particular emergency event. This objective would be undermined if such a declaration were disallowable, as the prospect of disallowance is likely to call into question the status of the emergency event.

This exemption also reflects the critical nature of the declaration, which puts into effect a range of mechanisms that may be employed to respond to the emergency event. The making of the declaration ensures that urgent and decisive action can be taken in response to a nationally significant emergency event. This also provides the greatest level of certainty for emergency response agencies about the legal framework under which they are operating, including the various legal obligations and duties that may flow from the making of a declaration. If a declaration were disallowed, it would destabilise the framework under which emergency response agencies are operating, leading to uncertainty and

20 Clauses 11 and 12. The committee draws senators’ attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

potential delays in the response and recovery effort where time is of the essence.²¹

1.33 While noting this explanation, it is unclear to the committee how the prospect of disallowance is likely to call into question the status of an emergency event or prevent the taking of urgent and decisive action in response to a nationally significant emergency event. In this regard the committee notes the observations of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Scrutiny of Delegated Legislation Committee) in its *Interim report on the Exemption of delegated legislation from parliamentary oversight* (Interim report):

...the disallowable status of delegated legislation does not impede the commencement of a legislative instrument, with legislative instruments made by the executive able to commence the day after they are registered. The subsequent disallowance of a legislative instrument (which may only occur after the instrument has been tabled in the Parliament) does not invalidate actions taken under the instrument prior to the time of disallowance. Consequently, the committee does not consider that the disallowable status of a legislative instrument would, of itself, prevent the government from taking immediate and decisive action in response to a significant emergency...

...the instances of the disallowance procedure resulting in disallowance by the Parliament is very low...In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised. Consideration of the risks and opportunities of subjecting emergency-related delegated legislation to disallowance must be assessed with this in mind.²²

1.34 The Scrutiny of Delegated Legislation Committee also noted that:

...arguments against making emergency related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. This need is particularly pronounced in times of emergencies, where legislative measures implemented in response to emergencies may be more likely to trespass on personal rights and liberties than those implemented in non-emergency periods.²³

21 Explanatory memorandum, p. 16–17.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 61-62.

23 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 62.

1.35 The Scrutiny of Delegated Legislation Committee further noted that:

...views about the manner and appropriateness of exempting emergency-related delegated legislation from disallowance must be informed by the constitutional separation of powers between the legislature and executive, and Parliament's role in Australia's system of representative democracy. The committee considers that the Parliament, and particularly the Senate, has an important role in ensuring that delegated legislation is subject to effective scrutiny by elected representatives who reflect the considered views of the community and that governments of all persuasions do not introduce extreme measures in the absence of broad community support.²⁴

1.36 The committee also notes that clauses 11 and 12 are closely modelled on sections 475 and 476 of the *Biosecurity Act 2015* (Biosecurity Act) which set out the circumstances in which a human biosecurity emergency may be declared by the Governor-General to exist, and the circumstances in which such a declaration may be varied to extend the human biosecurity emergency, respectively. Both the original declaration and extensions to the declaration are not subject to disallowance.

1.37 In its interim report the Scrutiny of Delegated Legislation Committee recommended the government propose amendments to the Biosecurity Act to provide that declarations of human biosecurity emergency periods and associated extensions are subject to disallowance.²⁵ The Scrutiny of Delegated Legislation Committee noted that exempting the declarations and associated extensions was inappropriate, particularly because the declaration of a human biosecurity emergency is a pre-condition to the implementation of other non-disallowable legislative measures which may override any Australian law and may restrict personal rights and liberties.²⁶ In this regard, the committee notes that a national emergency declaration made under clause 11 or extended under clause 12 of the bill is a precondition for enlivening the 'streamlined framework' for the exercise of the emergency powers set out in the bill and other legislation amended by the National Emergency Declaration (Consequential Amendments) Bill 2020.

1.38 Having regard to comments and recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its *Interim report on the exemption of delegated legislation from parliamentary oversight*, the committee therefore requests the Attorney-General's more detailed advice as to:

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 63.

25 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 69.

26 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 68.

