

The Senate

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Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

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Contents

Membership of the committee	iii
Introduction.....	ix
Part I – Technical legislative scrutiny	1
Chapter 1: New and ongoing matters	3
<i>New matters</i>	3
Australian Capital Territory National Land (Lakes) Ordinance 2022.....	3
Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022	16
Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022	20
Bankruptcy Amendment (Service of Documents) Regulations 2022.....	27
Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022	29
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022.....	31
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022	34
Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022	37
<i>Ongoing matters</i>	40
Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021.....	40
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2)	43
Competition and Consumer Amendment (Consumer Data Right) Regulations 2021	46

Financial Sector Reform (Hayne Royal Commission) Response (Hawking of Financial Products) Regulations 2021	50
Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021.....	54
Chapter 2: Concluded matters	57
Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021	57
Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021.....	62
Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021.....	62
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021	65
Industry Research and Development (Supporting Critical Transmission Infrastructure Program) Instrument 2021	73
Telecommunications (Interception and Access) Amendment (2021 Measures No. 1) Regulations 2021	76
Chapter 3: Agency engagement.....	79
<i>New matters</i>	79
<i>Ongoing matters</i>	83
<i>Concluded matters</i>	83
Chapter 4: Undertakings	89
<i>Implemented undertakings</i>	89
<i>Outstanding undertakings</i>	90
Part II – Matters of interest to the Senate	91
Chapter 5: Instruments raising significant issues	93

Chapter 6: Expenditure and taxation in delegated legislation.....	95
<i>Expenditure</i>	95
Advance to the Finance Minister determinations.....	95
Instruments specifying expenditure under the Financial Framework (Supplementary Powers) Act 1997 and Industry Research and Development Act 1986	96
Instruments providing for Commonwealth grants to states and territories under the Federal Financial Relations Act 2009	99
Instruments providing for expenditure pursuant to special accounts.....	101
<i>Levying of taxation in delegated legislation</i>	101
Chapter 7: Exemptions from disallowance and sunseting	103
<i>Exemptions from disallowance</i>	103
<i>Exemptions from sunseting</i>	106

Introduction

The Senate Standing Committee for the Scrutiny of Delegated Legislation, formerly the Senate Standing Committee on Regulations and Ordinances, was established in 1932. The role of the committee is to examine the technical qualities of all legislative instruments, and to decide whether they comply with the committee's non-partisan scrutiny principles or otherwise give rise to matters of interest to the Senate.

The *Delegated Legislation Monitor* (the Monitor) details the committee's views in relation to its technical scrutiny of legislative instruments registered on the Federal Register of Legislation. Part 1 of the Monitor details the committee's scrutiny concerns arising under the technical scrutiny principles set out in Senate standing order 23(3), extracted below. Part 2 of the Monitor details matters which the committee has resolved to draw to the attention of the Senate under standing order 23(4).

This Monitor details matters relating to the committee's scrutiny of **825** legislative instruments registered on the Federal Register of Legislation between 26 February and 26 July 2022. This includes **656** disallowable instruments and **169** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

Committee information

Terms of reference

The committee's technical scrutiny principles are set out in Senate standing order 23(3), which requires the committee to scrutinise each instrument as to whether:

- (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
- (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
- (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
- (d) those likely to be affected by the instrument were adequately consulted in relation to it;
- (e) its drafting is defective or unclear;
- (f) it, and any document it incorporates, may be freely accessed and used;
- (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
- (h) it trespasses unduly on personal rights and liberties;

- (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- (j) it contains matters more appropriate for parliamentary enactment;
- (k) in the case of an instrument exempt from sunseting, it is appropriate for the instrument to be exempt from sunseting;
- (l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and
- (m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

Additionally, Senate standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.

Senate standing order 23(4A) further provides that the committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. The committee may also consider whether it is appropriate for such instruments to be exempt from disallowance.

Nature of the committee's scrutiny

Technical legislative scrutiny

The committee operates on a non-partisan basis to scrutinise delegated legislation made by the executive branch of government against its technical scrutiny principles.

Resolving minor technical scrutiny concerns

After scrutinising a legislative instrument, the committee may initially engage in informal correspondence with agencies via its secretariat to gather information or seek clarification to identify and resolve minor technical scrutiny concerns. This engagement with agencies assists the committee in deciding whether it is necessary to seek further advice from the relevant minister about those concerns. Agency correspondence is not published; however, the relevant instruments are listed on the committee's website, and Chapter 3 also contains statistics on ongoing and concluded agency matters.

Resolving significant technical scrutiny concerns

Where the committee considers that an instrument raises significant technical scrutiny concerns, it details its concerns in Part 1 of the Monitor for the benefit of the Senate

in its oversight of delegated law-making powers. The committee generally seeks a formal response from the relevant minister in relation to concerns set out in this Part; however, in some circumstances the committee may report its scrutiny concerns to the Senate without seeking further information from the minister.

Undertakings

As a result of raising its scrutiny concerns with the relevant minister or agency, the committee may seek an undertaking for specific action to address its scrutiny concerns. The committee summarises outstanding and implemented undertakings in Chapter 4 of the Monitor. The committee will record relevant undertakings on the [Index of Undertakings](#) on its website.

Matters of interest to the Senate

The committee does not scrutinise the policy merits of delegated legislation. If the committee determines that an instrument raises significant issues, or otherwise gives rise to issues likely to be of interest to the Senate under standing order 23(4), it may draw these instruments to the attention of the Senate in Part 2 of the Monitor.

Disallowance process¹

The disallowance procedure is one of the key mechanisms by which Parliament exercises control over delegated legislation. The conditions for the disallowance process are set out in the *Legislation Act 2003* and are reflected in Senate standing order 78.

The committee will give a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of an instrument before the original disallowance period expires. In addition, the committee may give such a notice where the committee requires an undertaking to be implemented before it can conclude its consideration of the instrument. The committee will usually withdraw a 'protective' notice when it receives a satisfactory response to its scrutiny concerns or confirmation that any outstanding undertakings have been implemented.

The committee may also give a notice of motion to disallow an instrument where it considers that the instrument raises significant and unresolved scrutiny concerns, and the committee has therefore resolved to recommend to the Senate that the instrument be disallowed. In these circumstances, the committee will detail its significant scrutiny concerns in Chapter 1 of the Monitor.

1 For further information on the disallowance process see [Odgers' Australian Senate Practice](#) and [Guide to Senate Procedure No. 19 - Disallowance](#).

Publications

Delegated Legislation Monitor

The committee's usual practice is to table its [Delegated Legislation Monitor](#) each Senate sitting week. Legislative instruments detailed in the Monitor are also listed in the [Index of Instruments](#) on the committee's website.

Scrutiny News

[Scrutiny News](#) is a brief newsletter summarising significant matters arising in the Monitor, as well as in the reports of the Senate Standing Committee for the Scrutiny of Bills. Past editions, and information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.

Guidelines

[Guidelines](#) relating to the committee's scrutiny principles are published on the committee's website.

Other resources

Ministerial responses to the committee's concerns can be accessed on the committee's website through either the [Delegated Legislation Monitors](#) webpage or the [Index of Instruments](#).

The [Federal Register of Legislation](#) should be consulted for the text of instruments, explanatory statements, and associated information.

The [Senate Disallowable Instruments List](#) provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.

The [Disallowance Alert](#) records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.

Part I—Technical legislative scrutiny

Part I: Introduction

Part I of the *Delegated Legislation Monitor* (the Monitor) details technical scrutiny concerns which the committee has identified in disallowable and non-disallowable legislative instruments under the technical legislative scrutiny principles set out in Senate standing order 23(3). Where the committee's concerns relate to a disallowable legislative instrument, the committee may give a notice of motion to disallow the instrument to provide the Senate and the committee with additional time to scrutinise the instrument while it is still subject to disallowance.

Chapter 1: New and ongoing matters

Where the committee considers that an instrument raises significant technical scrutiny issues, it details its concerns in Chapter 1 of the Monitor and may request further advice from the relevant minister, or otherwise draw its concerns to the attention of the Senate for consideration.

Chapter 2: Concluded matters

Where the committee has resolved to conclude its examination of an instrument, it details its concluding comments in Chapter 2 of the Monitor.

Chapter 3: Agency engagement

Where the committee identifies potential, minor technical scrutiny concerns in a legislative instrument, it may engage with relevant agencies via its secretariat to gather information or seek clarification to resolve those concerns before drawing them to the attention of the relevant minister. Chapter 3 of the Monitor summarises this engagement.

Chapter 4: Undertakings

The committee may resolve to conclude its examination of a legislative instrument based on an undertaking by the relevant minister or agency to amend an Act, legislative instrument or explanatory statement, or to conduct a review. The committee expects that when a minister or agency has made an undertaking, it will be implemented in a timely manner. Chapter 4 of the Monitor summarises all outstanding and implemented undertakings since the last Monitor was tabled. A full list of undertakings is published on the *Index of Undertakings* on the committee's website.¹

¹ See the [Index of Undertakings](#) page on the committee's website.

Chapter 1

New and ongoing matters

1.1 This chapter details the committee's significant new and ongoing scrutiny concerns in legislative instruments relating to the committee's technical legislative scrutiny principles in Senate standing order 23(3).

New matters

1.2 The committee has identified significant technical scrutiny concerns in relation to the instruments listed below.

Australian Capital Territory National Land (Lakes) Ordinance 2022

FRL No.	F2022L00468 ¹
Purpose	Regulates the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory, relating to lake areas located on National Land.
Authorising legislation	<i>Seat of Government (Administration) Act 1910</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022)

Overview

1.3 The Australian Capital Territory National Land (Lakes) Ordinance 2022 (the instrument) regulates various matters relating to the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory, including the grant of permits to use Lake Burley Griffin for various activities, regulation of boating and the closure of the lake area for safety, maintenance and for approved events. The committee has identified several significant technical scrutiny concerns in the instrument, detailed below.

1 Accessible on the [Federal Register of Legislation](#).

Scrutiny concerns

Coercive powers;² significant matters in delegated legislation³

1.4 Several provisions in the instrument contain search and seizure powers.⁴ Where an instrument contains coercive powers such as these, the committee will consider relevant limitations on the powers, including who may exercise them,⁵ and whether the powers unduly trespass on personal rights and liberties,⁶ such that they are a matter more appropriate for parliamentary enactment.⁷

Inclusion of coercive powers

1.5 Part 8 division 2 of the instrument confers entry, search and seizure powers on inspectors to enter boats and seize evidence. Additionally, section 140 authorises the seizure of a boat if an inspector believes it is or has been involved in an offence against the instrument.

1.6 The committee considers that provisions which contain coercive powers have the potential to seriously trespass on personal rights and liberties and should not ordinarily be included in delegated legislation.⁸ Where an instrument nevertheless contains such provisions, the committee expects the explanatory statement to describe the nature and scope of the provisions and the circumstances in which the powers will be exercised. The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, whether compensation is available for any property seized or destroyed in the exercise of the powers, whether independent review is available of decisions made and actions taken in connection with the exercise of the powers, and whether the provisions comply with Chapters 7 and 8 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.⁹

2 Senate standing order 23(3)(c) (conferral of coercive powers) and Senate standing order 23(3)(h) (coercive powers).

3 Senate standing order 23(3)(j).

4 See, for example, part 8 division 2.

5 Senate standing order 23(3)(c).

6 Senate standing order 23(3)(h).

7 Senate standing order 23(3)(j).

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 25.

9 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, chapters 7–8.

1.7 In this regard, the explanatory statement does not appear to describe why entry, search and seizure powers are necessary and appropriate to be included in the instrument, nor does it explain whether these provisions comply with the Attorney-General's Department's *Guide to Framing Commonwealth Offences*. The explanatory statement separately clarifies that no independent review is available for decisions made under the instrument,¹⁰ heightening the committee's concern about the inclusion of coercive powers in delegated legislation and the need for such powers to be thoroughly justified.

Exercise of coercive powers

1.8 Subsection 150(1) of the instrument provides that the minister may appoint the Chief Executive of the National Capital Authority or a member of the staff of the National Capital Authority as an inspector for the purposes of the instrument. Subsection 150(3) provides that the Delegate for Lakes and police officers are also inspectors for the purposes of the instrument.

1.9 As noted above, where an instrument confers coercive powers on a person or class of persons, the committee will be concerned to ensure that the instrument does not unduly trespass on personal rights and liberties. In this regard, the committee will consider whether there are appropriate limits and safeguards in place on the exercise of powers, and whether the persons on whom the powers are conferred possess the appropriate qualifications or experience necessary to exercise the powers. Accordingly, the committee expects the explanatory statement to outline who will be exercising the relevant powers and whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to include the nature and source of any relevant limitations and safeguards on the exercise of the powers, including whether they are contained in law or policy.

1.10 In addition, where an instrument delegates administrative powers or functions to a member of the Australian Public Service, the committee expects that the delegation will be limited to members of the Senior Executive Service (SES) or equivalent. Consequently, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.

1.11 In this instance, neither the instrument nor its explanatory statement appears to provide any guidance about what qualifications or experience a person must possess to be appointed as an inspector, other than being a relevant office-holder in section 150, nor is there any detail about any safeguards or limitations on the exercise of the powers.

10 Explanatory statement, p. 35.

- 1.12 The committee therefore requests the minister's more detailed advice as to:**
- **why entry, search and seizure powers are necessary and appropriate, including how the public interest is served by their inclusion in delegated legislation, rather than primary legislation;**
 - **whether the provisions comply with Chapters 7 and 8 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*;**
 - **the circumstances in which the search and seizure powers will be exercised;**
 - **whether the individuals exercising the powers under section 150 will be required to have the appropriate skills, qualifications and experience to exercise the relevant powers; and**
 - **whether any safeguards or limitations apply to the exercise of these powers, and, if so, whether the safeguards are contained in law or policy.**

Significant penalties;¹¹ significant matters in delegated legislation¹²

1.13 The instrument contains several offences which impose custodial penalties ranging from three to twelve months.¹³ For example, section 47 provides that a person who operates an unsafe boat on the lake may incur a penalty of imprisonment for six months or 38 penalty units (\$8 436), or both.

1.14 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument imposes significant penalties.

1.15 In the committee's view, serious criminal offences and significant penalties should ordinarily be included in primary legislation rather than delegated legislation to ensure appropriate parliamentary oversight of the scope of the offence and penalty.

1.16 Where an instrument imposes significant penalties, the committee expects the explanatory statement to explain the nature and scope of the offence and what penalties apply.¹⁴ The committee also expects the explanatory statement to justify why the penalty is appropriate to the relevant offence, and why it is necessary and appropriate to include such penalties in delegated legislation. In addition, the committee expects the explanatory statement to state whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with

11 Senate standing order 23(3)(j).

12 Senate standing order 23(3)(j).

13 Sections 47, 48, 102, 104 and 105.

14 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 32.

part 3.3 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.¹⁵

1.17 In this instance, the explanatory statement provides that the penalties are consistent with the penalties for equivalent offences set out in the *Lakes Act 1976* (ACT). However, noting that the *Lakes Act 1976* is primary legislation, it remains unclear to the committee why it is appropriate to include such penalties in delegated legislation rather than primary legislation.

1.18 The committee therefore requests the minister's more detailed advice as to:

- **the justification for including custodial penalties in sections 47, 48, 102, 104 and 105 of the instrument, as opposed to primary legislation; and**
- **whether the Attorney-General's Department was consulted in relation to the inclusion of custodial penalties in the instrument, in accordance with Part 3.3 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.**

***Strict liability;*¹⁶ *absolute liability*¹⁷**

1.19 The instrument provides for several strict liability offences.¹⁸ For example, section 14 provides that a person commits an offence of strict liability if they put a boat in a lake or take a boat from a lake (other than a personal watercraft) at a place that is not in a prescribed launching area. Section 104 of the instrument similarly creates a strict liability offence for persons who operate a boat on a lake whilst having a prescribed drug in their oral fluid or blood. However, subsection 104(2) provides that a person cannot rely on a defence of mistake of fact about the identity of the prescribed drug in their oral fluid or blood. Excluding the defence of mistake of fact appears to apply absolute liability to this component of the offence. In addition to these offences on the face of the instrument, section 106 appears to apply certain strict liability offences in the *Road Transport (Alcohol and Drugs) Act 1977* to persons operating a boat on a lake.¹⁹

15 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, part 3.3.

16 Senate standing order 23(3)(h).

17 Senate standing order 23(3)(h).

18 See, for example, section 14 (general restrictions on boats), section 15 (restrictions on swimming and diving) and section 20 (speed limits).

19 See, for example, the strict liability offences in sections 22A, 22B, 22C and 23 of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) as applied by paragraph 106(2)(c) of the instrument.

1.20 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This includes whether the instrument provides for offences of strict or absolute liability.

1.21 The requirement for the prosecution to prove fault on the part of a defendant is an important element of the common law right to be presumed innocent. The application of strict and absolute liability undermines this right by removing the requirement to prove fault in relation to one or more elements of an offence.

1.22 Where an instrument provides for strict or absolute liability offences, the committee expects the explanatory statement to explain the nature and scope of each offence, including the relevant penalties.²⁰ The committee also expects the explanatory statement to justify why it is necessary and appropriate to apply strict or absolute liability to the offence with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.²¹

1.23 The inclusion of absolute liability offences requires a particularly strong justification, as this excludes the fault element and defence of honest and reasonable mistake of fact.

1.24 In this regard, the explanatory statement does not appear to outline why the strict and absolute liability offences are necessary and appropriate. While the statement of compatibility notes that 'many of the strict liability offences in the Ordinance relate to safety on the lake', it is unclear why strict liability offences are necessary for offences that do not relate to lake safety.²²

1.25 The committee further notes that sections 102 and 104 of the instrument include a maximum penalty of 12 months and three months imprisonment respectively. The committee's concerns about the lack of justification for strict or absolute liability offences are heightened by the inclusion of custodial penalties.²³ This is consistent with the position of the Senate Standing Committee for the Scrutiny of Bills and the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, which provides that the application of strict or absolute liability to all

20 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 26.

21 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, part 2.2.6.

22 Explanatory statement, p. 39. See, for example, section 19 (mooring offences), section 32 (camping or caravanning) and section 34 (commercial activity in a lake area).

23 Senate Standing Committee for the Scrutiny of Bills, [Sixth Report of 2002](#) (26 June 2002) p. 284.

physical elements of an offence is not appropriate where the offence is punishable by imprisonment.

1.26 The committee therefore requests the minister's more detailed advice as to why it is necessary and appropriate for the instrument to contain offences of strict and absolute liability, with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, particularly in relation to the following offences:

- **offences that include custodial penalties;**
- **offences in the *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* applied by section 106 of the instrument; and**
- **offences that do not relate to lake safety.**

Reverse burden of proof²⁴

1.27 Several offences in the instrument contain defences which impose an evidential burden of proof,²⁵ or legal burden of proof,²⁶ on the defendant. For example, subsection 15(1) creates an offence for swimming or diving in a lake in an area where swimming or diving is not permitted. Subsection 15(2) provides a defence where the swimming or diving is authorised by a regulated activity permit, and a note to the provision provides that a defendant bears an evidential burden in relation to the matter. Subsection 29(1) of the instrument makes it an offence to anchor a boat on a lake at night. Subsection 29(4) provides a defence if the defendant proves that the boat was anchored for the purpose of viewing a fireworks display and the defendant or someone else was on the boat for that purpose when the boat was anchored. A note to the provision provides that a defendant bears a legal burden in relation to this matter. In addition to these offences, section 106 of the instrument appears to apply certain provisions in the *Road Transport (Alcohol and Drugs) Act 1977* which reverse the legal burden of proof to persons operating a boat on a lake.²⁷

1.28 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to be presumed innocent.

1.29 The right to be presumed innocent is a fundamental principle of the Australian legal system. Normally, the right to be presumed innocent requires the prosecution to prove all elements of an offence. Consequently, this right is undermined by provisions

24 Senate standing order 23(3)(h).

25 See, for example, sections 14, 15, 20 and 21.

26 Sections 29, 50, 75, 78, 89 and 103.

27 See, for example, the offences in sections 22A to 22C of the *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* as applied by paragraph 106(2)(c) of the instrument.

which require the defendant to raise evidence about a matter (reverse evidential burden), or positively prove a matter (reverse legal burden).

1.30 The committee expects that the explanatory statements to instruments which reverse the burden of proof should justify why it is necessary and appropriate to do so in the explanatory statement.²⁸ Where the legal burden of proof is reversed, the committee considers that a much stronger justification is necessary. The committee also expects justification to refer to the test in part 4.3 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.²⁹ This test requires that the relevant matter is peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to prove. In addition, if the provision reverses the legal burden of proof, the committee expects the explanatory statement to justify why this is necessary, rather than reversing the evidential burden of proof.

1.31 In this regard, the committee notes that the explanatory statement provides limited explanation as to why it is necessary and appropriate to reverse the evidential burden of proof in relation to some offences and no explanation as to why it is necessary and appropriate to reverse the legal burden of proof.

1.32 The committee therefore requests the minister's more detailed advice as to:

- **why it is necessary and appropriate to reverse the evidential burden of proof for the relevant offences, with reference to the relevant guidance in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*;**
- **why it is necessary and appropriate to reverse the legal burden of proof in sections 29, 60, 75, 78, 89 and 103 of the instrument, with reference to the relevant guidance in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*;**
- **why it is necessary and appropriate to reverse the legal burden of proof in sections 29, 60, 75, 78, 89 and 103 of the instrument, as opposed to the evidential burden of proof; and**
- **why it is necessary and appropriate to apply provisions reversing the legal burden of proof in the *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* to persons who operate a boat on a lake within the meaning of the instrument.**

28 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 26.

29 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, part 4.3.

Conferral of discretionary powers³⁰

1.33 The instrument contains several provisions which confer broad discretionary powers on specified decision-makers, including the minister and Delegate for Lakes.³¹

1.34 Sections 10, 16, 18 and 27 of the instrument confer broad discretionary powers on the minister to approve certain applications and conduct. For example, section 16 permits the minister to approve an application to anchor a buoy or erect a wharf or jetty in the lake subject to 'any conditions' they think necessary. Similarly, section 18 permits the minister to give a person a permit to moor a boat on such conditions as the minister thinks fit.

1.35 Additionally, subsection 42(1) of the instrument provides that the minister may authorise the Delegate for Lakes to charge for admission to a lake area or a part of a lake area during a period and specify the amount of the admission charged. The instrument does not appear to provide any additional guidance as to the factors to be considered by the Delegate for Lakes in specifying the admission charge. As noted previously,³² section 150 of the instrument empowers the minister to appoint either the Chief Executive of the National Capital Authority or a member of the staff of the National Capital Authority as the Delegate for Lakes.

1.36 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer overly broad discretionary powers on a person.

1.37 The committee considers that instruments that confer discretionary powers on a person should set out the factors which the person must consider in exercising the discretion.³³ The explanatory statement should also address the purpose and scope of the discretion and why it is necessary, and explain who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to outline the nature and source of any relevant limitations on the exercise of the discretionary powers, including whether such limitations are contained in law or policy.

1.38 In addition, where an instrument provides for the delegation of administrative powers or functions to a member of the Australian Public Service, the committee expects that the delegation will be limited to members of the Senior Executive

30 Senate standing order 23(3)(c).

31 Sections 10, 16, 18, 27 and 42.

32 See [1.8]–[1.11].

33 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 2nd edition (February 2022) p. 14.

Service (SES) or equivalent. Consequently, the explanatory statement should provide a thorough justification for any delegation of powers to officers below the SES level.

1.39 In this instance, in the absence of further information in the instrument or its explanatory statement, it remains unclear to the committee why it is necessary for the instrument to empower the minister to approve certain conduct and permit certain actions 'subject to any conditions' or 'as the minister thinks fit'. It is also unclear what such conditions or considerations might be.

1.40 It is similarly unclear to the committee why the instrument does not provide any legislative guidance as to the factors that the Delegate for Lakes should consider in specifying the charge for admission to a lake area under section 42 of the instrument and whether any staff members of the National Capital Authority will be required to possess certain skills or qualifications to be appointed as the Delegate for Lakes under section 150.

1.41 The committee therefore requests the minister's advice as to:

- **what factors the minister may consider in exercising their discretion under subsections 10(2), 16(2), 18(2) and 27(3) of the instrument;**
- **what factors the Delegate for Lakes may consider when deciding whether to charge for admission to a lake area or in determining the amount of the admission to be charged, and whether a maximum cap on the charge can be set;**
- **whether any safeguards or limitations apply to the exercise of these discretionary powers, and whether such safeguards are contained in law or policy; and**
- **whether staff members of the National Capital Authority will be required to have the appropriate skills, qualifications and experience to exercise the powers and functions conferred on the Delegate for Lakes.**

Clarity of drafting³⁴

1.42 Section 60 of the instrument provides that a person commits an offence if they are on a boat on a lake and do something that is 'dangerous to the public'. The explanatory statement notes that this could be for operating a boat on the lake at a speed that is dangerous to the public, or in any other way that is dangerous to the public. However, there is no further information in the instrument or the explanatory statement about what 'dangerous conduct' means in this context.

1.43 Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear. In this instance, the lack

34 Senate standing order 23(3)(e).

of further legislative guidance as to the meaning of 'dangerous conduct' may affect the meaning or interpretation of the instrument, and may prevent persons interested in or affected by the law from understanding their rights and obligations. This is particularly important in circumstances such as this where a penalty attaches to the relevant conduct.³⁵

1.44 The committee therefore requests the minister's more detailed advice as to the meaning of 'dangerous conduct' in relation to section 60 of the instrument.

Availability of independent merits review³⁶

1.45 The instrument empowers decision-makers to make certain discretionary decisions with the capacity to affect rights, liberties, obligations or interests.³⁷ For example, section 10 of the instrument empowers the minister to determine the amount of compensation to be paid to land owners if their land is 'injuriously affected' as a result of an act authorised by the minister under section 9.

1.46 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests. The committee ordinarily expects that such decisions should be subject to independent merits review.

1.47 In this regard, the explanatory statement to the instrument notes that:

Although drafted, provisions providing for administrative review of the Minister's decisions have not been included at this time. This is due to doubt regarding the ability of the Administrative Appeals Tribunal (AAT) to review decisions made under ACT ordinances. The Administrative Appeals Tribunal Amendment Act 2005 deleted the definition of ACT enactment in subsection 3(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). As it stands the definition of enactment in subsection 3(1) of the AAT Act specifically excludes an Ordinance from the Australian Capital Territory. A subsequent amendment to this ordinance, containing the administrative review provisions, can be made once the AAT Act is amended to confirm the AAT can review decisions made under ACT ordinances.³⁸

1.48 Whilst noting this advice, it remains unclear to the committee when this matter might be definitively resolved, such that persons whose rights, liberties obligations or interests are affected by decisions made under the instrument may seek merits review of those decisions.

35 A breach of section 60 attracts 23 penalty units (\$5 106).

36 Senate standing order 23(3)(i).

37 Sections 10, 16, 18, 27 and 42.

38 Explanatory statement, p. 35.

1.49 The committee therefore requests the minister's advice as to whether the Attorney-General's advice has been sought, or will be sought, regarding the progress of amendments to the *Administrative Appeals Tribunal Act 1975* to ensure the availability of merits review in relation to the instrument.

Compliance with Legislation Act 2003 – incorporation;³⁹ incorporated materials freely accessible⁴⁰

1.50 Section 49 of the instrument creates an offence of strict liability to operate a boat where that boat is powered by a motor that exceeds the 'appropriate power rating'. Subsection 49(2) defines the 'appropriate power rating' by reference to the *Australian Standard AS 1799.1-2021, Small craft, Part 1: General requirements for power boats* (the Australian Standard), as in force at the commencement of the instrument.

1.51 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* that the explanatory statement to an instrument that incorporates a document describe that document, the manner in which it is incorporated and how it may be obtained. In addition, under Senate standing order 23(3)(f), the committee expects that any incorporated documents may be freely accessed and used.

1.52 In this instance, the explanatory statement does not appear to confirm that the Australian Standard is incorporated by reference in the instrument, nor does it describe the Australian Standard or indicate how it may be freely accessed.

1.53 The committee therefore requests the minister's advice as to whether the *Australian Standard AS 1799.1-2021, Small craft, Part 1: General requirements for power boats* is incorporated by reference in the instrument, and, if so, how it may be freely obtained.

Legal certainty⁴¹

1.54 Section 106 of the instrument is an application provision. It states that certain provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (the Road Transport Act) and any relevant regulation, as in force at the commencement of the instrument, applies to a person who operates a boat on a lake.

39 Senate standing order 23(3)(a).

40 Senate standing order 23(3)(f).

41 Senate standing order 23(3)(m).

1.55 Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes ensuring legal certainty.⁴² The committee generally considers that provisions which impose obligations on a person should be drafted with sufficient clarity to enable them to understand those obligations. Failure to do so may undermine legal clarity and certainty.

1.56 In this instance, neither the instrument nor the explanatory statement appear to provide any additional information about whether any regulations have been made under these provisions of the Road Transport Act, or where this information can be accessed. In the absence of this information, it is unclear to the committee what requirements may apply.

1.57 The committee's concern regarding the lack of legal certainty is heightened by the inclusion of offences and the application of penalties in the Road Transport Act. In this regard, it is unclear whether the penalty units that are brought across from the Road Transport Act into the instrument are subject to the amount determined by Commonwealth law or Australian Capital Territory law.

1.58 The committee therefore requests the minister's advice as to:

- **which regulations, if any, apply under section 106 of the instrument;**
- **whether an individual subject to an offence under a provision of the *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* or regulation made under it is subject to the penalty units set under Commonwealth or Australian Capital Territory law; and**
- **whether, in drafting the instrument, consideration has been given to redrafting the relevant provisions of the *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* and any other relevant Australian Capital Territory laws for inclusion in the instrument to ensure consistency with the Australian Capital Territory legislative framework and clarity over what obligations apply to an individual.**

42 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 38.

Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022

FRL No.	F2022L00481 ⁴³
Purpose	Amends the Australian Renewable Energy Agency Regulation 2016 to include a new function for the Australian Renewable Energy Agency to support clean energy technologies.
Authorising legislation	<i>Australian Renewable Energy Agency Act 2011</i>
Portfolio	Climate Change, Energy, the Environment and Water
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022)

Overview

1.59 The Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 (the instrument) amends the Australian Renewable Energy Agency Regulation 2016 (the principal regulations) to provide that the Australian Renewable Energy Agency (ARENA) can support clean energy technologies. The instrument was made prior to the prorogation of the 46th Parliament.

1.60 The instrument is similar in nature to two recent instruments considered by the committee: the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] and the Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]. Both instruments were disallowed by the Senate.⁴⁴

1.61 The most significant measures introduced by this instrument into the principal regulations have since been removed by the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022 [F2022L01004] which was registered on the Federal Register of Legislation on 22 July 2022. The committee has therefore resolved to draw its scrutiny concerns about this instrument to the attention of the Senate, without seeking the minister's further advice.

43 Accessible on the [Federal Register of Legislation](#).

44 The Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590] was disallowed by the Senate on 22 June 2021; the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] was disallowed in the Senate on 28 March 2022.

Scrutiny concerns

Compliance with authorising legislation⁴⁵

1.62 Item 9 of Schedule 1 to the instrument inserts new section 6 into the principal regulations to prescribe a new legislative function for ARENA to facilitate clean energy technologies. Item 3 of Schedule 1 inserts a definition of 'clean energy technologies' into the principal regulations, which has the same meaning as in the *Clean Energy Finance Corporation Act 2012*. The explanatory statement clarifies that 'clean energy technologies are technologies that are made up from one or more of renewable energy technologies, energy efficiency technologies and low-emission technologies'.⁴⁶

1.63 Item 9 of schedule 1 also inserts new section 7 into the principal regulations. New section 7 seeks to limit the operation of new section 6 to prevent the provision of financial assistance which is inconsistent with the *Australian Renewable Energy Agency Act 2011* (the ARENA Act) or is inconsistent with the regulation-making power provided for in paragraph 8(f) or section 74.⁴⁷

1.64 Section 3 of the ARENA Act provides that the main objects of the Act are to improve the competitiveness of renewable energy technologies, and to increase the supply of renewable energy in Australia.⁴⁸ Section 8 prescribes ARENA's functions. These functions relate to research and development of renewable energy technologies. Paragraph 8(f) provides that further functions can be prescribed via regulations made under the Act. In addition, paragraph 8(h) permits ARENA to do anything 'incidental or conducive to' the performance of its legislated functions.

1.65 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act. The committee is therefore concerned that, as with the previous two ARENA instruments, this instrument expands the remit of ARENA beyond what was envisaged by Parliament when the ARENA Act was passed. This interpretation is supported by the fact that there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that the ARENA would have the ability to foster anything other than renewable energy technologies.

45 Senate standing order 23(3)(a).

46 Explanatory statement, p. 8.

47 Item 9 of schedule 1, new paragraphs 7(a) and (b).

48 *Australian Renewable Energy Agency Act 2011*, section 3.

1.66 The committee raised near-identical scrutiny concerns about the compliance of the previous two ARENA instruments with the ARENA Act.⁴⁹ Both instruments sought to expand the remit of ARENA and were subsequently disallowed in the Senate.

1.67 From a scrutiny perspective, the committee is again concerned that the instrument seeks to expand the remit of ARENA beyond what was envisaged by Parliament when the ARENA Act was passed. The committee noted that the object of the ARENA Act is to improve the competitiveness and supply of renewable energy in Australia.

1.68 Section 15AA of the *Acts Interpretation Act 1901* provides that in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation. In this regard, the committee's position is that the interpretation that would best achieve the purpose or object of the Act is one that limits the functions of ARENA to investing in renewable energy technologies.

1.69 The committee's view is that statutory provisions must be read in context,⁵⁰ and that the terminology used in section 8 of the ARENA Act to provide ARENA's functions in relation to renewable energy indicates there are limits on the power to prescribe further functions by regulation. In addition, the committee considers that in general, delegated legislation can fill out the detail of an Act but cannot extend it. Where the power to extend the operation of an Act is claimed, it would need to be clear that the enabling provision is a Henry VIII power. In this instance, it does not appear to the committee that this is the case.

1.70 The explanatory statement to the instrument comments:

The power to prescribe additional functions for ARENA by regulation is not limited to the subject matter of renewable energy. There is nothing in the wording of paragraph 8(f) of the Act or in the Explanatory Memorandum to the Bill that became the Act which would indicate an intention to limit the regulation-making power to renewable energy alone. While the “main object” of the Act in section 3 relates to renewable energy, there is nothing that expressly excludes ARENA from pursuing other objects, including those conferred through additional functions such as those prescribed by the Regulations. It is also relevant that the new functions prescribed by the

49 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 8 of 2021](#) (16 June 2021) p. 15; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2021](#) (11 August 2021) pp. 8, 27; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) p. 43; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2022](#) (30 March 2022) p. 27.

50 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 [69].

Regulations are funded by new appropriations, and do not impact on the delivery of the statutory appropriation set out in section 64 of the Act.⁵¹

1.71 The committee recognises that this interpretation of the scope of ARENA under the Act has been the consistent position of the previous government. However, the committee maintains its scrutiny concerns that the instrument goes beyond the intentions of Parliament in passing the Act. These concerns are supported by the two recent disallowances of the two ARENA regulations in the Senate in 2021 and earlier in 2022, which are, in the committee's view, clear indications that Parliament does not intend for the remit of ARENA to be expanded in this manner.

1.72 In relation to new section 7 in item 9 of the instrument, the committee notes that subsection 13(2) of the *Legislation Act 2003* provides that if the making of a legislative instrument would be construed as being in excess of the power to make the instrument, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power. The need for new section 7 is therefore unclear, noting that the *Legislation Act 2003* already addresses the issue of the validity of instruments which may be made beyond power.

1.73 The committee notes that the key measures in this instrument which raise these scrutiny concerns have since been removed by the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022 [F2022L01004] which was registered on the Federal Register of Legislation on 22 July 2022. While it is important for the committee to draw its scrutiny views on this instrument to the attention of the Senate, the committee recognises that the most relevant provisions are no longer operational and therefore have no practical effect.

1.74 Noting that the instrument has now been superseded by the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022 [F2022L01004], the committee draws its scrutiny concerns to the attention of the Senate and makes no further comment.

51 Explanatory memorandum, p. 4.

Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022

FRL No.	F2022L01004 ⁵²
Purpose	To amend the Australian Renewable Energy Agency Regulation 2016 to remove 'clean energy technologies' from the functions of the Australian Renewable Energy Agency (ARENA) and add 'energy efficiency' and 'electrification' as new functions.
Authorising legislation	<i>Australian Renewable Energy Agency Act 2011</i>
Portfolio	Climate Change, Energy, the Environment and Water
Disallowance	15 sitting days after tabling (tabled in the Senate on 27 July 2022)

Overview

1.75 The Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022 (the instrument) amends the Australian Renewable Energy Agency Regulation 2016 (the principal regulations) to prescribe 'energy efficiency technologies' and 'electrification technologies' as functions of the Australian Renewable Energy Agency (ARENA) and remove 'clean energy technologies' from the list of prescribed functions.⁵³

1.76 The instrument is made under section 74 of the *Australian Renewable Energy Act 2011* (the ARENA Act), which empowers the Governor-General to make regulations under that Act. Section 8 of the ARENA Act sets out the functions of the Australian Renewable Energy Agency (ARENA) and provides that ARENA's functions include 'any other functions that are prescribed by regulations'.⁵⁴

52 Accessible on the [Federal Register of Legislation](#).

53 'Clean energy technologies' was added to ARENA's prescribed functions by the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulation 2022 [F2022L00481]. This instrument is considered at [1.59]–[1.74].