- **why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance; and**
- **whether the bill can be amended to omit subclauses 11(6) and 12(5) so that national emergency declarations made under subclause 11(1) and extensions of a national emergency declaration under subclause 12(1) are subject to the usual parliamentary disallowance process.**

Power for delegated legislation to modify primary legislation (Henry VIII clause)²⁷

1.39 Clause 15 establishes a process for ministers to modify certain provisions of legislation they administer relating to administrative requirements during the period a national emergency declaration is in force. Subclause 15(1) provides that the section applies to a provision of a law of the Commonwealth that requires or permits a prescribed list of relevant matters, set out in paragraphs 15(1)(a) to (j). Subclause 15(2) provides that if a declaration is in force, a responsible minister for an affected provision (as set out in subclause 15(1)) may, by legislative instrument, determine that, to the extent the affected provision relates to a relevant matter, the provision, for a period of time specified in the determination:

- (a) is varied as specified in the determination;
- (b) does not apply; or
- (c) does not apply, and that another provision specified in the determination applies instead.²⁸

1.40 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to amend primary legislation. The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the inclusion of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.41 In this instance, the explanatory memorandum states:

The purpose of a determination under subclause 15(2) is to enable Ministers and decision-makers to suspend, vary or substitute requirements

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

28 Paragraphs 15(2)(a) to (c).

in legislation they administer when a national emergency declaration is in force, where this would be of benefit to the public, or a section of the public, during or following a national emergency. It would allow Ministers and decision-makers to act quickly and decisively in response to a declared national emergency and adopt a tailored approach to suspending, varying and substituting regulatory requirements, depending on the particular emergency event.

The determination can be classified as a Henry VIII clause, which enables delegated legislation to alter or override the operation of primary legislation. In the context of a national emergency declaration, such a clause is justified as a time-limited, targeted mechanism to facilitate the provision of support to communities affected by the declared emergency. The clause, which may apply to a wide variety of Acts or instruments, is specifically confined to certain kinds of procedural requirements, as enumerated in the Bill. It is intended to have beneficial application, in that it would make it easier for persons affected by a declared national emergency to obtain government support without having to complete, for instance, certain manner and form requirements, or requirements for official documents to be witnessed or provided.

The power for Ministers to make such determinations acknowledges that it may not be possible for individuals or entities to meet certain regulatory requirements, in an emergency...The power to suspend, vary or substitute requirements in subclause 15(2) is limited to the enumerated list of requirements set out in subclause 15(1). The power would not, for example, enable a Minister to modify, suspend or substitute substantive provisions, such as eligibility criteria for a benefit or statutory criteria for a decision, or impose any obligations or liabilities on individuals.²⁹

1.42 The committee notes this explanation, including that determinations made under clause 15 are intended to have beneficial application.

1.43 Determinations made under clause 15 will cease either on a day specified in the determination or may continue while a national emergency declaration is in force.³⁰ The committee notes that, due to the power under clause 12 of the bill to extend the period of an emergency declaration for an indefinite number of 3-month periods,³¹ determinations made under clause 15 to modify the operation of primary legislation may be in effect for an extended period of time.

1.44 In this regard, the committee notes recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the duration of instruments made in response to emergencies including that:

29 Explanatory memorandum, p. 20–21.

30 Subclause 15(7).

31 Subclause 12(4).

- the government ensure that all delegated legislation made in response to emergencies ceases to be in force after three months. Where measures implemented by delegated legislation are required for a longer period of time the relevant legislative instrument should be remade to facilitate parliamentary oversight; and
- where primary legislation empowers the executive to make delegated legislation to amend or modify the operation of primary legislation in times of emergency (via a 'Henry VIII' clause), parliamentarians and the government should ensure that the primary legislation:
 - specifies a time limit in which those powers can be exercised; and
 - requires the maker of the delegated legislation to be satisfied that Parliament is not sitting and is not likely to sit within two weeks after the day the relevant instrument is made before they make the instrument.³²

1.45 In light of the recommendations of the Senate Standing Committee for the Scrutiny of Delegated Legislation, the committee requests the Attorney-General's advice as to whether the bill can be amended to provide that:

- **determinations made under clause 15 cease to be in force after three months; and**
- **before making a determination under clause 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.**