54 *Australian Renewable Energy Agency Act 2011* (ARENA Act), paragraph 8(f).

1.77 In the 46th Parliament the committee engaged extensively with the previous government about the scope of functions which can be conferred on ARENA by delegated legislation under paragraph 8(f) of the ARENA Act.⁵⁵

Scrutiny concerns

Compliance with authorising legislation⁵⁶

1.78 Items 2 to 4 of Schedule 1 to the instrument amend section 6 of the principal regulations to omit 'clean energy technologies' and substitute it with 'energy efficiency technologies' and 'electrification technologies'. This has the effect of providing that ARENA can give financial assistance to invest in these types of technologies. Item 1 inserts definitions of 'energy efficiency technologies' and 'clean energy technologies' into the principal regulations. 'Energy efficiency technologies' is defined to include energy conservation and demand management technologies and 'technologies (including enabling technologies) that are related to energy efficiency technologies'.

1.79 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act. For the reasons outlined below, the committee is concerned that, as with the previous three ARENA instruments,⁵⁷ this instrument expands the remit of ARENA beyond what was envisaged by Parliament when the ARENA Act was passed. This interpretation is supported by the fact that there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that ARENA would have the ability to foster anything other than renewable energy technologies.

1.80 The committee raised similar scrutiny concerns about the compliance with the ARENA Act of the previous three ARENA instruments, which also sought to expand the

55 These concerns related to the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] and the Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]. See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 8 of 2021](#) (16 June 2021) p. 15; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2021](#) (11 August 2021) pp. 8, 27; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) p. 43; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2022](#) (30 March 2022) p. 27.

56 Senate standing order 23(3)(a).

57 Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043]; Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]; and Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 [F2022L00481].

functions of ARENA.⁵⁸ The Senate subsequently disallowed two of these instruments. The third instrument, the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 [F2022L00481], has since been amended by this instrument.

Scope of power to prescribe ARENA's functions under the ARENA Act

1.81 As noted above, the instrument is made under the regulation-making power in section 74 of the ARENA Act. This section empowers the Governor-General to make regulations prescribing matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

1.82 Section 3 of the ARENA Act provides that the main objects of the Act are to improve the competitiveness of renewable energy technologies, and to increase the supply of renewable energy in Australia.⁵⁹ Section 8 prescribes ARENA's functions. These functions relate to research and development of renewable energy technologies. Paragraph 8(f) provides that further functions can be prescribed via regulations made under the Act. In addition, paragraph 8(h) permits ARENA to do anything 'incidental or conducive to' the performance of its legislated functions.

1.83 In general, the committee considers that delegated legislation can provide additional detail relevant to an Act but cannot extend it. Where the power to extend the operation of an Act is claimed, it would need to be clear that the enabling provision is a Henry VIII power. This does not appear to be the case in this instance. Accordingly, the instrument needs to fall within the existing scope of the ARENA Act.

1.84 In this regard, the explanatory statement to the instrument advises:

The power to prescribe additional functions for ARENA by regulation is not narrowly limited to the subject matter of renewable energy. There is nothing in the wording of paragraph 8(f) of the Act or in the Explanatory Memorandum to the Bill that became the Act which would indicate an intention to limit the regulation-making power to renewable energy alone. While the "main object" of the Act in section 3 relates to renewable energy, there is nothing that expressly excludes ARENA from pursuing other objects, including those conferred through additional functions such as those prescribed by the Regulations. It is also relevant that the new functions prescribed by the Regulations are funded by separate appropriations, and

58 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 8 of 2021](#) (16 June 2021) p. 15; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2021](#) (11 August 2021) pp. 8, 27; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) p. 43; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2022](#) (30 March 2022) p. 27.

59 *Australian Renewable Energy Agency Act 2011*, section 3.

do not impact on the delivery of the statutory appropriation set out in section 64 of the Act.⁶⁰

1.85 The committee notes that section 15AA of the *Acts Interpretation Act 1901* provides that in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation. As set out above, section 3 of the Act is clear that the object of the Act is to improve technology and supply of renewable energy. The committee reiterates that there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that ARENA would have the ability to foster anything other than renewable energy technologies.

1.86 The committee's view is that statutory provisions must be read in context,⁶¹ and that the terminology used in section 8 to provide ARENA's functions in relation to renewable energy indicates there are limits on the power to prescribe further functions by regulation. Accordingly, the committee considers that the interpretation of paragraph 8(f) of the ARENA Act that would best achieve the purpose or object of the Act is one that limits the prescribed functions to matters conducive or incidental to the use of renewable energy.

1.87 The committee acknowledges that section 7 of the principal regulations provides that the functions prescribed under section 6 do not extend to providing financial assistance that is inconsistent with the Act or not authorised by the regulation-making power provided for by paragraph 8(f) and section 74 of the ARENA Act.⁶² However, subsection 13(2) of the *Legislation Act 2003* already provides that if the making of a legislative instrument would be construed as being in excess of the power to make the instrument, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power. The need for section 7 is therefore unclear, noting that the *Legislation Act 2003* already addresses the issue of the validity of instruments which may be made beyond power.

Connection between the prescribed functions and the purpose of the ARENA Act

1.88 In light of the above, the committee is concerned that the instrument may authorise ARENA to foster energy efficiency technologies which are not incidental or conducive to the use of renewable energy. On this issue, the explanatory statement notes:

60 Explanatory statement, p. 4.

61 *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 [69].

62 This provision was inserted by the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 [F2022L00481], considered at [1.59]–[1.74].

The purpose of the Regulations is consistent with the objectives of the Act, as these additional technologies are expected to support the transition to greater shares of renewable energy generation and/or reduce the cost of transitioning to a greater share of renewable energy generation and use, resulting in an overall increase in the competitiveness and supply of renewable energy technologies. It is consistent with the Act to prescribe additional functions of energy efficiency, which includes demand management and energy conservation, and the transition to electrification of other sectors of the economy. This will provide market pull for greater investments in renewable energy generation and progressive fuel switch in the generation mix. The benefits of demand management are particularly important for energy reliability as Australia moves to transform its economy consistent with the new 2030 and 2050 emissions reduction targets whilst utilising greater amounts of variable renewable energy sources.⁶³

1.89 While noting this advice, the connection between energy efficiency technologies and renewable energy is not immediately clear to the committee. The explanatory statement appears to justify the inclusion of energy efficiency technologies as an approach to promote the transition over time to renewable energy generation; however, it is not clear how this is incidental or conducive to the performance of ARENA's currently legislated functions, which are to improve technology and supply of renewable energy. As per paragraph 8(h) of the Act, additional functions are authorised when they are incidental or conducive to the performance of ARENA's legislated functions. In this regard, the committee does not consider that, based on the information provided, energy efficiency technologies are sufficiently incidental or conducive to the performance of ARENA's legislated renewable energy functions.

Proposed amendments to the ARENA Act

1.90 The explanatory statement to the instrument advises that the government intends to move amendments to the Act to provide certainty to these additional functions and to allow ARENA to further expand its operation:

The Regulations are an interim measure, until the Act can be amended, to allow ARENA to undertake activities that further support their objective of increasing the supply of renewable energy. The regulation making power allows for new functions. The new functions conferred by the Regulations do not constrain the existing functions of ARENA set out in the Act, which include electrification that uses renewable energy. The need to continue to progress energy efficiency and electrification through funding provided to ARENA means the Regulations are necessary in advance of any Act amendments.⁶⁴

63 Explanatory statement, p. 2.

64 Explanatory statement, p. 1.

1.91 Noting the committee's past scrutiny concerns about the scope of functions which can be conferred on ARENA under paragraph 8(f) of the ARENA Act, the committee is concerned that the instrument was made and came into force prior to the Act being amended.

Conclusion

1.92 For the reasons set out above, the committee remains of the view that the power to prescribe ARENA's functions under paragraph 8(f) of the ARENA Act is limited to renewable energy or matters incidental or conducive to renewable energy. On the information provided in the explanatory statement, it is unclear to the committee whether the functions prescribed by this instrument in relation to 'energy efficiency' technologies are incidental or conducive to renewable energy.

1.93 The committee therefore requests the new minister's advice as to:

- **why the energy efficiency technologies are not explicitly limited to those incidental or conducive to renewable energy; and**
- **whether the definition of energy efficiency technologies in the instrument can be narrowed to focus on those incidental or conducive to renewable energy.**

*Consultation with persons affected*⁶⁵

1.94 The explanatory statement to the instrument explains that ARENA was consulted on a draft version of the instrument and intends to undertake further consultation.

1.95 Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, including relevant experts, were adequately consulted in relation to the specific instrument.

1.96 Section 17 of the *Legislation Act 2003* requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content, as per paragraph 17(2)(b) of the *Legislation Act 2003*. The committee therefore expects explanatory statements to provide details of any consultation undertaken with persons likely to be affected by the instrument.

1.97 Noting the prominence of ARENA and the substantial amount of parliamentary interest in the recent and similar instruments made to expand its remit, the committee

65 Senate standing order 23(3)(d).

considers that consultation with stakeholders outside of ARENA should have been undertaken. The committee does not consider that, in this instance, consultation with ARENA alone amounts to consultation with persons likely to be affected by the instrument including relevant industry bodies and stakeholders.

1.98 The committee therefore requests the new minister's advice as to why no further consultation was undertaken with affected persons in relation to the instrument.

Bankruptcy Amendment (Service of Documents) Regulations 2022

FRL No.	F2022L00528 ⁶⁶
Purpose	Amends section 102 of the Bankruptcy Regulations 2021 to disapply paragraphs 9(1)(d) and 9(2)(d) of the <i>Electronic Transactions Act 1999</i> to ensure that the valid electronic service of documents required or permitted by the <i>Bankruptcy Act 1966</i> can occur without the need to seek consent from the recipient.
Authorising legislation	<i>Bankruptcy Act 1966</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022)

Overview

1.99 The Bankruptcy Amendment (Service of Documents) Regulations 2022 (the instrument) amends the Bankruptcy Regulations 2021 (the principal regulations) to disapply paragraphs 9(1)(d) and 9(2)(d) of the *Electronic Transactions Act 1999* to ensure that the valid electronic service of documents required or permitted by the *Bankruptcy Act 1966* can occur without the need to seek consent from the recipient.

Scrutiny concerns

Modification of the operation of primary legislation;⁶⁷ parliamentary oversight⁶⁸

1.100 Paragraphs 9(1)(d) and 9(2)(d) of the *Electronic Transactions Act 1999* provide that information required or permitted to be given to another person under a Commonwealth law can be provided electronically with the recipient's consent. Item 3 of Schedule 1 to the instrument amends section 102 of the principal regulations so that the consent requirements do not apply to the electronic service of documents required or permitted by the Act or the principal regulations. It appears this exemption from the requirements of primary legislation is intended to remain in force for the ordinary 10-year sunset period.

1.101 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(m) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the

66 Accessible on the [Federal Register of Legislation](#).

67 Senate standing order 23(4)(l).

68 Senate standing order 23(4)(m).

technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

1.102 The committee's longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation.⁶⁹ If the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. The committee considers that, in most cases, this means the instrument should cease to operate no more than three years after it commences to ensure a minimum degree of regular parliamentary oversight. This approach facilitates appropriate regular consideration of the ongoing necessity of the relevant provisions and their inclusion in delegated legislation.

1.103 In addition, the committee considers that the explanatory statement to instruments which modify the operation of primary legislation should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate for inclusion in delegated legislation.⁷⁰

1.104 In this instance, the explanatory statement to the instrument does not appear to address why it is necessary and appropriate to implement the exemption in delegated legislation rather than primary legislation, whether a shorter duration for these measures was considered, and whether this approach will be subject to future review.

1.105 The committee therefore requests the minister's advice as to:

- **why it is necessary and appropriate to use delegated legislation, rather than primary legislation, to introduce this exemption from requirements under the *Electronic Transactions Act 1999*;**
- **whether the instrument can be amended to provide that the measures cease within three years after commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine whether they remain necessary and appropriate, including whether it is necessary to include the provisions in delegated legislation.**

69 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 36.

70 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 36.

Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022

FRL No.	F2022L00471 ⁷¹
Purpose	Amends the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 to increase transparency of the operation and structure of franchise systems, before prospective franchisees enter into franchise agreements.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022)

Overview

1.106 The Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022 (the instrument) amends the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the principal regulation) to introduce a public Franchise Disclosure Register and increase transparency regarding the operation and structure of franchise systems.

Scrutiny concerns

Parliamentary oversight—tabling documents⁷²

1.107 New section 53J of the principal regulation, as inserted by item 4 of schedule 1 to the instrument, requires a written report of a review into the operation of Part 5A of the industry code regulation to be provided to the minister before 30 June 2024.

1.108 Senate standing order 23(3)(m) requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. This includes whether instruments provide for reports on significant matters or measures to be tabled in Parliament.

1.109 The committee considers that the tabling of documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where

71 Accessible on the [Federal Register of Legislation](#).

72 Senate standing order 23(3)(m).

documents are not tabled.⁷³ Accordingly, the committee considers that instruments which provide for the review of significant matters should also require the report of that review to be tabled in Parliament.

1.110 In this instance, the explanatory statement to the instrument explains that the report will be published online to:

promote transparency and accountability, as well as ensure appropriate oversight of the review process. It is not necessary for the report to be tabled; since the Regulations have broad support, executive oversight of the review process is sufficient.⁷⁴

1.111 However, the explanatory statement does not appear to indicate why the instrument does not impose a requirement to table the report in Parliament.

1.112 The committee welcomes the requirement that the review be published online, and that relevant stakeholders be provided with an opportunity to make written submissions to the review. However, the committee notes that the tabling of the report in Parliament would provide additional, formal opportunities for parliamentarians to assess, scrutinise and debate the report of the review that are not available via executive oversight. In this way, the tabling requirement would further promote the objectives of transparency and accountability referred to in the explanatory statement.

1.113 Accordingly, the committee requests the minister's advice as to:

- **why the instrument does not require written reports of the review of the industry code regulation instrument under new section 53J to be tabled in Parliament; and**
- **whether the instrument could be amended to include such a requirement.**

73 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 38.

74 Explanatory statement, p. 11.

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022

FRL No.	F2022L00357 ⁷⁵
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on a certain activity administered by the Attorney-General's Department.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 March 2022)

Overview

1.114 The *Financial Framework (Supplementary Powers) Act 1997* (the Act) authorises the Commonwealth to spend public money on grants and program specified in legislative instruments made under it. The Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022 (the instrument) amends the Financial Framework (Supplementary Powers) Regulations 1997 made under the Act to establish legislative authority for government spending on the Justice Services—Community Legal Services Program (CLSP).

1.115 Item 2 of Schedule 1 to the instrument enables the CLSP to develop and implement a training package. Additional spending activities supported under the CLSP include the development and delivery of the National Bench Book on Aboriginal and Torres Strait Islander Peoples and the Legal System (the Bench Book) and the Mental Health Training Package for the Legal Assistance Sector (the training package).

Scrutiny concerns

Supported by a constitutional head of legislative power⁷⁶

1.116 Senate standing order 23(3)(b) requires the committee to scrutinise each legislative instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid. This includes whether

⁷⁵ Accessible on the [Federal Register of Legislation](#).

⁷⁶ Senate standing order 23(3)(b).

instruments which specify Commonwealth expenditure are supported by a constitutional head of power.

1.117 The instrument's explanatory statement provides that the constitutional basis for the training package comes from paragraph 51(v) of the Constitution, which empowers the Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services'.⁷⁷

1.118 Where any instrument is made under the *Financial Framework (Supplementary Powers) Act 1997*, the committee expects the explanatory statement to clearly identify each constitutional head of power that is relied on to support expenditure on the relevant grant or program and to explain how each identified head of legislative power supports the grant or program, drawing on relevant jurisprudence where appropriate.⁷⁸

1.119 In this instance, the explanatory statement indicates that the instrument is supported by paragraph 51(v) of the Constitution as the training package is 'delivered exclusively online'.⁷⁹ It further notes that the citing of this single head of constitutional power does not form a 'comprehensive statement of relevant constitutional considerations' but that the communications power relates to the objective of the training package specifically.⁸⁰

1.120 On the basis of this information, it is unclear to the committee how the instrument might properly be characterised as a law with respect to postal, telegraphic, telephonic and other like services, noting that the instrument itself does not prescribe the manner in which the programs are to be delivered. It is also unclear whether there are any other constitutional heads of power which support the objectives of the training package, in particular, in relation to mental health training and services.

1.121 While questions of legal validity are ultimately a matter for the courts to determine, the Senate has empowered the committee under its standing orders to scrutinise instruments as to whether they appear to be supported by a constitutional

77 Explanatory statement, p. 8.

78 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 12.

79 Explanatory statement, p. 8.

80 Explanatory statement, p. 8.

head of power,⁸¹ and whether this is adequately explained in the explanatory statement.⁸²

1.122 The committee therefore requests the minister's more detailed advice as to how the instrument might properly be characterised as a law with respect to 'postal, telegraphic, telephonic and other like services', and whether there are additional constitutional heads of power providing authority for the implementation and delivery of the training package.

81 Senate standing order 23(3)(b).

82 Senate standing order 23(3)(g).

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022

FRL No.	F2022L00240 ⁸³
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on the Australian Future Leaders Program, which is administered by the Department of the Prime Minister and Cabinet.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 March 2022)

Overview

1.123 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers powers on the Commonwealth to make arrangements under which money can be spent or to make grants of financial assistance to a state, territory or other person, as specified in regulations made under the Act. The Financial Framework (Supplementary Powers) Regulations 1997 (the Regulations) specify the relevant arrangements, grants and programs.⁸⁴

1.124 The Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022 (the instrument) amends the Regulations to establish legislative authority for the government to provide funding to the Australian Future Leaders Foundation Limited to deliver the Australia's Future Leaders Program. It does this by inserting item 544 into Part 4 of Schedule 1AB to the Regulations.

1.125 The explanatory statement to the instrument explains that the program, administered by the Department of the Prime Minister and Cabinet, is a leadership development opportunity for emerging mid-career leaders from government and non-

83 Accessible on the [Federal Register of Legislation](#).

84 The Financial Framework (Supplementary Powers) Regulations 1997 are made under section 65 of the *Financial Framework (Supplementary Powers) Act 1997*, which empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

government sectors including academia, not-for-profit and corporate. It further explains that funding of \$14 million over four years will be available for the program.⁸⁵

1.126 The committee's secretariat, on behalf of the committee, engaged with the Department of Finance about this instrument in May 2022. The committee has now resolved to raise its scrutiny concerns with the minister.

Scrutiny concerns

Adequacy of explanatory materials;⁸⁶ parliamentary oversight⁸⁷

1.127 The committee is concerned that, while the explanatory statement to the instrument sets out the amount of funding authorised for spending on the program (\$14 million over four years from 2021-22), it contains limited information about the eligibility criteria for the program. In this regard, it provides only that 'the program is a leadership development opportunity for emerging mid-career leaders from both government and non-government sectors including academia, not-for-profit and corporate'.⁸⁸ Similarly, item 544 as inserted by the instrument describes the program in broad terms, as a 'national leadership development program'.

1.128 In addition, on the information in the explanatory statement, it is unclear to the committee as to the status of the Foundation and whether the relevant funding has been expended on the program. In this regard, the explanatory statement provides only that the regulations 'establish legislative authority for the Government to provide a grant to the [Foundation] to deliver the [Program].' Such information would further promote appropriate parliamentary oversight of the relevant expenditure.

1.129 Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument. In addition, Senate standing order 23(3)(m) requires the committee to consider whether the instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes details of the eligibility criteria for Commonwealth funding for instruments that specify programs made under the FF(SP) Act.

1.130 The scrutiny of instruments made under the FF(SP) Act is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure. Therefore, the

85 Explanatory statement, p. 2.

86 Senate standing order 23(3)(g).

87 Senate standing order 23(3)(m).

88 Explanatory statement, p. 2.

committee generally expects that the explanatory material to such instruments adequately describe the nature and scope of the relevant program, including the amount of expenditure and the entities to which the funding will be provided. This is particularly the case where the program is described in broad terms in both the instrument and in the explanatory statement. In this instance, as noted above, it remains unclear to the committee what the eligibility criteria are for the program and the status of the expenditure and entity to which it is provided.

1.131 The committee therefore requests the minister's advice as to:

- **whether the eligibility criteria can be made publicly available and, if so, when this is likely to occur;**
- **whether the funding authorised by the instrument has been expended on the program;**
- **the status of the entity or entities to which the funding is proposed to be provided; and**
- **whether the explanatory statement can be amended to include the above information.**

Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022

FRL No.	F2022L00328 ⁸⁹
Purpose	Repeals and re-makes the Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011, to specify certain facilities as ‘fibre-ready facilities’ for the purposes of Part 20A of the <i>Telecommunications Act 1997</i> , and also to provide exemptions from requirements of that Part.
Authorising legislation	<i>Telecommunications Act 1997</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 March 2022)

Overview

1.132 The Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022 (the instrument) repeals and re-makes the Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011, to specify certain facilities as ‘fibre-ready facilities’ for the purposes of Part 20A of the *Telecommunications Act 1997* (the Act) and to exempt certain conduct and projects from the requirements under the Act.

Scrutiny concerns

Exemption from the operation of primary legislation;⁹⁰ parliamentary oversight⁹¹

1.133 Part 3 of the instrument creates exemptions to the statutory requirements relating to the installation of fibre-ready facilities contained in part 20A division 3 of the Act. These include exemptions for the installation of fixed line facilities used in connection with different networks from the requirements in subsections 372E(2) and 372F(2) of the Act,⁹² and exemptions for certain real estate development projects from

89 Accessible on the [Federal Register of Legislation](#).

90 Senate standing order 23(3)(l).

91 Senate standing order 23(3)(m).

92 Part 3 division 1.

the operation of section 372G of the Act.⁹³ The second category of exemptions enables real estate development projects in rural and remote areas to be undertaken without having functioning fibre-ready facilities.

1.134 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(m) requires the committee to scrutinise each legislative instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

1.135 The committee's longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation.⁹⁴ If the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. The committee considers that in most cases, this means the instrument should cease to operate no more than three years after it commences to ensure a minimum degree of regular parliamentary oversight.

1.136 The committee also considers that explanatory statements to instruments that include exemptions from primary legislation should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether they should remain in delegated legislation.⁹⁵

1.137 In this instance, the relevant exemptions have been in force since 2011. This instrument, which remakes the exemptions, will be in force until 2032, under the standard sunset regime of the *Legislation Act 2003*. The explanatory statement to the instrument indicates that these exemptions are supported by industry and are intended to continue in force for a significant amount of time.⁹⁶

1.138 Noting that there appears to be an ongoing need for such exemptions, the committee considers that regulatory certainty would be best served by their inclusion in primary legislation, rather than delegated legislation. This would also afford a higher degree of parliamentary oversight of these measures.

93 Part 3 division 2.

94 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 36.

95 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition, February 2022, pp. 36–37.

96 Explanatory statement, p. 2.

1.139 The committee therefore requests the minister's advice as to whether the measures in the instrument can be set out in primary legislation, and if not, why not

Ongoing matters

1.140 The committee requests further information from relevant ministers about its significant technical scrutiny concerns in relation to the instruments listed below.

Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021

FRL No.	F2021L01768 ⁹⁷
Purpose	Amends the Air Navigation (Aircraft Noise) Regulations 2018 to control the noise impacts of Remotely Piloted Aircraft (RPA) by requiring owners and operators of certain RPAs to obtain approval for the RPAs to engage in air navigation.
Authorising legislation	<i>Air Navigation Act 1920</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022)

Overview

1.141 The Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021 (the instrument) amends the Air Navigation (Aircraft Noise) Regulations 2018 (the principal regulations) to control the noise impacts of Remotely Piloted Aircraft (RPA) by requiring owners and operators of certain RPAs to obtain approval to engage in air navigation.

1.142 The committee raised initial technical scrutiny concerns with the former Deputy Prime Minister (the former minister) on 11 March 2022.⁹⁸ The former minister responded on 21 March 2022.⁹⁹

97 Accessible on the [Federal Register of Legislation](#).

98 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

99 This correspondence will be accessible on the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

Automated decision-making,¹⁰⁰ clarity of drafting¹⁰¹

1.143 The committee initially raised concerns about the inclusion of automated decision-making provisions in the instrument. Section 16A provides that the secretary may approve an application for an aircraft to engage in air navigation. The secretary must include in the approval the period during which the aircraft may engage in air navigation and any conditions with which the applicant must comply. This appears to involve a broad level of discretion. Section 22A further provides that the secretary may arrange for the use, under the secretary's control, of computer programs for the purposes of making a decision under section 16A.

1.144 Where an instrument provides for automated decision-making, the committee considers that the explanatory statement should justify why this is necessary and appropriate.¹⁰² The committee also expects an explanation of the extent to which discretion is involved in the making of the relevant decision and what safeguards are in place.

1.145 Accordingly, the committee sought the former minister's advice as to why it is considered necessary and appropriate for section 22A of the instrument to provide for automated decision-making in relation to decisions made under section 16A, given the broad discretion provided for in this section. The committee also sought the former minister's advice about what safeguards are in place to ensure that the decision-maker exercises their discretionary powers personally and without fetter and whether there are any review rights or complaint mechanisms available to those who are not the owner or operator of relevant RPAs.

Former minister's response¹⁰³

1.146 In response to these concerns, the former minister explained that the instrument is intended to support a 'risk-based approach' to the management of RPA noise and that:

automated decision making will have a limited role in the administration of the regulations and is intended only to support a self-assessment process as part of the risk-based approach to regulating drone noise.

100 Senate standing order 23(3)(m).

101 Senate standing order 23(3)(e).

102 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 39.

103 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

1.147 The former minister explained that where the self-assessment process determines a low risk of impact, an automated approval will be issued. Where the self-assessment process identifies a medium or high risk of noise impacts, drone operators will be required to gain an approval through a comprehensive assessment process managed by a person. The former minister clarified that the applicant will have the option to request that a departmental officer conduct the assessment.

1.148 Regarding the availability of review rights for those who are not the owner or operator of relevant RPAs, the former minister explained that complaints can be made to Airservices Australia, which is responsible for managing complaints and enquiries about aircraft noise through its Noise Complaint and Information Service.

Committee view

1.149 The committee notes the former minister's advice about when automated decision-making will be applied under the instrument, and the review and complaints mechanisms available. However, it is unclear to the committee why the information in the minister's response regarding the risk-based framework is not included in the instrument, including how a 'low', 'medium' or 'high' risk applicant will be determined, noting that this framework appears to be key to determining whether automated decision-making will apply under this instrument.

1.150 The committee also notes the former minister's advice that applicants will have the option to request that a departmental officer conduct the assessment, rather than the automated decision-making system. However, this information does not appear to be reflected in either the instrument or the explanatory statement, raising questions as to how applicants will be aware of this option, and the process by which such an assessment may be conducted.

1.151 The committee therefore requests the new minister's advice as to:

- **what standards or considerations are used to determine whether an Remotely Piloted Aircraft poses a low, medium or high risk;**
- **whether these standards or guidance used to inform the risk level can be included in the instrument;**
- **whether the instrument can be amended to clarify that applicants will have the option to request that a departmental officer conduct the assessment; and**
- **whether the instrument or the explanatory statement can be amended to include information about the available complaint mechanism via Airservices Australia, as detailed in the former minister's response of 21 March 2022.**

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2)

FRL No.	F2021L01658 ¹⁰⁴
Purpose	Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) to specify the conditions that must be met so an issue of an interest in a litigation funding scheme is exempt from the operation of the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> and to define the term litigation funding scheme.
Authorising legislation	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022)

Overview

1.152 The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2) (the instrument) specifies the conditions that must be met for the issue of an interest in a litigation funding scheme to be exempt from the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act).

1.153 The committee first sought advice about potential scrutiny concerns in the instrument in correspondence to the former Minister for Home Affairs (the former minister) on 10 February 2022.¹⁰⁵ The former minister responded on 25 February 2022.¹⁰⁶ The committee sought the former minister's further advice in correspondence of 31 March 2022.¹⁰⁷

104 Accessible on the [Federal Register of Legislation](#).

105 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 9 February 2022, pp. 9–11.

106 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 30 March 2022, pp. 1–4.

107 The relevant correspondence will be available via the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

Exemption from the operation of primary legislation;¹⁰⁸ exemption from sunseting¹⁰⁹

1.154 Section 248 of the Act empowers the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to make a written instrument which exempts people from provisions of the Act either unconditionally or subject to specified conditions. The breach of such conditions is subject to a civil penalty.¹¹⁰

1.155 The committee raised initial concerns with the former minister as to why the instrument sets out exemptions to the operation of primary legislation, noting the committee's longstanding view that executive-made law should not ordinarily amend the operation of parliamentary enactments.¹¹¹ These concerns are heightened by the fact that the measures in the instrument are exempt from sunseting and the explanatory statement does not appear to justify this exemption. Accordingly, the committee requested the minister's advice as to:

- why it was considered necessary and appropriate to use delegated legislation to exempt the issue of interests in litigation funding schemes from the operation of the Act; and
- why it was considered necessary and appropriate for the exemption to remain in force indefinitely.

Former minister's response¹¹²

1.156 In her response of 22 April 2022, the former minister advised that including these exemptions in delegated legislation allows for a more flexible approach in the face of changes and emerging risks in the sector. The minister also expressed concerns that a longer timeframe for progressing the changes via primary legislation may effectively cause litigation funders to cease their activities pending the change.

1.157 Regarding the ongoing operation of the relevant provisions, the former minister advised that in the future AUSTRAC will include a justification for exempting such provisions from sunseting in explanatory statements.

108 Senate standing order 23(3)(l).

109 Senate standing order 23(3)(k).

110 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, subsections 248(3) and (4).

111 The relevant correspondence is available via the [Index of Instruments](#) page on the committee's website.

112 The relevant correspondence will be available via the [Index of Instruments](#) page on the committee's website.

Committee view

1.158 The committee welcomes the former minister's advice that AUSTRAC will include justifications for any exemptions from sunseting in future explanatory statements. This is an important step towards improving parliamentary oversight of delegated legislation which continues in force indefinitely.

1.159 The committee also acknowledges the former minister's advice that it is necessary to include the relevant exemptions in delegated legislation, rather than primary legislation, as the longer timeframes associated with amending primary legislation could compromise the capacity of litigation funders to continue their activities and promote access to justice through open class actions.

1.160 While noting the former minister's advice as to the immediate need to include the exemptions in delegated legislation, it remains unclear to the committee why the exemptions cannot be time limited. In the committee's view, limiting the operation of the exemptions to a period of three years would appear to address the immediate regulatory gap identified by the minister, whilst ensuring a minimum degree of regular parliamentary oversight and providing time to consider future amendments to primary legislation.

1.161 In light of the above, the committee seeks the new minister's advice as to:

- **whether the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) can be amended to provide that the exemptions to primary legislation inserted by the instrument cease within three years of their commencement; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate for inclusion in delegated legislation.**

Competition and Consumer Amendment (Consumer Data Right) Regulations 2021

FRL No.	F2021L01617 ¹¹³
Purpose	Amends the Competition and Consumer Regulations 2010 to exempt the Australian Energy Market Operator (AEMO) from four privacy safeguard obligations, and in circumstances where AEMO provides Consumer Data Right data to a retailer.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ¹¹⁴

Overview

1.162 The Competition and Consumer Amendment (Consumer Data Right) Regulations 2021 (the instrument) amends the Competition and Consumer Regulations 2010 (the principal regulations) to exempt the Australian Energy Market Operator (AEMO) from four privacy safeguard obligations, and in circumstances where AEMO provides Consumer Data Right data to a retailer.

1.163 The committee first wrote to the former Treasurer on 10 February 2022, seeking further information in response to its technical scrutiny concerns.¹¹⁵ The former Minister for Superannuation, Financial Services and the Digital Economy (former minister) responded on 28 March 2022.¹¹⁶

113 Accessible on the [Federal Register of Legislation](#).

114 The instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

115 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 25 January 2022, pp. 12–14.

116 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

Exemption from the operation of primary legislation;¹¹⁷ exemption from sunseting¹¹⁸

1.164 The committee initially raised concerns that the instrument exempts AEMO from the operation of privacy safeguard obligations in the *Competition and Consumer Act 2010* (the Act) on an ongoing basis, due to the exemption of the principal regulations from sunseting.

1.165 The committee's longstanding view is that provisions which modify or exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation.¹¹⁹ If the provisions are in delegated legislation, the provisions should operate no longer than strictly necessary. The committee considers that in most cases, this means the provisions should cease to operate no more than three years after they commence to ensure a minimum degree of regular parliamentary oversight.

Former minister's response

1.166 In their response of 28 March 2022, the former minister explained that the Act empowers the Treasurer to make such designations by instrument and the measures have therefore been included in delegated legislation in a manner consistent with the structure of the Consumer Data Right regime. The former minister also advised that these exemptions apply to a small number of entities in exceptional circumstances, as foreshadowed in the explanatory memorandum of the relevant bill.

1.167 In addition, the former minister advised that consideration could be given to the necessity and appropriateness of including the exemptions in delegated legislation as part of the statutory review of the Consumer Data Right legislation that has recently been initiated under the Act.

1.168 Regarding the ongoing nature of the exemption, the former minister stated:

It is highly unlikely that there would ever be changes to AEMO's holding of CDR data such that AEMO could independently identify individual consumers, as this has been the status quo since the National Electricity Market commenced in 1998. As these circumstances are ongoing and not likely to change in the future, it would not be effective or appropriate for the modifications of this instrument to cease operating within three years

117 Senate standing order 23(3)(l).

118 Senate standing order 23(3)(k).

119 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 36.

of their commencement. Additionally, repealing these provisions in three years would lead to the removal of privacy safeguards applied to retailers, leaving uncertainty for AEMO, retailers and consumers.

Committee view

1.169 The committee welcomes the former minister's advice that the provisions may be considered as part of the statutory review of the Consumer Data Right legislation initiated under the Act. In this regard, the committee notes that the review was due to be completed in July 2022.¹²⁰ In the absence of further information, it is unclear to the committee whether this matter was considered in the review and, if so, the outcome of such consideration.

1.170 The former minister's advice that AEMO requires the relevant exemption on an ongoing basis indicates that the exemption would be more appropriate to include in primary legislation, rather than delegated legislation. While such exemptions remain in delegated legislation, the committee reiterates the importance of ensuring that the exemptions are subject to regular review and control by Parliament. This is an important component of Parliament's delegation of its law-making powers to the executive.

1.171 In response to the former minister's concern that the repeal of the provisions in three years could remove important privacy safeguards applied to retailers, the committee notes that this issue could be resolved by including the exemptions in primary legislation or by remaking the provisions at the end of three years with the additional benefit of regular parliamentary oversight.

1.172 The committee therefore requests the new minister's advice as to:

- **whether the statutory review of the Consumer Data Right legislation considered the use of delegated legislation to exempt AEMO from privacy safeguard obligations and, if so, any outcomes of that review; and**
- **whether the provisions exempting AEMO from certain privacy safeguard obligations under the *Competition and Consumer Act 2010* could be time-limited to facilitate greater parliamentary oversight.**

120 The Treasury, [Statutory Review of the Consumer Data Right](#), 2022.

Privacy;¹²¹ adequacy of explanatory materials¹²²

1.173 The committee raised concerns with the former minister in relation to the privacy of consumer information held by AEMO.¹²³

Former minister's response

1.174 The former minister provided detailed information about the relationship between AEMO and private consumer data in her response of 28 March 2022. Notably, she confirmed that AEMO does not hold private consumer data under the existing legislative framework and will not do so in the future in relation to the data shared under the Consumer Data Right.¹²⁴

Committee view

1.175 Noting the detailed information provided by the former minister about the operation of the Consumer Data Right in relation to AEMO, and the fact that AEMO does not and will not hold private or personal consumer data, the committee is satisfied that the information provided alleviates its scrutiny concerns relating to privacy.

1.176 In light of the information provided by the former minister, the committee concludes its examination of the instrument in relation to privacy.

121 Senate standing order 23(3)(h).

122 Senate standing order 23(3)(g).

123 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 January 2022, pp. 12–14.

124 This correspondence will be accessible on the [Index of Instruments](#) page on the committee's website.

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021

FRL No.	F2021L01080 ¹²⁵
Purpose	Amends the Corporations Regulations 2001 to partially implement recommendations 3.4 and 4.1 of the Financial Services Royal Commission in relation to the hawking of financial products.
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ¹²⁶

Overview

1.177 The Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080] (the instrument) amends the Corporations Regulations 2001 (the Corporations Regulations) to create exemptions to the prohibition on hawking financial products in new section 992A of the *Corporations Act 2001* (the Corporations Act).

1.178 The committee engaged extensively with the former Treasurer about its scrutiny concerns in the instrument in the previous Parliament.¹²⁷ Its concerns, detailed below, centre on the use of delegated legislation to create ongoing exemptions to primary legislation. In November 2021, the committee Chair, on the committee's behalf, gave a notice of motion to disallow the instrument to provide the Senate with additional time to consider the committee's scrutiny concerns.