Tabling of reports³³

1.46 Clause 17 requires that ministers administering a national emergency law (defined in clause 10) must prepare a report on the exercise of powers or functions under such national emergency laws. The report must be given to the minister administering the National Emergency Declarations Act (the Act) as soon as practicable after the national emergency declaration ceases to be in force or, if the national emergency declaration is extended, within three months after the declaration came into force and every subsequent period of three months that the declaration remains in force.³⁴ The minister administering the Act must then cause a

32 Recommendations 12 and 13. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 100.

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

34 Subclauses 17(2) and (4).

copy of the report to be tabled in each House of the Parliament 'as soon as practicable' after the minister receives it.³⁵

1.47 In relation to the presentation and tabling of reports 'as soon as practicable' at a general level, the committee notes that subsections 34C(2) and (3) of the *Acts Interpretation Act 1901* provide that:

(2) Where an Act requires a person to furnish a periodic report to a Minister but does not specify a period within which the report is to be so furnished, that person shall furnish the report to the Minister as soon as practicable after the end of the particular period to which the report relates and, in any event, within 6 months after the end of that particular period.

(3) Where an Act requires a person to furnish a periodic report to a Minister for presentation to the Parliament but does not specify a period within which the report is to be so presented, that Minister shall cause a copy of the periodic report to be laid before each House of the Parliament within 15 sitting days of that House after the day on which he or she receives the report.

1.48 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling and making reports on the exercise of powers or performance of functions in relation to a national emergency declaration available online in a timely manner promotes transparency and accountability.

1.49 The committee also notes that, in response to emergency situations, there may be variations to the parliamentary sitting calendar such that a period of 15 sitting days may stretch over a number of months.³⁶ Noting the importance of parliamentary oversight during periods of emergency, the committee considers that it would be appropriate for the bill to provide more specific timeframes in which reports on the exercise of powers and functions in relation to a national emergency should be provided to Parliament and made available to the public. In this regard,

35 Subclause 17(5).

36 For example, the Senate Standing Committee for the Scrutiny of Delegated legislation noted that, as a consequence of variations to the 2020 sitting calendar in response to the COVID-19 pandemic, as at 30 November 2020, the House of Representatives had sat on 18 days fewer than originally agreed for 2020, and the Senate had sat 15 days fewer than originally agreed. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 39.

the committee also notes the availability of mechanisms under parliamentary rules and procedure for documents to be presented when the Parliament is not sitting.³⁷

1.50 The committee therefore requests the Attorney-General's advice as to whether proposed paragraph 17(4)(a) of the bill can be amended 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.

1.51 The committee also requests the Attorney-General's advice as to whether subclause 17(5) of the bill can be amended 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.**

Significant matters in delegated legislation³⁸

1.52 Subclause 17(6) sets out certain matters that must not be included in reports on the exercise of powers and performance of functions in relation to a national emergency declaration, including information that is commercially sensitive, or affects national security. Paragraph 17(6)(c) expands these matters to include a kind of information prescribed by the regulations for the purposes of this paragraph.

1.53 The committee's view is that significant matters, such as the kind of information that must be omitted from reports on the exercise of powers during a national emergency, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

The regulation-making power in paragraph 17(6)(c) will allow additional kinds of information to be prescribed, as necessary. This may include, for example, information that would ordinarily not be required to meet

37 See, for example, Senate standing order 166. This standing order is referenced in a number of Senate orders of continuing effect which provide for the tabling of documents while the Senate is not sitting, such as the presentation of information on departmental and agency appointments and vacancies.

38 Subclause 17(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

tabling requirements under Acts that contain national emergency laws—such as information relating to an exemption for the stockpiling of therapeutic goods, including biologicals and medical devices, to create a preparedness to deal with a potential threat to public health, which is not subject to tabling requirements under the *Therapeutic Goods Act 1989*.³⁹

1.54 However, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.55 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. The committee also notes that allowing the regulations to prescribe types of information that must not be provided in reports presented to Parliament provides the minister with a broad power to prevent important information about the exercise of powers and functions during emergency from being reviewed by the Parliament in circumstances where there are already limitations on the Parliament's ability to review actions of the executive in relation to the declaration of national emergencies.