125 Accessible on the [Federal Register of Legislation](#).

126 The instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

127 The committee first raised concerns with the former Treasurer in correspondence of 30 September 2021. The former Treasurer responded on 22 October 2021. The committee sought the Treasurer's further advice in correspondence of 25 November 2021 and 25 January 2022, to which the former Treasurer responded on 10 December 2021 and 7 February 2022. This correspondence is summarised in [Delegated Legislation Monitor 3 of 2022](#), pp. 3–5. The full text of the correspondence is available via the [Index of Instruments](#) on the committee's webpage.

1.179 Despite the committee's extensive engagement with the former Treasurer, its scrutiny concerns were not resolved. Accordingly, in *Delegated Legislation Monitor 3 of 2022*, the committee confirmed that it would not withdraw its notice of motion to disallow the instrument and instead recommended that it be disallowed.¹²⁸

1.180 The committee's notice of motion to disallow the instrument lapsed at the prorogation of the 46th Parliament.¹²⁹ The *Legislation Act 2003* provides that where an instrument is subject to an unresolved disallowance motion at prorogation, it is deemed to be tabled on the first sitting day of the new Parliament, so that the 15 sitting day period for giving a notice of motion to disallow the instrument begins anew.¹³⁰ The committee has therefore resolved to raise its scrutiny concerns with the new Treasurer.

Scrutiny concerns

Exemptions from the operation of primary legislation;¹³¹ parliamentary oversight¹³²

1.181 Item 2 of Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* amended the Corporations Act to prohibit hawking of financial products. As amended, section 992A of the Corporations Act provides that a person cannot offer to sell or issue a financial product to a consumer if the offer is made in the course of, or because of, unsolicited contact with the consumer.

1.182 The provisions inserted by the instrument into the Corporations Regulations are not explicitly time-limited and the Corporations Regulations themselves are not subject to sunseting. Accordingly, it appears that the exemptions inserted by the instrument are intended to remain in force on an ongoing basis.

1.183 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(m) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

128 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2022](#) (10 March 2022) pp. 2–7.

129 Prorogation terminates all business pending before both Houses of Parliament, including notices of motion: [Odgers' Australian Senate Practice](#), p. 185.

130 *Legislation Act 2003*, subsection 42(3).

131 Senate standing order 23(3)(l).

132 Senate standing order 23(3)(m).

1.184 The committee's longstanding view is that provisions which amend or modify the operation or primary legislation, or exempt person or entities from the operation of primary legislation, should be included in primary rather than delegated legislation.¹³³ If the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. The committee considers that in most cases, this means the instrument should cease to operate no more than three years after it commences to ensure a minimum degree of regular parliamentary oversight. This view was clearly set out in the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight.¹³⁴

1.185 In this instance, the explanatory statement to the instrument does not address why the exemptions are provided for in delegated, rather than primary, legislation, nor does it appear to address why it is necessary and appropriate for the exemption to continue in force for an unspecified period of time. The committee therefore sought the former Treasurer's advice about these matters, including whether the duration of the exemptions could be limited in accordance with the committee's guidelines.¹³⁵ In the committee's view, such an approach would facilitate necessary parliamentary oversight of provisions modifying primary law.

Former minister's response

1.186 In his correspondence with the committee, the former Treasurer advised that it is necessary and appropriate to include the exemptions in delegated legislation due to the specific nature of the exemptions, and the fact that they do not apply to all persons who are offering to sell or issue financial products.

1.187 The former Treasurer also advised that the Australian Law Reform Commission (ALRC) has undertaken to conduct a review of Chapter 7 of the Corporations Act, which may include consideration of whether it is appropriate for these provisions to be included in delegated legislation.¹³⁶

1.188 Regarding the ongoing nature of the exemptions, the former Treasurer explained that it would 'not be appropriate for the provisions to cease to have effect

133 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p 36.

134 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 120–121.

135 See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p 36.

136 This correspondence is accessible via the [Index of Instruments](#) page on the committee's website.

after three years, as they are made under a specifically delegated power rather than a general exemption or modification power'.¹³⁷

Committee view

1.189 The committee notes the former Treasurer's advice that the specific nature of the exemptions, including the limits on the classes of people to whom they apply, makes them appropriate for inclusion in delegated legislation.

1.190 Where it is considered necessary to use delegated legislation to create an exemption to primary legislation, the committee remains of the view that such exemptions should be time-limited, to preserve Parliament's capacity to review the ongoing necessity and appropriateness of the exemptions, including whether they should continue to be included in delegated legislation.

1.191 The committee further notes that limiting the duration of the relevant exemptions would allow sufficient time for the findings of the ALRC's review of the Corporations Act to be finalised and considered prior to the cessation of the provisions.

1.192 As the disallowance period for the regulations restarted following the prorogation of the 46th Parliament, the committee requests the new Treasurer's advice as to whether the Corporations Regulations can be amended to provide that the relevant exemptions cease to operate three years after they commence.

137 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 October 2021, pp. 49–50.

Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021

FRL No.	F2021L01708 ¹³⁸
Purpose	Prescribes the Underwriting New Generation Investments Program to reduce wholesale electricity prices by increasing competition and supply, assist commercial and industrial customers and smaller retailers to access affordable energy supply arrangements, and improve the reliability of the system by increasing the level of firm capacity.
Authorising legislation	<i>Industry Research and Development Act 1986</i>
Portfolio	Industry, Science and Resources
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022) ¹³⁹

Overview

1.193 The *Industry Research and Development Act 1986* (the IRD Act) authorises the Commonwealth to spend public money on programs that the minister prescribes by legislative instruments.

1.194 The Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021 (the instrument) prescribes the Underwriting New Generation Investments Program (the Underwriting Program). The Underwriting Program provides financial support for new investments in dispatchable electricity generation projects.¹⁴⁰

1.195 The committee first sought advice about potential scrutiny concerns in the instrument in correspondence to the former Minister for Industry, Energy and Emissions Reduction (the former minister) on 10 February 2022.¹⁴¹ The committee did

138 Accessible on the [Federal Register of Legislation](#).

139 The instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

140 Subsection 5(2).

141 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 9 February 2022, pp. 15–16.

not receive a response prior to the prorogation of the 46th Parliament. Accordingly, the committee has resolved to raise its scrutiny concerns with the new minister.

Scrutiny concerns

*Parliamentary oversight*¹⁴²

1.196 Subsection 5(1) of the instrument prescribes the Underwriting Program for the purposes of section 33 of the IRD Act. Subsection 5(2) provides that the Underwriting Program gives financial support for new investments in dispatchable electricity generation through various means, including grants and loans.

1.197 Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument and its explanatory statement discloses sufficient information about authorised expenditure, including the amount of expenditure and the conditions on which it will be provided.

1.198 Neither the instrument nor its explanatory statement appears to indicate the total amount of funding that is authorised to be allocated to new investments in dispatchable electrical generation under the Underwriting Program. In this regard, the committee notes that the explanatory memorandum to the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2022 (the Grid Reliability Fund Bill), which lapsed on the prorogation of the 46th Parliament, indicated that funding for the program would be drawn from a new \$1 billion Grid Reliability Fund, but did not specify the proportion of funding to be allocated.¹⁴³

1.199 It is the committee's longstanding view that scrutiny of instruments made under the IRD Act is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure and any uncertainty surrounding the funding authorised inhibits Parliament's capacity to effectively scrutinise such instruments.

1.200 Accordingly, the committee requests the new minister's advice as to the amount of funding that is authorised to be spent on eligible projects under the Underwriting New Generation Investments Program via this instrument.

142 Senate standing order 23(3)(m).

143 Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2022, explanatory memorandum, p. 1.

Matters more appropriate for parliamentary enactment¹⁴⁴

1.201 The explanatory statement to the instrument indicates that the use of delegated legislation is intended as a temporary measure, pending passage of the Grid Reliability Fund Bill:

The intention is that the shortlisted projects will be considered, in due course, for investment under the proposed \$1 billion Grid Reliability Fund (the Fund) rather than through the mechanisms provided for in the Legislative Instrument. The Fund will be established upon the enactment of the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 (the Bill) (currently before Parliament) and will be administered by the Clean Energy Finance Corporation in accordance with the Clean Energy Finance Corporation Act 2012, as amended by the Bill. Pending the enactment of the Bill, projects will be considered for support through the mechanisms provided for in the Legislative Instrument.¹⁴⁵

1.202 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. Prior to the prorogation of the 46th Parliament, the committee expressed concern that the instrument was being used to pre-emptively authorise the expenditure of funds related to the Underwriting Program while the matter was actively before the Parliament in the Grid Reliability Fund Bill.¹⁴⁶

1.203 As the Grid Reliability Fund Bill has now lapsed following the prorogation of the 46th Parliament, the committee is concerned that the relevant matters may now be contained in delegated legislation on a continuing basis.

1.204 In light of the above, the committee requests the new minister's advice as to:

- **why it is considered necessary and appropriate to provide authority for spending on the Underwriting Program by delegated legislation, rather than primary legislation; and**
- **the status of the instrument, and any spending it authorises, noting that the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 lapsed with the prorogation of the 46th Parliament.**

144 Senate standing order 23(3)(j).

145 Explanatory statement, p. 2.

146 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 February 2022, p. 16.

Chapter 2

Concluded matters

2.1 This chapter details the committee's concluding comments on significant technical scrutiny issues in legislative instruments relating to the committee's principles in Senate standing order 23(3).

Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021

FRL No.	F2021L01855 ¹
Purpose	Introduces new thematic listing criteria to enable the Minister for Foreign Affairs to list persons and entities for the purposes of applying targeted financial sanctions and travel bans.
Authorising legislation	<i>Autonomous Sanctions Act 2011; Customs Act 1901; Migration Act 1958</i>
Portfolio	Foreign Affairs and Trade; Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022)

Overview

2.2 The Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021 (the instrument) amends the Autonomous Sanctions Regulations 2011 (the principal regulations) and related regulations to add new criteria relating to cyber incidents, human rights violations and corruption against which the minister can list persons or entities for the purpose of Australia's autonomous sanctions regime.² The principal regulations enable the minister to impose targeted financial sanctions and travel bans in relation to such listed persons and entities.

2.3 The committee previously sought advice on this instrument in a letter to the former Minister for Foreign Affairs (the former minister) on 10 March 2022.³ The

1 Accessible on the [Federal Register of Legislation](#).

2 The instrument also makes consequential amendments to the Customs (Prohibited Exports) Regulations 1958 and Migration Regulations 1994.

3 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 March 2022, pp. 28–31.

former minister responded on 4 April 2022,⁴ shortly before the 46th Parliament was prorogued and the government entered the caretaker period prior to the 2022 federal election.⁵

Scrutiny concerns

Matters more appropriate for parliamentary enactment;⁶ personal rights and liberties⁷

2.4 In its correspondence of 10 March 2022, the committee raised concerns with the former minister about the appropriateness of including criteria for listing persons or entities under the autonomous sanctions regime in delegated legislation, rather than primary legislation, given the potentially significant consequences of listing on the personal rights and liberties of listed individuals. The committee's longstanding view is that significant matters, including matters that have a significant impact on personal rights and liberties, should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation.⁸

Former minister's response⁹

2.5 In response to the committee's concerns, the former minister explained that the new thematic criteria have been introduced through delegated legislation rather than primary legislation as this is consistent with Australia's autonomous sanctions framework, and 'allows the Government to use autonomous sanctions to respond flexibly and swiftly to international situations of concern'.

Committee view

2.6 The committee considers that the need for flexibility and efficiency is not, of itself, a sufficient justification for including significant matters in delegated legislation, particularly where the measures in the instrument are likely to have a significant impact on the personal rights and liberties of individuals. The committee therefore considers that it is more appropriate to set out the criteria for the thematic

4 This correspondence will be available via the [Index of Instruments](#) page on the committee's website.

5 The caretaker period commenced on the dissolution of the House of Representatives on 11 April 2022.

6 Senate standing order 23(3)(j).

7 Senate standing order 23(3)(h).

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd ed (February 2022) p. 31.

9 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

designation of persons or entities or the declaration of persons in primary legislation rather than delegated legislation.

2.7 Noting the former minister's advice that the inclusion of significant matters in this instrument is consistent with Australia's autonomous sanctions framework, the committee has resolved to make no further comment in relation to this particular instrument, and to instead draw this systemic matter to the attention of the Senate.

2.8 The committee draws the inclusion of significant matters in delegated legislation to the attention of the Senate.

Scope of administrative powers;¹⁰ procedural fairness¹¹

2.9 The committee raised concerns with the former minister about the conferral of broad discretionary power on the minister to list an individual or entity, and the capacity for these powers to be delegated to senior departmental officers.¹²

2.10 While the instrument sets out some factors that the minister or their delegate may have regard to in exercising their discretion to list a person or entity, the explanatory statement does not outline the scope of the discretionary power and whether any limitations and safeguards exist beyond those set out in the instrument. In the committee's view, such safeguards are particularly important given the non-exhaustive nature of the factors that can be considered by the minister, and the significant consequences that listing an individual has on personal rights and liberties. The committee also expressed concerns that the instrument does not appear to provide for procedural fairness in relation to listing decisions.

Former minister's response¹³

2.11 The former minister advised that the broad discretionary powers that the instrument inserts into the principal regulations are appropriate and in line with Recommendation 20 of the Joint Standing Committee on Foreign Affairs, Defence and Trade Report.¹⁴ The former minister clarified that when making thematic designations of persons or entities or declarations of persons, the instrument

10 Senate standing order 23(3)(c).

11 Senate standing order 23(3)(h).

12 Schedule 1 item 8, inserting new regulation 6A into the principal regulations. See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 March 2022, pp. 29–30.

13 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

14 Joint Standing Committee on Foreign Affairs, Defence and Trade, [Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?](#) (7 December 2020) p. 101.

requires the minister to consult with the Attorney-General and any other ministers they consider appropriate when considering thematic sanctions listings. The former minister also stated that 'the application of sanctions is only reserved for the most egregious violations and abuses of human rights' and that while the minister has the authority 'to delegate to certain employees in the department including the secretary, in practice I have not delegated any of my listing or relisting powers'.¹⁵

2.12 Regarding procedural fairness, the former minister stated that there is no requirement to accord procedural fairness prior to listing affected persons or entities for the first time and that doing so would undermine the policy objective of issuing listing decisions. The former minister added that once a listing is made they may revoke the listing at any time upon application by the person to which the listing applies, or on the minister's own initiative. The minister also noted that the listings automatically expire after three years if not otherwise continued in effect by legislative instrument and, when considering whether to continue a listing, the minister invites submissions from the listed person or entity or their authorised representatives to enable affected parties to be heard.

Committee view

2.13 While the minister's response clarifies the extent of safeguards available to protect the policy and national security objectives of the regime, it remains unclear to the committee whether any safeguards or limitations apply to protect the persons who are affected by a listing decision. The committee reiterates this is particularly important given the non-exhaustive nature of the list of factors the minister must consider and the significant consequences that listing an individual has on personal rights and liberties. The apparent lack of safeguards for listed persons at the point of listing also heightens the committee's concerns regarding the availability of procedural fairness.

2.14 Noting that the issues raised by the committee apply generally to the listing framework under Australia's autonomous sanctions regime, the committee has resolved to draw these systemic matters to the attention of the Senate.

2.15 The committee draws its concerns about the availability of procedural fairness and the conferral of broad discretionary powers on the minister to the attention of the Senate.

15 This correspondence is accessible via the [Index of Instruments](#) page on the committee's website.

Clarity of drafting¹⁶

2.16 The committee also raised concerns with the former minister about the apparent lack of legislative guidance and clarity as to what constitutes a 'significant cyber incident' or 'serious corruption',¹⁷ noting the importance of these concepts to whether a person and entity may be designated or declared.¹⁸ For example, the committee noted that while the instrument includes criteria which the minister 'may' have regard to in assessing whether a cyber incident is significant, the list is non-exhaustive and permits the minister to have regard to any other relevant matters.

Former minister's response¹⁹

2.17 The former minister advised that the explanatory statement provides a definition of 'cyber incident' and that the 'list is non-exhaustive because factors which may be relevant for me to determine whether a "cyber incident" is "significant" will vary from case to case'. The minister similarly advised that the explanatory statement provides further elaboration on the factors the minister may have regard to when considering whether an act of corruption is serious and that this is non-exhaustive because 'factors which may be relevant for me to determine whether corruption is "serious" will vary from case to case'.

Committee view

2.18 The committee acknowledges the former minister's advice that it is necessary to define 'significant' cyber incidents and 'serious' corruption by reference to a non-exhaustive list of factors as the relevant factors may vary from case to case. Noting this, and the inclusion of additional information in the explanatory statement about the types of factors to which the minister may have regard in making this assessment, the committee makes no further comment on this matter.

2.19 The committee concludes its examination of the instrument in relation to this matter.

16 Senate standing order 23(3)(e).

17 Schedule 1, item 8, inserting new regulation 6A into the principal regulations. 'Significant cyber incident' and 'serious corruption' are new thematic criteria for the listing of persons or entities.

18 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 March 2022, pp. 28–31.

19 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021; Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021

FRL No.	F2021L01392; ²⁰ F2021L01561 ²¹
Purpose	<p>F2021L01392: Amends the Competition and Consumer (Consumer Data Right) Rules 2020 to facilitate greater participation in the Consumer Data Right regime by participants and consumers, provide greater control and choice to consumers in sharing their data, promote innovation of Consumer Data Right offerings including intermediary services, and enable services to be more effectively and efficiently provided to customers.</p> <p>F2021L01561: Amends the Competition and Consumer (Consumer Data Right) Rules 2020 to implement the Consumer Data Right in the energy sector by establishing a peer-to-peer data access model for the energy sector and making energy sector specific rules and other minor amendments.</p>
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ²²

Overview

2.20 The Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021 and the Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021 (the instruments) make various amendments to the Competition and Consumer (Consumer Data Right) Rules 2020 (the Consumer Data Right Rules), including amending the existing Consumer Data Right accreditation, representative

20 Accessible on the [Federal Register of Legislation](#).

21 Accessible on the [Federal Register of Legislation](#).

22 The instruments were subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instruments are deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

and data-sharing models,²³ and implementing a Consumer Data Right regime in the energy sector.²⁴

2.21 The committee raised initial scrutiny queries about the instruments with the Department of the Treasury via the committee secretariat but was unable to resolve its concerns. Therefore, the committee wrote to the former Treasurer on 25 January 2022.²⁵ The former Assistant Minister for Superannuation, Financial Services and Financial Technology (the former assistant minister) responded to the committee on 28 March 2022.²⁶

Scrutiny concerns

Significant penalties in delegated legislation²⁷

2.22 The committee raised concerns that the instruments insert significant civil penalties for certain breaches into the Consumer Data Right Rules. The committee considers that significant civil penalty provisions should ordinarily be included in primary legislation, rather than delegated legislation.²⁸ The committee therefore sought the former Treasurer's advice as to the justification for including significant penalties in these instruments and asked whether the explanatory statements for the instruments could be amended to include this justification.