1.56 In light of the above, the committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to leave the specification of additional kinds of information that must not be included in a report on the exercise of powers and functions during a national emergency to delegated legislation; and**
- **whether the bill can be amended omit proposed paragraph 17(6)(c) or, at a minimum, to include at least high-level guidance regarding the kinds of additional information that may be prescribed in the regulations.**

39 Explanatory memorandum p. 25.

National Emergency Declaration (Consequential Amendments) Bill 2020

Purpose	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
Portfolio	Attorney-General
Introduced	House of Representatives on 3 December 2020

Limitation on judicial review⁴⁰

1.57 Item 2 of Schedule 1 seeks to insert proposed paragraph (zfa) into Schedule 1 to the *Administrative Decisions (Judicial Review Act) 1977* (the ADJR Act). This would exempt decisions made under Part 2 of the *National Emergency Declaration Act 2020*, in relation to a declaration made under proposed subsection 11(1), from judicial review under the ADJR Act. This is intended to cover advice provided by the Prime Minister to the Governor-General in relation to a decision made under Part 2 of the National Emergency Declaration Bill 2020 in the event that such advice constitutes a decision.⁴¹

1.58 Judicial review of certain decisions made under the National Emergency Declaration Bill 2020 is nonetheless available under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the Constitution.⁴²

1.59 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion. In this instance, the explanatory memorandum states:

Decisions of the Governor-General are not subject to review under the ADJR Act, pursuant to paragraph (d) of the definition of decision to which this Act applies in section 3 of that Act. As such, a decision of the Governor-General to declare a national emergency under section 11 of the NED Act or to extend, vary or revoke such a declaration under sections 12, 13 or 14 of that Act, would not be subject to review of the ADJR Act. The

40 Schedule 1, item 2, proposed paragraph (zfa) of Schedule 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

41 Explanatory memorandum, p. 16.

42 Explanatory memorandum, p. 16.

purpose of this item is to place beyond doubt that, if the Prime Minister's advice to the Governor-General in relation to a decision under Part 2 of the NED Act was considered to constitute a 'decision' for the purposes of the ADJR Act, that such a decision would not be subject to review under the ADJR Act, to ensure that the non-application of the ADJR Act to decisions of the Governor-General is not undermined by the character of the decisions that relate to the making of a declaration.⁴³

1.60 The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act 1903*) and also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.61 In light of the detailed information provided in the explanatory memorandum, and the availability of judicial review under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the Constitution, the committee leaves to the Senate as a whole the appropriateness of exempting decisions made under Part 2 of the National Emergency Declaration Bill 2020 from the judicial review under the ADJR Act.

Significant matters in non-disallowable instruments

Privacy⁴⁴

1.62 Item 40 of Schedule 1 seeks to insert proposed subsection 80J(2) into the *Privacy Act 1988*. Section 80J of the *Privacy Act 1988* provides that the Prime Minister or the minister may declare an emergency where they are satisfied that an emergency or disaster has occurred and it is of such a kind that it is appropriate in the circumstances for Part VIA of the *Privacy Act 1988* to apply. The emergency or disaster must be of national significance and affect one or more Australian citizens or permanent residents. Proposed subsection 80J(2) provides that the Prime Minister or the minister may also make a declaration under section 80J if a national emergency declaration is in force, and they are satisfied that the emergency to which the declaration relates is of such a kind that it is appropriate in the circumstances for Part VIA to apply.

1.63 The effect of this is to authorise the collection, use and disclosure of personal information by entities in relation to affected individuals at any time an emergency declaration is in force, in line with the further requirements in section 80P. As per

43 Explanatory memorandum, p. 16.

44 Schedule 1, item 40, proposed subsection 80J(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

subsection 80L(3), an emergency declaration made under section 80J is not a legislative instrument.

1.64 The committee's view is that any exemption of instruments from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

The purpose of this item is to simplify the process for the making of an emergency declaration under Part VIA of the Privacy Act where a national emergency declaration is in force, by omitting criteria in the statutory test for the making of an emergency declaration that overlap with the criteria for the making of a national emergency declaration.⁴⁵

1.65 While noting this explanation, the committee does not consider that a desire to simplify legislative procedures or to have consistency with existing legislative provisions is an adequate justification for such measures to be provided for in an instrument other than a legislative instrument. The committee notes that such instruments are excluded from all forms of parliamentary oversight, including disallowance.