Former minister's response

2.23 In response to these concerns, the former assistant minister confirmed that these instruments, like several other instruments the committee had previously considered, include penalties in delegated legislation as opposed to primary legislation because the *Competition and Consumer Act 2010* provides that where a civil penalty does apply to a breach of the rules, the rules may specify a lower penalty amount than the default maximum in the Act. Therefore, including the penalty in delegated legislation in this instance means that a lower penalty than the default

23 Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021 [F2021L01392].

24 Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021 [F2021L01561].

25 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 25 January 2022, pp. 15–16.

26 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

27 Senate standing order 23(3)(j).

28 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd ed (February 2022) p. 32.

maximum can be applied. The former assistant minister also undertook to amend the explanatory statements to include this information as soon as practicable.

Committee view

2.24 In light of the additional information provided by the former assistant minister, and the former assistant minister's undertaking to amend the relevant explanatory statements to include this information, the committee makes no further comment on this matter.

2.25 In light of the information and undertaking provided by the former assistant minister, the committee concludes its examination of the instruments.

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021

FRL No.	F2021L01430 ²⁹
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on the COVID-19 Vaccine Claims Scheme administered by the Department of Health.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance; Health and Aged Care
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ³⁰

Overview

2.26 The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021 (the instrument) amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on the COVID-19 Vaccine Claims Scheme (the Scheme). The Scheme provides compensation for individuals who suffer moderate to significant injury as a result of being vaccinated against COVID-19.

2.27 In December 2021, the committee sought advice from the former Minister for Finance about several potential scrutiny concerns in the instrument, copying in the former Minister for Health and Aged Care (the former minister).³¹ The former minister responded on 25 January 2022.³² In light of the former minister's advice, the committee concluded its examination of some matters, but sought further advice

29 Accessible on the [Federal Register of Legislation](#).

30 The instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

31 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 6 December 2021, pp. 1–6.

32 See [correspondence](#) from the Minister for Health and Aged Care on 25 January 2022, pp. 1–8.

from the former minister on 10 February 2022 on outstanding issues.³³ The former minister responded on 7 April 2022,³⁴ shortly before the 46th Parliament was prorogued and the government entered the caretaker period prior to the 2022 federal election.³⁵

Scrutiny concerns

*Significant matters in delegated legislation*³⁶

2.28 In correspondence of 6 December 2021, the committee expressed concern about the establishment of a significant nationwide vaccine claims scheme in delegated legislation, rather than primary legislation, and requested the minister's advice as to why this was considered necessary and appropriate. In correspondence of 25 January 2022, the former minister advised that it was necessary to urgently establish the Scheme in delegated legislation given the risk that primary legislation may not have been made in that calendar year.

2.29 Noting that eight months had passed between the commencement of the vaccine rollout and the registration of the instrument, the committee sought the former minister's further advice on 10 February 2022 as to why it was considered necessary to include the Scheme in delegated legislation on an ongoing basis and whether primary legislation could instead be introduced to set out high-level parameters to guide the operation of the Scheme.

*Former minister's response*³⁷

2.30 The former minister reiterated that delegated legislation was necessary to respond to the unique nature of the pandemic and the enactment of primary

33 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 February 2022, pp. 17–21. The committee noted the minister's advice on the availability of privacy protections and the reduced claims threshold and requested that the explanatory statement be revised to reflect this information. The minister undertook to update the explanatory statement on 7 April 2022 and a revised explanatory statement was registered on 8 April 2022. This undertaking is recorded on the [Index of Undertakings](#) page on the committee's website.

34 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

35 The caretaker period commenced on the dissolution of the House of Representatives on 11 April 2022.

36 Senate standing order 23(3)(j).

37 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

legislation would have delayed its establishment. The former minister further advised that:

a change in the operation of the scheme would negatively impact existing and future claimants and would undermine confidence in the scheme, and potentially the range of health measures in support of the Australian community during the pandemic.

Committee view

2.31 The committee considers that the urgent need to establish the Scheme does not, of itself, justify the ongoing inclusion of such nationally significant matters in delegated legislation instead of primary legislation. In the committee's view, the inclusion of high-level parameters in primary legislation would have promoted legal certainty and ensured that such matters were afforded full and robust parliamentary scrutiny.

2.32 Noting the time that has elapsed since the Scheme commenced, and the former minister's advice that further changes to the Scheme may have an adverse impact on existing and future claimants and undermine pandemic-related health measures, the committee has resolved to conclude its examination of the instrument and draw its concerns to the attention of the Senate.

2.33 The committee draws the inclusion of significant matters in delegated legislation to the attention of the Senate, noting the importance of full and effective parliamentary oversight of issues of national significance.

Disclosure of funding information³⁸

2.34 In correspondence of 6 December 2021, the committee sought the former minister's advice as to the total amount of Commonwealth funding provided for the program, noting that neither the instrument nor the explanatory statement specify the amount of expected expenditure. The former minister explained in his response of 25 January 2022 that 'anticipating funding by the nature of claims that might be made is extremely difficult'. Whilst acknowledging this difficulty, the committee repeated its request on 10 February 2022, noting that the non-disclosure of the funding amount inhibits Parliament's capacity to effectively scrutinise and control Commonwealth expenditure.

38 Senate standing order 23(3)(m).

*Former minister's response*³⁹

2.35 The former minister reiterated the difficulty of providing such an estimate and stated that '[t]he Government has used advice from the Australian Government Actuary to make a provision in the budget to ensure appropriation as needed is available to support payments from the Scheme'. The former minister also noted that 'as more claims are finalised by Services Australia, the Government will be in a better position to estimate likely scheme costs'.

Committee view

2.36 The committee remains of the view that uncertainty about the nature and volume of claims to be made under the Scheme is an insufficient justification for failing to indicate the likely expenditure allocated to the Scheme in either the instrument or its explanatory statement. In this regard, the committee reiterates its view that the scrutiny of instruments under the *Financial Framework (Supplementary Powers) Act 1997* is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure and non-disclosure of the funding amount may inhibit Parliament's capacity to effectively scrutinise such instruments.

2.37 The committee draws the lack of information in the instrument and explanatory statement about the total amount of expenditure allocated to the Scheme to the attention of the Senate, noting the importance of parliamentary oversight of Commonwealth expenditure.

*Parliamentary oversight*⁴⁰

2.38 The committee raised scrutiny concerns in correspondence of 6 December 2021 about the inclusion of key elements of the Scheme in policy guidance rather than legislation. These include the eligibility criteria, evidentiary requirements and process for making a claim. In his response of 25 January 2022, the former minister provided additional details about the operation of the Scheme and justified the inclusion of these matters in policy as making the Scheme 'simple and easily adaptable administratively, should there be any changes to the policy direction to achieve the policy objective'. Whilst acknowledging the need for the government to respond quickly to the changing nature of the pandemic, the committee reiterated its request on 10 February 2022 that detailed content of the Scheme should be set out in disallowable delegated legislation, noting the significance of these matters.

39 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

40 Senate standing order 23(3)(m).

Former minister's response⁴¹

2.39 The former minister advised that including such detail in the instrument 'would limit timely access to compensation for individuals who have suffered harm if new clinical conditions emerge or as vaccines are added', as changes to the relevant schedule to the instrument are typically only considered for making by the Governor-General in Federal Executive Council meetings. By contrast, the Scheme policy can be quickly updated following advice from the Therapeutic Goods Administration and the Australian Technical Advisory Group on Immunisation.

Committee view

2.40 The committee remains of the view that the inclusion of key elements of the Scheme in a policy document, rather than disallowable delegated legislation, inhibits effective parliamentary oversight of the Scheme. Noting the time that has elapsed since the Scheme commenced, and the former minister's advice that further changes to the Scheme may have an adverse impact on existing and future claimants and undermine pandemic-related health measures, the committee has resolved to conclude its examination of the instrument and draw its concerns to the attention of the Senate.

2.41 The committee draws the inclusion of key elements of the COVID-19 Vaccine Claims Scheme in policy guidance rather than legislation to the attention of the Senate.

Availability of independent merits review⁴²

2.42 In its correspondence of 6 December 2021 the committee expressed concern that the instrument does not provide for independent merits review of compensation claims and sought the former minister's advice as to whether independent merits review could be provided for decisions made under the Scheme. In response, the former minister stated that the enabling legislation does not provide for review by the Administrative Appeals Tribunal (AAT) but that an internal merits review process is available which may involve input from an independent expert panel or a relevant medical officer in relation to the review of a claim. Noting that independent review does not necessarily require appeal to the AAT, the committee reiterated its request on 10 February 2022 as to whether an alternative form of independent review could be provided for in relation to decisions made under the Scheme and, if this is not considered possible, the minister's justification as to why this is the case.

41 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

42 Senate standing order 23(3)(i).

*Former minister's response*⁴³

2.43 The minister responded that the Scheme 'has a free, robust and transparent appeals process' which involves 'reassessment by another decision maker at a higher level in the public service'. The minister also stated that the 'anticipated turnaround time for such reviews is expected to be faster than reviews conducted by the AAT' and reiterated that judicial review is available.

Committee view

2.44 The committee remains of the view that the instrument should provide for independent review, noting that it empowers decision-makers to make discretionary decisions involving individual applications for compensation. In this regard, the committee considers that the fact that relevant decisions do not fall within the scope of the *Administrative Appeals Tribunal Act 1975* does not constitute a sufficient justification for excluding independent merits review, as other independent review options could be pursued. The committee also considers that the availability of internal review or the availability of judicial review does not constitute a sufficient justification for excluding independent merits review.

2.45 Noting the time that has elapsed since the Scheme commenced, and the former minister's advice that further changes to the Scheme may have an adverse impact on existing and future claimants and undermine pandemic-related health measures, the committee has resolved to conclude its examination of the instrument and draw its concerns to the attention of the Senate.

2.46 The committee draws the lack of availability of independent merits review for decisions made under the instrument to the attention of the Senate.

***Delegation of administrative powers and functions;*⁴⁴ *conferral of discretionary powers*⁴⁵**

2.47 The committee raised concerns on 6 December 2021 that the instrument does not contain high-level eligibility criteria or evidentiary requirements to receive compensation under the Scheme, nor any details about how the amount of compensation will be determined or who is empowered to make the relevant decisions. In the absence of such information, the committee sought the former minister's advice as to the skills, qualifications and experience of persons making

43 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

44 Senate standing order 23(3)(c).

45 Senate standing order 23(3)(c).

decisions and recommendations under the Scheme and the safeguards in place to ensure the appropriate exercise of such powers.

2.48 In correspondence of 25 January 2022, the former minister responded that there are three tiers of claims within the Scheme and explained that officials at Services Australia will have 'the appropriate expertise and training to undertake the assessment and authorisation of payments' and are able to refer particular claims to medical officers at the Department of Health and complex claims to an independent expert panel. The committee remained concerned about the lack of clarity in the instrument as to how claims, particularly complex claims, will be assessed and relies on officials below a Senior Executive Service (SES) level to make these assessments. Accordingly, on 10 February 2022, the committee sought the former minister's further advice about the safeguards in place to guide the exercise of discretionary powers under the Scheme, including whether claims under \$20 000 could still be assessed by an SES official if they were sufficiently complex and the process for escalating such matters.

*Former minister's response*⁴⁶

2.49 Regarding the assessment of complex claims, the former minister clarified that:

a claim under \$20,000 could be considered sufficiently complex to be escalated for consideration by a member of the SES provided a claimant sought a review of a decision made by an EL2 delegate in the first instance; or the delegate considered a decision could not be made based on independent medical or legal advice provided by the independent expert panel established to assist in the effective and consistent application of the Scheme.

2.50 The former minister further advised that:

Services Australia has implemented safeguards and limitations on the exercise of the discretionary powers through delegation guidelines; the use of independent medical and legal panels to review evidence and to make recommendations and processing guidance as issues arise.

Committee view

2.51 The committee reiterates its view that non-legislative guidance documents are not an adequate substitute for clearly defined administrative powers in primary or delegated legislation. The committee also remains concerned that, regardless of their complexity, claims under \$20 000 may only be considered by an SES official on

46 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

request for a review by the claimant, rather than complex claims being automatically escalated to a decision-maker with appropriate qualifications and skills.

2.52 Noting the time that has elapsed since the Scheme commenced, and the former minister's advice that further changes to the Scheme may have an adverse impact on existing and future claimants and undermine pandemic-related health measures, the committee has resolved to conclude its examination of the instrument and draw its concerns to the attention of the Senate.

2.53 The committee draws the lack of safeguards and limitations on the exercise of discretionary power under the COVID-19 Vaccine Claims Scheme to the attention of the Senate.

Industry Research and Development (Supporting Critical Transmission Infrastructure Program) Instrument 2021

FRL No.	F2021L01312 ⁴⁷
Purpose	Prescribes the Supporting Critical Transmission Infrastructure Program to support electricity transmission projects that have potential to benefit electricity price, reliability and/or security outcomes.
Authorising legislation	<i>Industry Research and Development Act 1986</i>
Portfolio	Industry, Science and Resources
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ⁴⁸

Overview

2.54 The *Industry Research and Development Act 1986* (the IRD Act) authorises the Commonwealth to spend public money on programs that the minister prescribes by legislative instruments.⁴⁹ This instrument prescribes the Supporting Critical Transmission Infrastructure Program (the Program). The Program is intended to provide financial support for certain electricity transmission projects.

2.55 The committee raised initial technical scrutiny concerns with the former Minister for Industry, Energy and Emissions Reduction (the former minister) on 2 December 2022,⁵⁰ and received a response on 30 March 2022.⁵¹

47 Accessible on the [Federal Register of Legislation](#).

48 The instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

49 *Industry Research and Development Act 1986*, section 33.

50 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 25 November 2021, pp. 7–8.

51 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

*Parliamentary oversight*⁵²

2.56 In its correspondence of 2 December 2021, the committee raised concerns that neither the instrument nor its explanatory statement specifies the amount of Commonwealth funding to be provided for the Program, noting the importance of this information to Parliament's capacity to scrutinise Commonwealth expenditure. Accordingly, the committee asked the former minister whether, at a minimum, a high-level indication as to the total amount of funding that is expected to be expended on the Program could be provided to Parliament while the instrument is still subject to disallowance.

*Former minister's response*⁵³

2.57 In response to these concerns, the former minister advised that:

Explanatory statements for section 33 instruments contain information about the context in which an instrument is made, including the amount of funding available where it is known at the time that the instrument is made, and where it is appropriate at that time to disclose it.

As my Department identified in its correspondence with your secretariat on 4 November 2021, there is no current appropriation for funding that would be authorised by the instrument, and the support being provided is subject to ongoing commercial negotiations. That is the primary reason that a funding amount was not included in the Explanatory Statement.

At this time, the maximum expected value of Commonwealth support for the Program is in the order of \$500 million.

Committee view

2.58 The committee appreciates the former minister's response to its concerns and his advice that the maximum expected value of Commonwealth support for the Program is around \$500 million.

2.59 The committee reiterates its view that this kind of information should be included in the instrument itself or its explanatory statement, noting that the non-disclosure of the funding amount may restrict Parliament's capacity to effectively scrutinise Commonwealth expenditure.

52 Senate standing order 23(3)(m).

53 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

2.60 In light of the information provided by the former minister, the committee concludes its examination of the instrument.

Telecommunications (Interception and Access) Amendment (2021 Measures No. 1) Regulations 2021

FRL No.	F2021L01622 ⁵⁴
Purpose	Amends the Telecommunications (Interception and Access) Regulations 2017 to specify the matters a court is to have regard to in determining whether an act or thing done by a person for the purposes of identifying and blocking malicious SMS messages was reasonably necessary in order for the person to perform their duties effectively.
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ⁵⁵

Overview

2.61 The Telecommunications (Interception and Access) Amendment (2021 Measures No. 1) Regulations 2021 (the instrument) sets out the matters a court is to have regard to in determining whether something done by a person to identify and block malicious SMS messages was reasonably necessary for the person to perform their duties effectively.

2.62 The committee first raised technical scrutiny concerns with the former Minister for Home Affairs (the former minister) regarding the compliance of the instrument with its authorising legislation in correspondence of 10 March 2022.⁵⁶ The former minister responded on 29 March 2022.⁵⁷

54 Accessible on the [Federal Register of Legislation](#).

55 The instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

56 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 March 2022, pp. 44–45.

57 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

Compliance with authorising legislation⁵⁸

2.63 The committee initially raised concerns that the instrument was not authorised by or otherwise within the scope of the *Telecommunications (Interception and Access) Act 1979* (the Act). Specifically, the committee was concerned that the measures in the instrument do not fall within the scope of subsection 7(2) of the Act which sets out exceptions to a prohibition on interception of telecommunications.

Former minister's response

⁵⁹

2.64 On 29 March 2022, the former minister clarified that the instrument does not declare that identifying and blocking malicious SMS messages is an action specifically connected to the operation or maintenance of a telecommunications system, as per the exceptions in the Act. Rather, the instrument supports carriers, and ultimately courts, by setting out matters to consider in deciding whether actions by employees to identify and block malicious messages fall within the exceptions in the Act. The former minister also noted that the volume and scale of malicious SMS messages make their detection and prevention necessary to ensure the operation and maintenance of the telecommunications system.

Committee view

2.65 The committee notes the former minister's advice that the instrument does not definitively declare that identifying and blocking malicious SMS messages falls within the exceptions in the Act, but instead sets out matters for carriers, and ultimately the courts, to consider in deciding whether such actions fall within the exceptions. The committee also acknowledges the former minister's advice on the impact of malicious SMS messages on the telecommunications system, which further clarifies the relevance of the instrument to subsection 7(2) of the Act.

2.66 In light of the information provided by the former minister, the committee has concluded its examination of the instrument.

58 Senate standing order 23(3)(a).

59 This correspondence will be available on the [Index of Instruments](#) page on the committee's website.

Chapter 3

Agency engagement

3.1 As part of its technical scrutiny of legislative instruments, the committee may engage with relevant agencies via its secretariat to gather information or seek clarification to resolve minor technical scrutiny concerns. While this correspondence is confidential, the committee lists the relevant instruments on its website and provides a statistical overview of the relevant scrutiny issues raised in its *Annual Reports*. The committee reports on matters which cannot be satisfactorily resolved via engagement with the relevant agency in Chapter 1 of the *Delegated Legislation Monitor* (the Monitor).

3.2 Some instruments may be listed as both 'new' and 'concluded', where the committee via its secretariat has both raised and resolved concerns with the relevant agency in the period covered by the Monitor.

New matters

3.3 Of the instruments registered on the Federal Register of Legislation between 26 February and 26 July 2022, the committee commenced engaging with the relevant agency via its secretariat about the following **80** instruments.¹

Instrument

Accounting Standard AASB 2022-1 Amendments to Australian Accounting Standards – Initial Application of AASB 17 and AASB 9 – Comparative Information [F2022L00398]

Accounting Standard AASB 2022-3 Amendments to Australian Accounting Standards – Illustrative Examples for Not-for-Profit Entities accompanying AASB 15 [F2022L00705]

Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022 [F2022L00979]

ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224 [F2022L00697]

ASIC Market Integrity Rules (Securities Markets and other ASIC-Made Rules) Amendment Instrument 2022/117 [F2022L00295]

ASIC Market Integrity Rules (Securities Markets) Amendment 2022/73 [F2022L00292]

Auditing Standard ASA 2022-1 Amendments to Australian Auditing Standards [F2022L00712]

Auditing Standard ASA 600 Special Considerations—Audits of a Group Financial Report (Including the Work of Component Auditors) [F2022L00709]

Australian Capital Territory National Land (Leased) Ordinance 2022 [F2022L00470]

1 For further details, see the [Index of Instruments](#) page on the committee's website.

Instrument

Australian Capital Territory National Land (Unleased) Ordinance 2022 [F2022L00472]

Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2022 (No. 1) [F2022L00237]

Biosecurity (Exit Requirements) Repeal Determination 2022 [F2022L00433]

Cape Wickham Lighthouse Heritage Management Plan [F2022L00967]

Child Care Subsidy Amendment (Coronavirus, Local Area Emergencies and Other Measures) Minister's Rules 2022 [F2022L00376]

Christmas Island Applied Laws Amendment (Heritage) Ordinance 2022 [F2022L00525]

Cocos (Keeling) Islands Applied Laws Amendment (Fish Resources Management) Ordinance 2022 [F2022L00542]

Commonwealth Electoral (COVID Enfranchisement) Regulations 2022 [F2022L00463]

Competition and Consumer (Prices Surveillance—Aeronautical Services to NSW Regional Airlines) Direction 2022 [F2022L00863]

Customs By-law No. 2200082 [F2022L00859]

Customs By-law No. 2200083 [F2022L00860]

Customs By-law No. 2200084 [F2022L00861]

Environment Protection and Biodiversity Conservation (Indian Ocean Territories Marine Parks) Proclamation 2022 [F2022L00427]

Family Law Legislation Amendment (Superannuation Valuation and Information) Instrument 2022 [F2022L00431]

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 2) Regulations 2022 [F2022L00358]

Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2022 [F2022L00359]

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022 [F2022L00353]

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 4) Regulations 2022 [F2022L00489]

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2022 [F2022L00352]

Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2022 [F2022L00222]

Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2022 [F2022L00223]

Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2022 [F2022L00209]

Instrument

Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2022 [F2022L00210]

Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2022 [F2022L00217]

Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2022 [F2022L00225]

Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2022 [F2022L00227]

Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2022 [F2022L00228]

Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2022 [F2022L00212]

Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2022 [F2022L00214]

Food Standards (Proposal P1057 – Review of the kava standard) Variation [F2022L00308]

Foreign Acquisitions and Takeovers Amendment Regulations 2022 [F2022L00465]

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022 [F2022L00999]

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (Definition of Booster Dose) Determination 2022 [F2022L00452]

Health Insurance Legislation Amendment (2022 Measures No. 3) Determination 2022 [F2022L00567]

Higher Education Support (Student Services, Amenities, Representation and Advocacy) Guidelines 2022 [F2022L00346]

Industry Research and Development (Northern Endeavour Temporary Operations Program) Amendment Instrument 2022 [F2022L00569]

Industry Research and Development (Strengthening Business Program) Instrument 2022 [F2022L00484]

Insolvency Practice (Bankruptcy) Amendment Rules 2022 [F2022L00539]

Insurance (prudential standard) determination No. 1 of 2022 [F2022L00880]

Insurance (prudential standard) determination No. 2 of 2022 [F2022L00881]

Insurance (prudential standard) determination No. 3 of 2022 [F2022L00882]

Insurance (prudential standard) determination No. 4 of 2022 [F2022L00883]

Interactive Gambling (National Self-Exclusion Register) Register Rules 2022 [F2022L00953]

List of CITES Species Amendment (2022/014019) Instrument 2022 [F2022L00760]

Migration Amendment (Pacific Australia Labour Mobility) Regulations 2022 [F2022L00270]

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244]

National Health (Electronic National Residential Medication Chart Trial) Amendment (Transitional Conformant Software Systems) Special Arrangement 2022 [F2022L00799]

Instrument

Notice of Intention to Propose Customs Tariff Alterations (No. 2) 2022 [F2022L00504]

Notice of Intention to Propose Customs Tariff Alterations (No. 5) 2022 [F2022L00977]

Notice of Intention to Propose Customs Tariff Alterations Notice (No. 6) 2022 [F2022L01001]

Privacy (Credit Reporting) Code 2014 (Version 2.3) [F2022L00746]

Remuneration Tribunal (Members of Parliament) Determination 2022 [F2022L00769]

Safety, Rehabilitation and Compensation (Notional Interest) Determination 2022 [F2022L00233]

Safety, Rehabilitation and Compensation Directions Amendment Instrument 2022 [F2022L00577]

Security of Critical Infrastructure (Australian National University) Rules (LIN 22/041) 2022 [F2022L00315]

Security of Critical Infrastructure (Definitions) Amendment Rules (LIN 22/021) 2022 [F2022L00306]

Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022 [F2022L00581]

Superannuation (CSS) Productivity Contribution (2022-2023) Declaration 2022 [F2022L00791]

Superannuation (prudential standard) determination No. 1 of 2022 [F2022L00741]

Superannuation (PSS) Maximum Benefits (2022-2023) Determination 2022 [F2022L00793]

Superannuation (PSS) Productivity Contribution (2022-2023) Determination 2022 [F2022L00796]

Tax Agent Services Regulations 2022 [F2022L00238]

Taxation Administration Withholding Schedules 2022 [F2022L00819]

Telecommunications (ACCC Inquiry into Access to Regional Towers and Associated Infrastructure) Direction 2022 [F2022L00439]

Telecommunications (Infringement Notices) Guidelines 2022 [F2022L00250]

Vehicle Standard (Australian Design Rule 35/06 – Commercial Vehicle Brake Systems) 2018 Amendment 1 [F2022L00215]

Vehicle Standard (Australian Design Rule 35/07 – Commercial Vehicle Brake Systems) 2022 [F2022L00213]

Vehicle Standard (Australian Design Rule 97/00 – Advanced Emergency Braking for Omnibuses, and Medium and Heavy Goods Vehicles) 2022 [F2022L00211]

Veterans' Entitlements (Special Disability Trust—Discretionary Spending) Determination 2022 [F2022L00904]

Veterans' Affairs (Treatment Principles – Extend Support Provided Under the Psychiatric Assistance Dog Program) Amendment Determination 2022 [F2022L00921]

West Block and the Dugout Heritage Management Plan 2022 [F2022L00620]

Ongoing matters

3.4 Since the last Monitor was tabled, the committee has concluded all outstanding matters involving agencies that were listed as ongoing in *Delegated Legislation Monitor 4 of 2022*. These instruments are listed below as concluded agency matters.

Concluded matters

3.5 The committee has concluded its examination of the following **86** instruments after engagement with relevant agencies via its secretariat.²

Instrument

Accounting Standard AASB 2022-1 Amendments to Australian Accounting Standards – Initial Application of AASB 17 and AASB 9 – Comparative Information [F2022L00398]

Accounting Standard AASB 2022-3 Amendments to Australian Accounting Standards – Illustrative Examples for Not-for-Profit Entities accompanying AASB 15 [F2022L00705]

Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022 [F2022L00979]

Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards 2022 [F2022L00137]

Amendment of List of Exempt Native Specimens – Commonwealth Southern and Eastern Scalefish and Shark Fishery, February 2022 [F2022L00133]

ASIC Market Integrity Rules (Securities Markets and other ASIC-Made Rules) Amendment Instrument 2022/117 [F2022L00295]

ASIC Market Integrity Rules (Securities Markets) Amendment 2022/73 [F2022L00292]

Auditing Standard ASA 2022-1 Amendments to Australian Auditing Standards [F2022L00712]

Australian Capital Territory National Land (Leased) Ordinance 2022 [F2022L00470]

Australian Capital Territory National Land (Road Transport) Parking Authority Guidelines 2021 [F2021L01677]

Australian Capital Territory National Land (Unleased) Ordinance 2022 [F2022L00472]

Australian Public Service Commissioner's Directions 2022 [F2022L00088]

Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2022 (No. 1) [F2022L00237]

Biosecurity (Exit Requirements) Repeal Determination 2022 [F2022L00433]

2 For further details, see the [Index of Instruments](#) page on the committee's website.

Instrument

Carbon Credits (Carbon Farming Initiative—Animal Effluent Management) Methodology Determination Variation 2022 [F2022L00053]

Carbon Credits (Carbon Farming Initiative—Estimation of Soil Organic Carbon Sequestration Using Measurement and Models) Methodology Determination 2021 [F2021L01696]

Carbon Credits (Carbon Farming Initiative—Industrial and Commercial Emissions Reduction) Methodology Determination 2021 [F2021L01789]

Carbon Credits (Carbon Farming Initiative—Plantation Forestry) Methodology Determination 2022 [F2022L00047]

Carbon Credits (Carbon Farming Initiative—Tidal Restoration of Blue Carbon Ecosystems) Methodology Determination 2022 [F2022L00046]

Child Care Subsidy Amendment (Coronavirus, Local Area Emergencies and Other Measures) Minister's Rules 2022 [F2022L00376]

Christmas Island Applied Laws Amendment (Heritage) Ordinance 2022 [F2022L00525]

Cocos (Keeling) Islands Applied Laws Amendment (Fish Resources Management) Ordinance 2022 [F2022L00542]

Commonwealth Electoral (COVID Enfranchisement) Regulations 2022 [F2022L00463]

Competition and Consumer (Prices Surveillance—Aeronautical Services to NSW Regional Airlines) Direction 2022 [F2022L00863]

Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Albania and Lithuania) Determination 2022 [F2022L00105]

Consumer Data Right (Telecommunications Sector) Designation 2022 [F2022L00068]

Corporations (Relevant Providers—Education and Training Standards) Determination 2021 [F2021L01714]

Customs By-law No. 2200082 [F2022L00859]

Customs By-law No. 2200083 [F2022L00860]

Customs By-law No. 2200084 [F2022L00861]

Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Albania and Lithuania) Determination 2022 [F2022L00106]

Environment Protection and Biodiversity Conservation (Indian Ocean Territories Marine Parks) Proclamation 2022 [F2022L00427]

Export Control Legislation Amendment (2021 Measures No. 1) Rules 2021 [F2021L01730]

Family Law Legislation Amendment (Superannuation Valuation and Information) Instrument 2022 [F2022L00431]

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 2) Regulations 2022 [F2022L00358]

Instrument

Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2022 [F2022L00359]

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022 [F2022L00353]

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 4) Regulations 2022 [F2022L00489]

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2022 [F2022L00352]

Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2022 [F2022L00222]

Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2022 [F2022L00223]

Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2022 [F2022L00209]

Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2022 [F2022L00210]

Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2022 [F2022L00217]

Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2022 [F2022L00225]

Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2022 [F2022L00227]

Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2022 [F2022L00228]

Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2022 [F2022L00212]

Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2022 [F2022L00214]

Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021 [F2021L01854]

Food Standards (Proposal P1057 – Review of the kava standard) Variation [F2022L00308]

Foreign Acquisitions and Takeovers Amendment Regulations 2022 [F2022L00465]

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (Definition of Booster Dose) Determination 2022 [F2022L00452]

Health Insurance Legislation Amendment (2022 Measures No. 3) Determination 2022 [F2022L00567]

Higher Education Support (Student Services, Amenities, Representation and Advocacy) Guidelines 2022 [F2022L00346]

Industry Research and Development (Northern Endeavour Temporary Operations Program) Amendment Instrument 2022 [F2022L00569]

Industry Research and Development (Strengthening Business Program) Instrument 2022 [F2022L00484]

Insolvency Practice (Bankruptcy) Amendment Rules 2022 [F2022L00539]

Instrument

List of CITES Species Amendment (2022/014019) Instrument 2022 [F2022L00760]

Migration Amendment (Extension of Temporary Graduate and Skilled Regional Provisional Visas) Regulations 2022 [F2022L00151]

Migration Amendment (Pacific Australia Labour Mobility) Regulations 2022 [F2022L00270]

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022 [F2022L00244]

Military Rehabilitation and Compensation (Special Assistance) Instrument 2022 [F2022L00122]

Norfolk Island Applied Laws and Service Delivery (Queensland) Amendment Rules 2022 [F2022L00076]

Notice of Intention to Propose Customs Tariff Alterations (No. 2) 2022 [F2022L00504]

Notice of Intention to Propose Customs Tariff Alterations (No. 5) 2022 [F2022L00977]

Notice of Intention to Propose Customs Tariff Alterations Notice (No. 6) 2022 [F2022L01001]

Renewable Energy (Electricity) Amendment (Small-Scale Renewable Energy Scheme Reforms and Other Measures) Regulations 2021 [F2021L01828]

Safety, Rehabilitation and Compensation (Notional Interest) Determination 2022 [F2022L00233]

Safety, Rehabilitation and Compensation Directions Amendment Instrument 2022 [F2022L00577]

Security of Critical Infrastructure (Australian National University) Rules (LIN 22/041) 2022 [F2022L00315]

Security of Critical Infrastructure (Definitions) Amendment Rules (LIN 22/021) 2022 [F2022L00306]

Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022 [F2022L00581]

Superannuation (CSS) Productivity Contribution (2022-2023) Declaration 2022 [F2022L00791]

Superannuation (prudential standard) determination No. 1 of 2022 [F2022L00741]

Superannuation (PSS) Maximum Benefits (2022-2023) Determination 2022 [F2022L00793]

Superannuation (PSS) Productivity Contribution (2022-2023) Determination 2022 [F2022L00796]

Tax Agent Services Regulations 2022 [F2022L00238]

Telecommunications (ACCC Inquiry into Access to Regional Towers and Associated Infrastructure) Direction 2022 [F2022L00439]

Telecommunications (Infringement Notices) Guidelines 2022 [F2022L00250]

Telecommunications (Interception and Access) (Enforcement Agency—NSW Department of Communities and Justice) Declaration 2022 [F2022L00154]

Telecommunications (Interception and Access) Amendment (International Production Orders) Regulations 2022 [F2022L00111]

Therapeutic Goods (Permissible Ingredients) Determination (No. 1) 2022 [F2022L00031]

Instrument

Vehicle Standard (Australian Design Rule 35/06 – Commercial Vehicle Brake Systems) 2018 Amendment 1 [F2022L00215]

Vehicle Standard (Australian Design Rule 35/07 – Commercial Vehicle Brake Systems) 2022 [F2022L00213]

Vehicle Standard (Australian Design Rule 97/00 – Advanced Emergency Braking for Omnibuses, and Medium and Heavy Goods Vehicles) 2022 [F2022L00211]

Chapter 4

Undertakings

4.1 This chapter provides a summary of undertakings that the committee is aware have been implemented or remain outstanding since the committee's last *Delegated Legislation Monitor*.

4.2 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.¹ Further information about the scrutiny concerns leading to these undertakings can be found through the links published on the *Index of Instruments* available on the committee's website.²

Implemented undertakings

4.3 Since the last *Delegated Legislation Monitor* was tabled, amendments were made to **40** explanatory statements in response to the committee's scrutiny concerns. The following table records undertakings to amend an Act, legislative instrument or conduct a review that the committee is aware have been implemented since the tabling of the committee's last *Delegated Legislation Monitor*.

Instrument	Undertaking	Date implemented
Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030]	The Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs undertook to amend the instrument in response to the committee's scrutiny concerns.	04/03/2022
ASIC Market Integrity Rules (Capital) 2021 [F2021L00765]	The Department of the Treasury undertook to amend the instrument in response to the committee's scrutiny concerns.	09/03/2022
Taxation Administration (Data Sharing—Relevant COVID-19 Business Support Program) Declaration 2021 [F2021L01157]	The Treasurer undertook to amend the principal instrument in response to the committee's scrutiny concerns.	16/03/2022
Taxation Administration (Data Sharing—Relevant COVID-19 Business Support Program) Amendment Declaration (No. 1) 2021 [F2021L01237]	The Treasurer undertook to amend the principal instrument in response to the committee's scrutiny concerns.	16/03/2022

1 See the [Index of Undertakings](#) page on the committee's website.

2 See the [Index of Instruments](#) page on the committee's website.

Instrument	Undertaking	Date implemented
Student Assistance Regulations 2021 [F2021L00201]	The Minister for Families and Social Services undertook to amend the instrument in response to the committee's scrutiny concerns.	31/03/2022
Health Insurance (Quality Assurance Activity—Australian Vigilance and Surveillance System for Organ Donation for Transplantation) Declaration 2021 [F2021L01783]	The Department of Health undertook to amend the instrument in response to the committee's scrutiny concerns.	17/06/2022

Outstanding undertakings

4.4 During this period, **38** new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. The following table records new undertakings to amend an Act, legislative instrument or conduct a review in the relevant period that remain outstanding. The committee draws these undertakings to the attention of the Senate.

Instrument	Undertaking	Date of Undertaking
Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards 2022 [F2022L00137]	The Department of Agriculture, Water and the Environment undertook to amend the instrument in response to the committee's scrutiny concerns.	01/04/2022

Part II—Matters of interest to the Senate

Part II: Introduction

Part II of the *Delegated Legislation Monitor* (the Monitor) identifies the instruments which the committee has resolved to draw to the attention of the Senate under Senate standing order 23(4) as they:

- contain significant issues;
- specify, prescribe or otherwise provide for Commonwealth expenditure or taxation; or
- do not meet the committee's expectations regarding exemptions from disallowance and sunseting.

Chapter 5 of the Monitor details the instruments which the committee considers raise significant issues under standing order 23(4). In practice, this may include instruments which:

- set out significant elements of a regulatory scheme;
- significantly trespass on personal rights and liberties;
- amend primary legislation; or
- contain significant policy matters.

Chapter 6 details the instruments which specify, prescribe or otherwise provide for Commonwealth expenditure or the levying of taxation, noting the importance of parliamentary oversight of these matters.

Chapter 7 details the instruments which are exempt from disallowance and sunseting, and which do not satisfy the committee's expectations in relation to the source and appropriateness of those exemptions under standing order 23(4A) and 23(3)(k).¹

1 The committee's expectations in relation to the source and appropriateness of the exemptions from disallowance and sunseting are informed by the interim and final reports of the committee's [inquiry into the exemption of delegated legislation from parliamentary oversight](#).