1.66 The committee's scrutiny concerns in this instance are heightened by the potential impact of the provisions on individual privacy.

1.67 In light of the above, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments which are not subject to parliamentary scrutiny.

Significant matters in non-disallowable legislative instruments⁴⁶

1.68 Item 55 of Schedule 1 seeks to insert proposed subsection 313(4A) into the *Telecommunications Act 1997*. Proposed subsection 313(4A) provides that a carrier or carriage service provider must, in connection with the operation or supply of services, give officers and authorities of the Commonwealth and the States and Territories such help as is reasonably necessary for the following purposes:

- preparing for, responding to or recovering from an emergency to which a national emergency declaration in force relates;⁴⁷

45 Explanatory memorandum, p. 34.

46 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).

47 Proposed paragraph 313(4A)(c).

- preparing for, responding to or recovering from a disaster or emergency that has been declared to be a disaster or state of emergency by or with the approval of a minister of a State or Territory under that law;⁴⁸ and
- preparing for, responding to or recovering from an emergency about which a declaration made under proposed subsection 313(4D) relates.⁴⁹

1.69 Proposed subsection 314(4B) provides for the same measures in relation to carriage service intermediaries.

1.70 Proposed subsection 313(4D) provides that the minister may declare in writing that an emergency exists, and proposed subsection 313(4F) provides that such a declaration is a legislative instrument exempt from disallowance. Proposed subsection 313(4H) provides that the minister may formulate guidelines, by legislative instrument, which under proposed subsection 313(4G) the officer or authority of the Commonwealth, State or Territory who is requiring help under proposed subsections 313(4A) or (4B) must have regard to.

1.71 The committee's view is that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum states:

New subsection 313(4F) provides that a declaration made under subsection 313(4D) is a legislative instrument, but that section 42 of the *Legislation Act 2003* (disallowance) does not apply to the declaration. This aligns with the status of a national emergency declaration under the NED Act. A declaration made under subsection 313(4D) can be made independently of a declaration being made under the NED Act. A key objective of the declaration is to provide clarity and certainty about the status of an emergency event, whether impending or currently existing. Certainty will be critical to ensure that participants are sufficiently prepared and can readily divert resources to assist in the response and recovery effort. The prospect of a declaration being disallowed would undermine a key objective of the making of such a declaration, and may disrupt the underlying framework that would support further action being taken. This provision provides telecommunications companies with certainty that once the Minister declares that an emergency exists, there is no risk that immunities would fall away in the event of Parliamentary disallowance.⁵⁰

1.72 While noting this explanation, from a scrutiny perspective it is unclear to the committee why it is necessary for the minister to have a secondary power to declare an emergency for the purposes of proposed subsections 313(4A) and (4B), when

48 Proposed paragraph 313(4A)(d).

49 Proposed paragraph 313(4A)(e).

50 Explanatory memorandum, p. 42.

these provisions are enlivened when a declaration of emergency is made under the National Emergency Declaration Bill 2020. The power to declare an emergency in proposed subsection 313(4D) appears to be a much broader power when compared to the National Emergency Declaration Bill 2020, which requires certain conditions to first be met before an emergency may be declared. By contrast, there is no guidance or criteria on the face of the bill to be taken into account by the minister when making a non-disallowable emergency declaration under proposed subsection 313(4D).

1.73 In addition, the committee does not consider that the prospect of disallowance would undermine certainty during an emergency, as the subsequent disallowance of an instrument does not invalidate actions taken under it prior to disallowance. Moreover, the committee notes the observations of the Senate Standing Committee for the Scrutiny of Delegated Legislation in its *Interim report on the exemption of delegated legislation from parliamentary oversight* which are outlined at paragraphs 1.33–1.38 above.⁵¹

1.74 The committee's scrutiny concerns are heightened by the broad, onerous and potentially intrusive powers that proposed subsections 313(4A) and 313(4B) provide for in relation to requiring carriers, carriage service providers and carriage service intermediaries to give such help as is reasonably necessary to officers and authorities of the Commonwealth and the States and Territories.

1.75 In light of the above, the committee requests the Attorney-General's advice as to whether the bill can be amended to:

- **provide that an emergency declaration made under proposed 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 proposed subsection 313(4D).**

51 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report on the Exemption of delegated legislation from parliamentary oversight* (2 December 2020) p. 62.

Significant matters in non-disallowable instruments (provisions akin to Henry VIII clause)⁵²

Exclusion from tabling⁵³

1.76 Items 60, 65 and 70 of Schedule 1 extend the circumstances in which the minister may exempt therapeutic goods, biologicals and devices from the operation of Division 2 of Part 3-2 of the *Therapeutic Goods Act 1989* (the Act) by non-legislative instrument.

1.77 Existing section 18A provides the minister with the power to exempt specified therapeutic goods or classes of therapeutic goods from the operation of Division 2 of Part 3-2 of the Act. Subsection 18A(2) sets out the criteria that the minister must be satisfied of in determining that it is in the national interest to exempt such goods. Item 60 would insert proposed subsection 18A(2A) into section 18A to provide that an exemption may be made if a national emergency declaration is in force, and either the exemption should be made so that goods may be stockpiled to deal with a potential threat to public health,⁵⁴ or so that the goods can be urgently available to deal with an actual threat to public health.⁵⁵ The health emergency must be the emergency to which the national emergency declaration relates.

1.78 An exemption made under subsection 18A of the Act is not a legislative instrument as per subsection 18A(9A).

1.79 Item 65 seeks to insert proposed subsection 32CB(2A) which provides for the same measures in relation to exempting biologicals from the operation of Division 4 of the Act by non-legislative instruments.

1.80 Item 70 seeks to insert proposed subsection 41GS(2A) which provides for the same measures in relation to exempting medical devices from Division 1 of Part 4-2 and Division 1 of Part 4-3, Part 4-4- and Part 4-5 of the Act by non-legislative instruments.

1.81 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to amend primary legislation. While, in this instance, the provisions do not allow delegated legislation to directly amend the primary legislation, the committee has

52 Schedule 1, item 60, proposed subsection 18A(2A); item 65, proposed subsection 32CB(2A); and item 70, proposed subsection 41GS(2A). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

53 Schedule 1, item 62, proposed paragraph 18A(11)(a); item 67, proposed paragraph 32CF(2)(a); item 72, proposed paragraph 41GW(2)(a)(v).

54 Subparagraph 18A(2A)(b)(i).

55 Subparagraph 18A(2A)(b)(ii).

significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.82 In this regard, no explanation has been provided in the explanatory memorandum as to why it is necessary and appropriate for proposed subsections 18A(2A), 32CB(2A) and 41GS(2A) to provide for further circumstances under which the operation of the *Therapeutic Goods Act 1989* may be modified by non-legislative instruments.

1.83 In addition, items 62, 67 and 72 of Schedule 1 seek to limit the circumstances in which these non-legislative instruments made under the *Therapeutic Goods Act 1989* must be tabled in the Parliament. Each of these items provides that only instruments made under proposed subparagraphs 18A(2A)(b)(ii), 32CB(2A)(b)(ii), and 41GS(2A)(b)(ii) are subject to tabling in the Parliament. This has the effect that non-legislative instruments exempting specified therapeutic goods, biologicals or devices from the operation of the *Therapeutic Goods Act 1989* on the basis of a 'potential' as opposed to 'actual' threat to public health will be exempt from tabling requirements.

1.84 The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. As such, the committee expects there to be appropriate justification where instruments are not required to be tabled in the Parliament.

1.85 In relation to each of the three items the explanatory memorandum explains that this approach is consistent with the current tabling requirements not applying to the similar existing exemptions.⁵⁶ While noting this, the committee's view is that the fact that a certain matter continues current arrangements does not, of itself, provide an adequate justification. The committee's concerns in this regard are heightened by the fact that non-legislative instruments are subject to little to no parliamentary scrutiny, particularly noting that they are exempt from the disallowance process.

1.86 As no justification has been provided in the explanatory materials, the committee requests the Attorney-General's advice as to:

- **why it is considered necessary and appropriate to include powers in the bill which allow non-legislative instruments to modify the operation of the *Therapeutic Goods Act 1989*; and**

56 Explanatory memorandum, pp. 45, 46, and 48.

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- **why it is necessary and appropriate to provide that instruments made under proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) are not required to be tabled in the Parliament.**