Chapter 5

Instruments raising significant issues

5.1 This chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4), on the basis that they raise significant issues.¹ This may include instruments which:

- set out significant elements of a regulatory scheme;
- significantly trespass on personal rights and liberties;
- amend primary legislation; or
- contain significant policy matters.

5.2 In this *Delegated Legislation Monitor*, there are no instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4) on the basis that they raise significant issues.

1 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the [committee's website](#).

Chapter 6

Expenditure and taxation in delegated legislation

6.1 This chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) in the interests of promoting appropriate parliamentary scrutiny and control of Commonwealth expenditure in delegated legislation.¹ This chapter is divided into two sections, covering expenditure-related matters and the levying of taxation in delegated legislation.

Expenditure

6.2 This section contains four broad categories of expenditure-related instruments:

- Advance to the Finance Minister determinations;
- instruments specifying Commonwealth expenditure under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986*;
- instruments providing grants to the states and territories under the *Federal Financial Relations Act 2009*; and
- instruments providing for or in relation to expenditure pursuant to other special accounts.

Advance to the Finance Minister determinations

6.3 The annual Appropriation Acts contain Advance to the Finance Minister (AFM) provisions which enable the Finance Minister to provide additional appropriations to agencies throughout the financial year via non-disallowable determinations.² The Finance Minister may only issue an AFM determination if satisfied that there is an urgent need for expenditure that is either not provided for or has been insufficiently provided for in the existing appropriations of the agency.

6.4 The committee detailed its concerns about the AFM mechanism in the reports of its inquiry into the exemption of delegated legislation from parliamentary

1 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the [committee's website](#).

2 A list of Advance to the Finance Minister Determinations is available on the Department of Finance's [website](#). They may also be accessed on the [Federal Register of Legislation](#).

oversight.³ These concerns include the large amount of public money that may be allocated under the AFM provisions and the non-disallowable status of the AFM determinations which limit parliamentary oversight. In light of these concerns, the committee has resolved to draw the Senate's attention to Commonwealth expenditure provided for by AFM determinations under Senate standing orders 23(4) and 23(4A).⁴

6.5 The table below lists AFM determinations registered during the relevant period, including specified expenditure.

Instrument	Amount	Description
Advance to the Finance Minister Determination (No. 6 of 2021-2022) [F2022L00814]	\$235 million	Provides for urgent expenditure to the Department of Infrastructure, Transport, Regional Development and Communications to upgraded NBN Co Limited's fixed wireless and satellite networks.

Instruments specifying expenditure under the Financial Framework (Supplementary Powers) Act 1997 and Industry Research and Development Act 1986

6.6 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified in instruments made under those Acts. Consequently, the specification of expenditure in an instrument made under these Acts effectively authorises the Commonwealth to spend public monies on the relevant grant or program. The scrutiny of these instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.⁵ Accordingly, the committee has resolved to draw the Senate's attention to Commonwealth expenditure authorised by delegated legislation made under the FF(SP) Act and IRD Act under Senate standing order 23(4).⁶

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) p. 59–60, 71; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) p. 59, 70.

4 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the [committee's website](#).

5 For further information see the committee's guideline on [Scrutiny of Commonwealth expenditure](#) and Chapter 7 of the report of the committee's inquiry, [Parliamentary scrutiny of delegated legislation](#).

6 Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

6.7 The table below lists the expenditure specified in legislative instruments made under the FF(SP) Act and IRD Act registered in the relevant period.

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 2) Regulations 2022 [F2022L00339]	\$50.5 million over four years, ongoing funding of \$2.5 million from 2025-26	Koala Conservation and Protection package
	\$68.4 million over four years from 2021-22	Cultivating Australia's Traceability measure
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022 [F2022L00357]	\$3.1 million over four years from 2021-22	Justice Services—Community Legal Services Program
Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 2) Regulations 2022 [F2022L00358]	\$134.9 million over three years from 2022-23	Work for the Dole program
	\$8 million over two years from 2022-23	Competitive fund for micro-credentials (pilot program)
	\$10 million over five years from 2021-22	Scaling up Success in Remote Schools
	\$4.9 billion over four years from 2021-22	Workforce Australia
Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2022 [F2022L00359]	\$87.2 million over four years from 2021-22; \$23.4 million per year ongoing from 2025-26	Australian Agriculture Visa program
	\$47.1 million over four years from 2021-22	Pacific Australia Labour Mobility Scheme
	\$12 million over three years from 2022-23	Support for the Republic of Palau
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2022 [F2022L00354]	\$0.72 million over three years from 2021-22	NRL All Stars—State of Mind Program
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022 [F2022L00353]	Unspecified amount	Papua New Guinea Independent Management Arrangement
Financial Framework (Supplementary Powers) Amendment (Industry, Science, Energy and Resources Measures No. 1) Regulations 2022 [F2022L00485]	Unspecified amount	Assistance to Ukraine

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet’s Portfolio Measures No. 2) Regulations 2022 [F2022L00240]	\$14 million over four years from 2021-22	Australian Future Leaders program
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet’s Portfolio Measures No. 3) Regulations 2022 [F2022L00311]	Up to \$200 million in 2021-22	Australian Government Disaster Recovery Payment (Special Supplement)
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet’s Portfolio Measures No. 4) Regulations 2022 [F2022L00489]	\$13.5 million in 2021-22 uncapped	Emergency income relief—2022 floods
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2022 [F2022L00352]	\$10.7 million over three years from 2021-22	Jobs and Market Fund
	\$40 million over four years from 2021-22	National Disability Data Asset
	\$134 million per annum, ongoing	Information, Linkages and Capacity Building
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 2) Regulations 2022 [F2022L00355]	\$22 million over two years from 2022-23	Cashless Welfare Support Services—Jobs and Infrastructure program
Financial Framework (Supplementary Powers) Amendment (Veterans’ Affairs Measures No. 1) Regulations 2022 [F2022L00351]	\$20 million across 2021-23	Veteran Wellbeing
Industry Research and Development (Catalysing the Artificial Intelligence Opportunity in Our Regions Program) Instrument 2022 [F2022L00482]	\$9 million from 2021-26	Artificial Intelligence Opportunity in Our Regions Program
Industry Research and Development (Northern Endeavour Temporary Operations Program) Amendment Instrument 2022 [F2022L00569]	Unspecified amount	Northern Endeavour Temporary Operations Program
Industry Research and Development (Small Business Debt Helpline Program) Instrument 2022 [F2022L00333]	\$2.1 million in 2021-22	Small Business Debt Helpline Program
Industry Research and Development (Square Kilometre Array Program) Instrument 2022 [F2022L00324]	\$383.8 million from 2021-31	Square Kilometre Array Program

Instrument	Amount	Grant/Program
Industry Research and Development (Strengthening Business Program) Instrument 2022 [F2022L00484]	\$14 million in 2022-23	Strengthening Business Program

Instruments providing for Commonwealth grants to states and territories under the Federal Financial Relations Act 2009

6.8 The *Federal Financial Relations Act 2009* (the Federal Financial Relations Act) is a key source of legislative authority for funding provided by the Commonwealth to the states and territories. It empowers the relevant minister to make determinations providing for payments of general revenue assistance to the states and territories (under section 9) and specific purposes agreed with a state or territory (under section 16). Such instruments are not subject to disallowance by Parliament.

6.9 The Annual Appropriation Acts set a debit limit on the total amounts that can be provided in general revenue assistance and specific purpose payments under sections 9 and 16 of the Federal Financial Relations Act. The *Appropriation Act (No.2) 2021-2022* set these limits at \$5 billion and \$25 billion, respectively. Noting the significant amount of expenditure which the relevant minister may determine subject to these limits, together with the non-disallowable status of the determinations, the committee has resolved to draw these instruments to the attention of the Senate under standing order 23(4).

6.10 The following table lists instruments providing for Commonwealth grants pursuant to the Federal Financial Relations Act framework registered in the relevant period.

General revenue assistance – section 9, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 9) Determination 2022 [F2022L00330]	\$119 578 164.66	Determine amounts of general purpose financial assistance to be paid to Western Australia and the Australian Capital Territory.
Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 10) Determination 2022 [F2022L00617]	\$96 681 116.12	
Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 11) Determination 2022 [F2022L00714]	\$109 923 857.66	
Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 12) Determination 2022 [F2022L00785]	\$100 457 932.60	

Instrument	Amount	Description
Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 1) Determination 2022 [F2022L00991]	\$118 372 701.27	

Specific purpose payments – section 16, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (National Health Reform Payments for 2020-21) Determination 2022 [F2022L00226]	\$26 661 276 047.28	Determines the amounts of National Health Reform funding to be paid to each state, the Australian Capital Territory and the Northern Territory for the 2020-21 financial year.
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 10) Determination 2022 [F2022L00229]	\$584 106 180.39	Determine amounts of financial assistance to be paid to the states, the Australian Capital Territory or the Northern Territory to:
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 12) Determination 2022 [F2022L00544]	\$1 265 733 941.21	support the delivery of agreed outputs or projects; facilitate state and territory reforms; and reward states and territories for nationally significant reforms.
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 13) Determination 2022 [F2022L00680]	\$1 008 760 098.36	
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 14) Determination 2022 [F2022L00743]	\$1 750 090 464.84	
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 15) Determination 2022 [F2022L00855]	\$2 549 813 806.34	
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 1) Determination 2022 [F2022L00950]	\$295 172 541.00	
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 11) Determination 2022 [F2022L00327]	\$2 847 000.00	Determines amounts of financial assistance to be paid to New South Wales to: support the delivery of agreed outputs or projects; facilitate state and territory reforms; and reward states and territories for nationally significant reforms.

Instruments providing for expenditure pursuant to special accounts

6.11 In addition to instruments made under the Federal Financial Relations Act, the Commonwealth may make other instruments providing for, or relating to, payments to states, territories and other entities. The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) empowers the Finance Minister to establish special accounts by legislative instrument (section 78) or enactment (section 80). Special accounts are a mechanism by which an amount of money in the consolidated revenue fund can be identified for a specific purpose and may only be expended subject to any conditions imposed on the account.

6.12 Where special accounts are established by primary legislation under section 80 of the PGPA Act, legislative instruments relating to the expenditure under the special account may be made. Such instruments may, for example, relate to investment of the expenditure or caps on the amount of expenditure under the special account.

6.13 As instruments that provide for or relate to special accounts can involve significant expenditure and may be exempt from disallowance, the committee has resolved to draw these instruments to the attention of the Senate.

6.14 The table below lists such instruments registered in the relevant period.

Instrument	Amount	Description
Fuel Indexation (Road Funding) Special Account Determination 2022 [F2022L00710]	\$1 001 000 000.00	Specifies an amount to be credited to the Fuel Indexation (Road Funding) special account for the 2020-21 financial year.
National Housing Finance and Investment Corporation Investment Mandate Amendment (Review Measures) Direction 2022 [F2022L00592]⁷	Up to \$5 500 000 000.00	Increases the cap of the National Housing Finance and Investment Corporation's total guaranteed liabilities from \$2 billion to \$5.5 billion.

Levying of taxation in delegated legislation

6.15 The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's longstanding view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee's concerns are heightened where the tax is not limited by a cap in the relevant enabling Act.

7 See also Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 3 of 2018](#) (21 March 2018) pp. 28–30.

6.16 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). This includes where an instrument imposes, or sets the rate of, a tax or levy. As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved to draw the following instruments to the attention of the Senate under standing order 23(4).

Instrument	Limit on the taxation amount in primary legislation?
Australian Transaction Reports and Analysis Centre Industry Contribution Determination 2022 (No. 1) [F2022L00237]	Yes
Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022 [F2022L00999]	Yes
Greenhouse and Energy Minimum Standards (Registration Fees) Instrument (No. 1) 2022 [F2022L00385]	No
National Vocational Education and Training Regulator (Charges) Determination 2022 [F2022L00833]	Yes
Radiocommunications (Receiver Licence Tax) Amendment Determination 2022 (No. 2) [F2022L00935]	No
Radiocommunications (Transmitter Licence Tax) Amendment Determination 2022 (No. 2) [F2022L00934]	No
Therapeutic Goods (Charges) Amendment (2022 Measures No. 1) Regulations 2022 [F2022L00589]	No

Chapter 7

Exemptions from disallowance and sunseting

7.1 This chapter lists the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) because they are exempt from disallowance and sunseting and do not satisfy the committee's expectations in relation to the source and appropriateness of the exemptions following the committee's scrutiny under standing orders 23(4A) and 23(3)(k).

Exemptions from disallowance

7.2 On 16 June 2021, the Senate resolved that delegated legislation should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.¹

7.3 Senate standing order 23(4A) provides that the committee may consider instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance. Noting the Senate's concern about the exemption of delegated legislation from disallowance, this section identifies the instruments which do not satisfy the committee's expectations regarding the circumstances of their exemption from disallowance.

7.4 Subject to exceptional circumstances, the committee's expectations will not be met where the instrument:

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;²
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;

1 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

2 Items 1 to 4 of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from disallowance: instruments requiring the approval of either or both Houses of Parliament; instruments that are directions by a minister to any person or body; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- facilitates the expenditure of public money, including Advance to the Finance Minister determinations; or
- otherwise contains a matter requiring parliamentary oversight.

7.5 To assess whether an instrument is appropriately exempt from disallowance, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from disallowance.

7.6 Further information about the committee's expectations about the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.³

Instruments which do not meet the committee's expectations

7.7 Instruments listed below do not meet the committee's expectations under standing order 23(4A).

Instrument

Advance to the Finance Minister Determination (No. 6 of 2021-2022) [F2022L00814]

Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2022 [F2022L00501]

Biosecurity (Exit Requirements) Determination 2022 [F2022L00500]

Biosecurity Legislation Amendment (2022 Measures No. 1) Determination 2022 [F2022L00939]

Biosecurity (Negative Pratique) Amendment (2022 Measures No. 1) Instrument 2022 [F2022L00234]

Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2022 [F2022L00744]

Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 9) Determination 2022 [F2022L00330]

Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 10) Determination 2022 [F2022L00617]

Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 11) Determination 2022 [F2022L00714]

3 See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd Edition (February 2022) pp. 47–49; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 61–72; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 99–123.

Instrument

Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 12) Determination 2022 [F2022L00785]

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 1) Determination 2022 [F2022L00991]

Federal Financial Relations (National Health Reform Payments for 2020-21) Determination 2022 [F2022L00226]

Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 10) Determination 2022 [F2022L00229]

Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 11) Determination 2022 [F2022L00327]

Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 12) Determination 2022 [F2022L00544]

Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 13) Determination 2022 [F2022L00680]

Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 14) Determination 2022 [F2022L00743]

Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 15) Determination 2022 [F2022L00855]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 1) Determination 2022 [F2022L00950]

Legislation (Deferral of Sunsetting—Airport Instruments) Certificate 2022 [F2022L00410]

Legislation (Deferral of Sunsetting—Recovery Plans) Certificate 2022 [F2022L00408]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Home Guarantee Scheme) Direction 2022 [F2022L00593]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Price Cap Update) Direction 2022 [F2022L00585]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Review Measures) Direction 2022 [F2022L00592]

Superannuation Industry (Supervision) Self-Managed Superannuation Funds (COVID-19 Rental Income Deferrals – In-House Asset Exclusion) Determination 2022 [F2022L00232]

Superannuation (prudential standard) determination No. 1 of 2022 [F2022L00741]

Superannuation (PSS) Maximum Benefits (2022-2023) Determination 2022 [F2022L00793]

Superannuation (PSS) Productivity Contribution (2022-2023) Determination 2022 [F2022L00796]

Exemptions from sunseting

7.8 Senate standing order 23(3)(k) requires the committee to scrutinise instruments which are exempt from the sunseting provisions of the *Legislation Act 2003* (the Legislation Act), including whether it is appropriate for these instruments to be exempt from sunseting.

7.9 The sunseting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. Sunseting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

7.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.⁴

7.11 Where an instrument is exempt from sunseting, Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether the exemption is appropriate. Noting the Senate's concern about the exemption of delegated legislation from sunseting, this section identifies instruments which do not satisfy the committee's expectations regarding the appropriateness of their exemption from sunseting.

7.12 Subject to exceptional circumstances, the committee's expectations will not be met where the instrument:

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁵
- overrides or modifies primary legislation;

4 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

5 Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunseting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

7.13 To assess whether an instrument is appropriately exempt from sunseting, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from sunseting.

7.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.⁶

Instruments which do not meet the committee's expectations

7.15 Instruments listed below do not meet the committee's expectations under standing order 23(3)(k).

Instrument

Australia New Zealand Food Standards Code — Schedule 20 - Maximum residue limits Variation Instrument No. APVMA 2, 2022 [F2022L00696]

Australia New Zealand Food Standards Code — Schedule 20 - Maximum residue limits Variation Instrument No. APVMA 3, 2022 [F2022L00970]

Christmas Island Applied Laws Amendment (Heritage) Ordinance 2022 [F2022L00525]

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2022 [F2022L00352]

Food Standards (Application A1212 – Beta-fructofuranosidase enzyme from *Aspergillus fijiensis*) Variation [F2022L00722]

Food Standards (Application A1226 – Food derived from insect-protected corn line MON95379) Variation [F2022L00607]

Food Standards (Application A1230 – Very Low Energy Diets (VLED)) Variation [F2022L00733]

6 See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) pp. 34–35; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 87–88 and pp. 99–123.

Instrument

Food Standards (Application A1231 – Maltogenic alpha amylase from GM Escherichia coli) Variation [F2022L00723]

Food Standards (Application A1232 – Food derived from drought-tolerant and herbicide-tolerant wheat line IND-00412-7) Variation [F2022L00965]

Food Standards (Application A1233 – 2'-FL from new GM source for infant formula) Variation [F2022L00964]

Marine Order 64 (Vessel traffic services) 2022 [F2022L00748]

Safety, Rehabilitation and Compensation Directions Amendment Instrument 2022 [F2022L00577]

Superannuation (CSS) Productivity Contribution (2022-2023) Declaration 2022 [F2022L00791]

Superannuation (prudential standard) determination No. 1 of 2022 [F2022L00741]

Superannuation (PSS) Maximum Benefits (2022-2023) Determination 2022 [F2022L00793]

Superannuation (PSS) Productivity Contribution (2022-2023) Determination 2022 [F2022L00796]

Superannuation Industry (Supervision) Self-Managed Superannuation Funds (COVID-19 Rental Income Deferrals – In-House Asset Exclusion) Determination 2022 [F2022L00232]

Superannuation Legislation (CSS and PSS Membership Eligibility—ASIC Employees) Amendment Declaration 2022 [F2022L00595]

Telecommunications (ACCC Inquiry into Access to Regional Towers and Associated Infrastructure) Direction 2022 [F2022L00439]

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation