

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Annual Report 2021

28 September 2022

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ISSN: 2652-9742 (Print)

ISSN: 2652-9750 (Online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Delegated Legislation and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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Senator Catryna Bilyk	Tasmania, ALP
Senator David Pocock	Australian Capital Territory, IND
Senator Louise Pratt	Western Australia, ALP
Senator Paul Scarr	Queensland, LP

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Senator the Hon Kim Carr (Deputy Chair)	Victoria, ALP
Senator Raff Ciccone	Victoria, ALP
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Introduction

Overview

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), 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 set out in Senate standing order 23.

The executive branch of government makes thousands of legislative instruments each year, known as 'delegated legislation'. Delegated legislation has the same force in law as Acts made by the Parliament and may form as much as half of the statutory law of the Commonwealth of Australia.¹

The committee's work may be broadly described as technical legislative scrutiny. The committee does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny.

This Annual Report provides a summary of the committee's work for the period from 1 January to 31 December 2021. The annual report is set out in three chapters:

- Chapter 1 discusses the committee's inquiry into the exemption of delegated legislation from parliamentary oversight, including details of the final report tabled in March 2021;
- Chapter 2 sets out statistics relating to the work of the committee in 2021; and
- Chapter 3 highlights the most significant scrutiny issues that the committee identified in 2021.

Changes to standing order 23

On 16 March 2021, the committee tabled the final report of its inquiry into the exemption of delegated legislation from parliamentary oversight.

On 16 June 2021 the Senate adopted three recommendations of the final inquiry report that were directed to the Senate, including the recommendation to amend standing order 23 to clarify the committee's scrutiny principles in relation to:

- exemptions from sunseting;
- instruments that amend or modify the operation of primary legislation (Henry VIII clauses); and
- instruments that are exempt from disallowance.

1 [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 432.

The amendments altered the committee's powers, procedures and scrutiny principles. The committee began operating in accordance with its new scrutiny principles for instruments registered from 1 July 2021. From this time, the committee scrutinises 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.

In addition, standing order 23(4) empowers the committee to scrutinise instruments 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.

Further, standing order 23(4A) empowers the committee to consider instruments made that are not subject to disallowance, including whether it is appropriate for the instrument to be exempt from disallowance.

Committee membership

Senate standing order 23 provides for the committee to be appointed at the commencement of each Parliament. The committee shall comprise six members:

three government senators and three non-government senators. The committee is to be chaired by a government senator.

A list of current committee members can be found at the beginning of this report.²

The committee processes

In undertaking its work, the committee is supported by a secretariat comprising a secretary, two principal research officers, two senior research officers and a legislative research officer.

The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Associate Professor Andrew Edgar served as the committee's legal adviser during the reporting period.

The committee's work is also supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.

Scrutiny of instruments

Each instrument is scrutinised by the committee secretariat and the legal adviser against the committee's scrutiny principles. The committee meets regularly, including during Senate sitting weeks, to consider instruments that give rise to potential scrutiny issues.

Where an instrument raises a scrutiny concern, the committee's usual approach is to include the instrument in its *Delegated Legislation Monitor* (the Monitor) and write to the responsible minister or agency seeking further explanation or requesting specific action to address the relevant issue.

The committee's use of the disallowance process

The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns. The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.³

In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.⁴ This extends the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.

2 This list is also available on the [Committee Membership](#) page on the committee's website.

3 [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 437.

4 [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 438.

The committee may otherwise give a notice of motion to disallow an instrument where it considers that the instrument raises serious, unresolved scrutiny concerns, and should be drawn to the Senate's attention or disallowed. In these circumstances, the committee will advise the relevant minister in writing of its intention to move to disallow the instrument and may publish a summary of its scrutiny concerns in Chapter 1 of its Monitor.⁵

In the vast majority of cases, these notices are withdrawn when the committee receives a satisfactory response from the relevant minister or agency which, for example, provides information that addresses the committee's concerns or includes an undertaking to progress amendments to the instrument or its explanatory statement. Where a satisfactory response is received, the Chair withdraws the notice of motion on behalf of the committee.

Undertakings

As mentioned above, ministers or agencies may provide an undertaking to address the committee's concerns. Typically, they will undertake to progress amendments to the instrument or its explanatory statement, or to propose amendments to an instrument's enabling legislation. The acceptance of such undertakings by the committee has the benefit of securing a satisfactory outcome in relation to the committee's scrutiny concerns without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

The committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The two other committees are the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee).⁶

The work of the three committees is complementary in many respects. The committee therefore monitors the work of the PJCHR and the Scrutiny of Bills Committee and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

Committee publications

Committee publications may be accessed on the committee's website. A brief overview of these publications is provided below.

5 The committee commenced this practice after 1 July 2019.

6 More information about these committees can be found at the web pages for the [Parliamentary Joint Committee on Human Rights](#) and the [Senate Standing Committee for the Scrutiny of Bills](#).

Delegated Legislation Monitor⁷

The Monitor is the regular scrutiny report on the work of the committee. It is generally published in each Senate sitting week. It identifies instruments in relation to which the committee is engaging with the relevant minister or agency or has concluded its examination. The Monitor also lists all the instruments which specify Commonwealth government expenditure that have been registered during the reporting period, as well as instruments that the committee is raising under standing order 23(4) as a matter of interest to the Senate. From September 2021, the Monitor also records the instruments exempt from disallowance registered in that reporting period and whether they meet the committee's expectations under standing order 23(4A). It also records undertakings that have been made or implemented to address the committee's scrutiny concerns.

Scrutiny News⁸

The committee secretariat prepares *Scrutiny News* each sitting week. This is a brief publication which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list. *Scrutiny News* highlights recent comments drawn from material in the committee's Monitor and the Scrutiny of Bills Committee's *Scrutiny Digest*, with a particular focus on complex issues. *Scrutiny News* is also used to raise awareness about the committees and their functions.

Guidelines⁹

The committee's guidelines provide detail on the committee's work practices and its technical scrutiny principles, as well as its scrutiny of Commonwealth expenditure and matters of interest of the Senate.

Index of Instruments¹⁰

The *Index of Instruments* is an alphabetical list of all instruments about which the committee has raised a scrutiny concern in a particular year, with links to the committee's relevant correspondence regarding each instrument.

Scrutiny of COVID-19 instruments¹¹

To facilitate public scrutiny of COVID-19 related delegated legislation, the committee has published a list of all such delegated legislation registered on the Federal Register

7 Monitors for 2021 and for previous years, may be accessed via the [committee's webpage](#).

8 Past editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's [website](#).

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

10 The [Index of Instruments](#) can be accessed on the committee's website.

11 The [Scrutiny of COVID-19 instruments](#) list can be accessed on the committee's website.

of Legislation since 18 March 2020. The committee continued to maintain this list in 2021.

A total of 220 COVID-related instruments registered between 1 January 2021 and 31 December 2021 were added to this list in 2021.

Other resources

A number of other resources relevant to the committee can be accessed on the Senate website. A brief overview of these resources is provided below.

Disallowance Alert¹²

The *Disallowance Alert* is a webpage listing all instruments for which a notice of motion for disallowance has been given in either House (whether by the committee or by an individual senator or member). The progress and outcome of all disallowance notices is also recorded here.

Senate Disallowable Instruments List¹³

The Senate Disallowable Instruments List is a list of all disallowable instruments tabled in the Senate.¹⁴ This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

Guides to Senate Procedure¹⁵

The *Guides to Senate Procedure* are a series of guidance notes designed to provide a practical understanding of the procedures governing the work of the Senate. Of particular relevance to the work of the committee is Brief No. 19 on disallowance.

Odgers' Australian Senate Practice¹⁶

Odgers' Australian Senate Practice is an authoritative reference work on all aspects of the Senate's powers, procedures and practices.

Acknowledgements

The committee greatly appreciates the assistance of its legal adviser, Associate Professor Andrew Edgar, during the reporting period.

12 The [Disallowance Alert](#) can be accessed via Parliament's website.

13 The [Senate Disallowable Instruments List](#) can be accessed via Parliament's website.

14 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a [House of Representatives Disallowable Instruments List](#).

15 The [Guides to Senate Procedure](#) can be accessed via Parliament's website.

16 [Odgers' Australian Senate Practice](#) can be accessed via Parliament's website.

The committee also wishes to acknowledge the assistance of ministers and agencies during the reporting period. The responsiveness of ministers and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

Chapter 1

Inquiry into the exemption of delegated legislation from parliamentary oversight

Overview

1.1 On 30 April 2020, the committee unanimously resolved to undertake an inquiry into the exemption of delegated legislation from parliamentary oversight. It subsequently tabled its interim and final reports in December 2020 and March 2021.¹

1.2 This chapter provides an overview of the committee's inquiry, including the rationale for undertaking the inquiry and details of its conduct. The *Annual Report 2020* discussed the interim report; however, the government response had not yet been received at the time of publication. Accordingly, this chapter includes a brief description of both the interim and final reports, as well as their recommendations, the government response and the implementation of recommendations.

Rationale for undertaking the inquiry

1.3 The committee's decision to undertake an inquiry into the exemption of delegated legislation from parliamentary oversight was informed by a number of considerations. These included its 2019 report of the inquiry into parliamentary scrutiny of delegated legislation,² the increasing proportion of delegated legislation exempt from disallowance,³ and the use of delegated legislation to respond to the COVID-19 pandemic.

Findings of 2019 inquiry report

1.4 In its 2019 inquiry report, the committee raised significant concerns about the increasing exemption of delegated legislation from parliamentary oversight. The committee commented:

...exempting instruments from disallowance raises significant scrutiny concerns...because such exemptions effectively remove Parliament's control of delegated legislation, leaving it to the executive to determine

1 The committee's interim and final reports can be found on the [committee's website](#).

2 Further information about the 2019 inquiry can be found on the [committee's website](#).

3 This issue is addressed in further detail in Chapter 3.

(albeit within the confines of the enabling legislation and the Constitution)
the content of the law...⁴

Increasing amount of delegated legislation exempt from disallowance

1.5 The committee was also concerned about the increasingly significant amounts of delegated legislation exempt from disallowance being made in recent years. In particular, the committee was concerned that, in 2019, nearly 20 per cent of legislative instruments were exempt from disallowance.⁵

Impact of COVID-19

1.6 The committee considered that the number of instruments exempt from disallowance in 2020 would likely be above average due to the increased number of exempt instruments being made in response to the COVID-19 pandemic. The committee was concerned about this extensive use of non-disallowable delegated legislation, even in the early months of the COVID-19 pandemic, and considered that this would reduce opportunities for parliamentary oversight during times of emergency.⁶

Commencement of the inquiry

1.7 Senate standing order 23(12) provides that the committee may inquire into, and report on, any matter related to the technical scrutiny of delegated legislation.⁷

1.8 In April 2020, the committee resolved, under standing order 23(12), to inquire into and report on the exemption of delegated legislation from parliamentary oversight, with particular regard to:⁸

4 Senate Standing Committee on Regulations and Ordinances, [Parliamentary scrutiny of delegated legislation](#) (June 2019) pp. 122–124.

5 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) pp. 8–9. This issue is discussed further in Chapter 3 of this report.

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) p. 8.

7 Standing order 23 was amended to include this power in accordance with the recommendations made by the committee in its 2019 inquiry report: [Parliamentary scrutiny of delegated legislation](#).

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) p. 13.

- a) the appropriateness and adequacy of the existing framework for exempting delegated legislation from parliamentary oversight, including:
 - i. the amount and nature of delegated legislation currently exempt from parliamentary oversight;
 - ii. the grounds upon which delegated legislation is currently made exempt from parliamentary oversight;
 - iii. the manner in which delegated legislation is currently made exempt from parliamentary oversight; and
 - iv. the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and
- b) whether the existing framework for exempting delegated legislation from parliamentary oversight should be amended, and, if so, how, including:
 - i. the grounds upon which it is appropriate to exempt delegated legislation from parliamentary oversight; and
 - ii. the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

1.9 As the inquiry was self-referred, the committee established its own reporting timelines; resolving to table an interim report in December 2020, and the final inquiry report in March 2021.

Conduct of the inquiry

Submissions

1.10 The committee invited submissions directly from scrutiny committees in other jurisdictions, Commonwealth departments and agencies, academics, and other relevant experts and organisations. The closing date for submissions was 25 June 2020. However, submissions continued to be received and accepted after this date with committee approval. The committee also distributed information about the inquiry via the Department of the Senate website and Twitter account, and through its publication *Scrutiny News*.

1.11 The committee received 30 public submissions, which can viewed on the committee's website.⁹

9 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Exemption of delegated legislation from parliamentary oversight: Submissions](#).

Public hearings

1.12 As part of the inquiry, the committee held its first public hearings since the establishment of the committee as the Standing Committee on Regulations and Ordinances in 1932.

1.13 Three public hearings were held in Canberra on 27 August, 31 August, and 3 September 2020. The committee heard evidence from academics, organisations and government departments. The *Hansard* transcripts of the hearings are available on the committee's website.¹⁰

Interim report

1.14 The committee presented its interim report to the Senate on 2 December 2020.¹¹ The focus of the interim report is the exemption of delegated legislation made during times of emergency from parliamentary oversight.¹²

Recommendations and response

1.15 In its interim report, the committee made 18 recommendations to improve parliamentary oversight of delegated legislation in times of emergency. A discussion of the recommendations from the interim report was included in the committee's *Annual Report 2020*.¹³

10 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Exemption of delegated legislation from parliamentary oversight: Public hearings](#).

11 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020).

12 The interim report particularly addresses the issues raised in evidence received by the committee relevant to terms of reference (a)(iv) and (b)(ii): the appropriateness of exempting delegated legislation made in times of emergency, including in response to the COVID-19 pandemic, from parliamentary oversight; and the options available to ensure appropriate and adequate parliamentary oversight of delegated legislation in times of emergency.

13 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Annual Report 2020](#) (23 June 2021) pp. 13–14.

Government response

1.16 The government response to the interim report was presented to the Senate on 18 November 2021, at the same time as the response to the final report.¹⁴ Of the 18 recommendations made in the interim report, the government agreed with only one recommendation, related to the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency.

Implementation of inquiry recommendations

1.17 The committee's interim report included several recommendations relating to the *Biosecurity Act 2015*. The committee noted the delayed government response and expressed its disappointment at the lack of agreement and implementation of the interim report recommendations. The committee raised these concerns in the first half of 2021 and put the Senate on notice that the committee planned on moving amendments to the *Biosecurity Act 2015* to implement the recommendations.

1.18 In September 2021, the government introduced the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 (the bill) to amend the *Biosecurity Act 2015* in the House of Representatives. The bill was introduced in the Senate on 2 December 2021, and on the same day the Chair circulated amendments to the bill on the committee's behalf which would ensure that instruments made under the *Biosecurity Act 2015* are subject to disallowance and therefore appropriate parliamentary scrutiny and oversight.¹⁵ The proposed amendments included that:

- section 475 be amended to provide that declarations of a human biosecurity emergency by the Governor-General are subject to disallowance;
- section 476 be amended to provide that extensions of a human biosecurity emergency period by the Governor-General are subject to disallowance; and
- section 477 be amended to provide that determinations specifying emergency requirements during human biosecurity emergencies are subject to disallowance.

1.19 The bill was still before the Senate when the Parliament was prorogued on 11 April 2022. As prorogation terminates all business before the Senate, there was no

14 The government responses are published on the committee's website: [Australian Government response to the Standing Committee for the Scrutiny of Delegated Legislation: Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (November 2021); [Australian Government response to the Standing Committee for the Scrutiny of Delegated Legislation: Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (November 2021).

15 Biosecurity Amendment (Enhanced Risk Management) Bill 2021, [proposed amendments](#) moved by Senator Fierravanti-Wells on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation [sheet 1475].

opportunity for the amendments to be considered by the Senate during the 46th Parliament.

Final report

1.20 The committee tabled its final report on 16 March 2021. The committee's final report considers exemptions from disallowance and other parliamentary oversight mechanisms more generally. It looks broadly at issues of constitutionality, how the current framework for exemptions from disallowance operates, and how the deficiencies in its operation might be addressed.

1.21 The committee's report is divided into three parts:

- *Part I – Background*, which includes an introduction to the inquiry and background to the interim and final reports;
- *Part II – The existing framework for exemptions from disallowance*, which considers the constitutionality of the existing framework for exemptions from disallowance and its operation; and
- *Part III – Future scrutiny of delegated legislation*, which considers the appropriate grounds, authority and guidance on exemptions from disallowance, the role of the committee, and the committee's view and recommendations.

Recommendations and response

1.22 In making its recommendations in the final report, the committee noted that if the Parliament is unable to scrutinise legislation because it has been exempted from disallowance, the Parliament's role as the ultimate lawmaking authority is diminished. Insisting that legislation is subject to effective parliamentary oversight is not a matter of policy, but of ensuring the proper functioning of the institutions established by the Constitution.¹⁶

1.23 The committee made 11 recommendations to improve parliamentary oversight of delegated legislation.¹⁷

1.24 Of these 11 recommendations, the committee made seven recommendations to government. Recommendations were made to amend the *Legislation Act 2003*, including to require all exemptions from disallowance and sunseting to be in primary

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) p. 3.

17 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) pp. 99–123.

legislation; to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance and sunseting; and to clarify that notifiable instruments must not be legislative in character.

1.25 The committee also made recommendations to government to amend the *Legislation Act 2003* to provide that the explanatory statements to instruments exempt from disallowance or sunseting must contain a statement that outlines the exceptional circumstances that justify such an exemption. The committee further recommended that legislation be introduced to provide that the explanatory memoranda of all bills that delegate legislative power and exempt this delegated legislation from disallowance or sunseting must contain a statement that outlines the exceptional circumstances that justify such an exemption. The committee recommended that, if these recommendations were not accepted by the government, the Senate agree to an order of continuing effect to provide for the same.

1.26 The committee made further recommendations to government to repeal the Legislation (Exemptions and Other Matters) Regulation 2015 and for any exemptions in the regulation that remain appropriate to instead be set out in a schedule to the *Legislation Act 2003*, and recommended that Advance to the Finance Minister determinations be disallowable instruments.

1.27 The committee made three recommendations to the Senate. These were:

- to adopt a resolution emphasising the importance of disallowance and sunseting of delegated legislation to parliamentary scrutiny;
- that the Senate order the Attorney-General to table a statement setting out the rationale for specifying instruments as non-legislative, and the rationale for the exemptions from disallowance or sunseting in Parts 2, 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015; and
- that the Senate agree to amend standing order 23 to clarify the committee's scrutiny principles in relation to exemptions from sunseting and instruments that amend or modify the operation of primary legislation (Henry VIII clauses), and to allow the committee to scrutinise instruments that are exempt from disallowance.

Government response

1.28 As noted, the government responses to the interim and final reports were presented to the Senate on 18 November 2021.¹⁸

1.29 Of the 11 recommendations made in the final report, the government noted 10 recommendations, commenting that the then-forthcoming statutory review of the *Legislation Act 2003* provides an opportunity to consider several of the recommendations in more detail. The government expressly did not support one recommendation, that Advance to the Finance Minister determinations be disallowable legislative instruments. The committee is disappointed by the former government's general lack of engagement with the important recommendations made in each of these two inquiry reports.

Implementation of inquiry recommendations

1.30 On 16 June 2021, the Senate adopted the three recommendations of the final inquiry report that were directed to it.¹⁹

1.31 The Senate adopted a resolution emphasising the importance of disallowance and sunseting of delegated legislation to parliamentary scrutiny, implementing recommendation 8.

1.32 In implementing recommendation 9, the Senate ordered the Attorney-General to table, by no later than 5 pm on Tuesday 31 August 2021,²⁰ a statement setting out the rationale for specifying that each class of instrument and each particular instrument in Part 2 of the Legislation (Exemptions and Other Matters) Regulation 2015 are not legislative instruments, and the exceptional circumstances that justify each exemption from disallowance or sunseting currently set out in Parts 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015.

1.33 On 31 August 2021, the Attorney-General tabled the response to the order for the production of documents. In line with the order, the document outlines the rationale for specifying instruments as non-legislative, and the rationale for the

18 The government responses are published on the committee's website: [Australian Government response to the Standing Committee for the Scrutiny of Delegated Legislation: Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (November 2021); [Australian Government response to the Standing Committee for the Scrutiny of Delegated Legislation: Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (November 2021).

19 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Resolutions relating to oversight of delegated legislation](#) (16 June 2021).

20 The Chair of the committee moved an amended version of recommendation 9 which extended the return date for the order of the production of documents by four weeks, from 3 August 2021 to 31 August 2021.

exemptions from disallowance or sunseting in Parts 2, 4 and 5 of the Legislation (Exemptions and Other Matters) Regulation 2015. The response collates and categorises existing justifications and clarifies when a particular rationale is said to apply to a specific instrument or class of instruments. Many of the justifications provided in the response have not been accepted as appropriate by the committee.

1.34 In implementing recommendation 10, the Senate agreed to amend standing order 23, with effect from 1 July 2021, to clarify the committee's scrutiny principles in relation to exemptions from sunseting and instruments that amend or modify the operation of primary legislation, and to allow the committee to scrutinise instruments that are exempt from disallowance. The committee utilised this power rigorously in the second half of 2021 to report to the Senate on unacceptable exemptions from parliamentary oversight and the appropriateness of particular instruments being exempt from disallowance.

Chapter 2

Scrutiny work of the committee in 2021

Overview

2.1 This chapter provides information about the work of the committee in 2021, including relevant statistics relating to the instruments it considered during the 2021 reporting period.

2.2 As noted in Chapter 1, on 16 June 2021, the Senate amended the committee's scrutiny principles on the committee's recommendation following the final report of its *Inquiry into the exemption of delegated legislation from parliamentary oversight*. As a result, from 1 July 2021, it began scrutinising instruments in accordance with two new scrutiny principles, regarding exemptions from sunseting,¹ and instruments that amend or modify the operation of primary legislation (Henry VIII clauses).² In addition, it began scrutinising instruments that are exempt from disallowance.³

2.3 Due to these changes in the committee's scrutiny principles, there are some differences in the statistics captured for instruments registered before and after 1 July 2021. However, where possible, this chapter identifies and discusses any differences in the relative outcomes of the committee's work.

Meetings and Delegated Legislation Monitors

2.4 In 2021, the committee held 22 private meetings, including one private briefing. Private briefings are informal meetings with ministers or senior departmental officers, which enable the committee to obtain further information about certain legislative instruments that raise scrutiny concerns. The committee met with senior officials from the Australian Securities and Investments Commission and Treasury on 28 April 2021 in relation to Treasury portfolio exemption and modification instruments. More detail in relation to the committee's consideration of these instruments is provided in Chapter 3.

2.5 Across the 17 Monitors tabled in 2021, the committee considered 1712 legislative instruments, registered between 30 September 2020 and 22 October 2021. The Chair gave 11 tabling statements in tabling the *Monitors*, to draw the Senate's attention to particular instruments or systemic issues raising

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

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

3 Senate standing order 23(4A); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Resolutions relating to oversight of delegated legislation](#).

significant scrutiny concerns.⁴ This is considerably greater than the six tabling statements delivered in each of the 2019 and 2020 reporting periods.⁵

2.6 The statistics in this chapter relate to the scrutiny of these 1712 legislative instruments. This includes the scrutiny of 1646 disallowable instruments and 66 instruments exempt from disallowance, which were registered from 1 July 2021. This is a significantly greater number of instruments scrutinised in the reporting period than the 1194 disallowable legislative instruments examined in 2020.

Scrutiny of instruments

2.7 Of the 1712 legislative instruments that the committee examined in the 2021 reporting period,⁶ it identified 420 instruments raising one or more scrutiny concerns which required a response from the relevant agency or minister, or were drawn to the attention of the Senate or relevant minister.⁷ This is a significantly greater number than the 240 instruments it identified as raising scrutiny concerns in the 2020 reporting period.⁸

2.8 The 420 instruments raising scrutiny concerns during the 2021 reporting period can be broken down into:⁹

- 66 instruments exempt from disallowance that did not meet the committee's expectations as set out in its guidelines;¹⁰

4 The Chair made tabling statements for Monitors 2, 3, 4, 7, 8, 9, 11, 12, 13, 15 and 16 of 2021. These can be viewed on the [committee's website](#).

5 There were fewer opportunities for tabling statements in 2020 following the reduction in parliamentary sittings due to the COVID-19 pandemic.

6 The committee scrutinises all Commonwealth legislative instruments, noting this now also includes instruments which are exempt from disallowance registered from 1 July 2021.

7 Details of these instruments may be found on the [Index of Instruments](#) page on the committee's website.

8 This is partly due to the inclusion of the scrutiny of instruments exempt from disallowance from 1 July 2021, and partly due to the general increase in the number of instruments scrutinised in this reporting period, see [2.6].

9 This breakdown of numbers at [2.8] shows a total of 482 instruments raised. However, some instruments were raised simultaneously due to scrutiny concerns under both standing order 23(4) and standing order 23(4A), and other scrutiny concerns. In the 2021 reporting period, 62 instruments were raised under two or more of the categories. 420 is therefore the total number of unique instruments raised by the committee.

10 This figure also includes consideration of one disallowable instrument, the Radiocommunications (Spectrum Licence Allocation – 850/900 MHz Band) Determination 2021 [F2021L01155], given parts of the instrument were exempt. The committee's expectations with respect to exemptions from disallowance are contained in Senate standing order 23(4A); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 47. See also Chapter 4 for further discussion of the scrutiny of instruments exempt from disallowance.

- 151 instruments drawn to the attention of the Senate because they raised significant issues or were otherwise likely to be of interest to the Senate.¹¹ Of these:
 - 71 instruments related to matters of interest to the Senate; and
 - 80 instruments related to Commonwealth expenditure; and
- 265 instruments which raised scrutiny concerns under other principles which the committee is empowered to examine under standing order 23(3).

2.9 The committee also concluded its examination of 259 instruments in the 2021 reporting period.¹²

Scrutiny principles engaged

2.10 Due to the changes to the scrutiny principles noted above from 1 July 2021, the committee was empowered to examine instruments against two new scrutiny principles, relating to exemptions from sunseting and exemptions or modifications to primary legislation, and to scrutinise instruments exempt from disallowance. This led to an increase in the number of instruments the committee identified in the 2021 reporting period as raising scrutiny issues. Specifically, as noted previously, it identified 265 instruments registered during the 2021 reporting period compared to 154 in 2020.

2.11 The following tables provide a breakdown of the instruments raising scrutiny issues in that reporting period. Table 1 shows the number of times each scrutiny issue as set out in the committee's previous principles (a) to (k) was raised in instruments registered before 1 July 2021 (which were listed in Monitors 1 to 13 of 2021).¹³ Table 2 shows the number of times these issues arose in instruments registered from 1 July 2021 (which were listed in Monitors 14 to 17 of 2021), when the committee began considering the two additional scrutiny principles.

11 Senate standing order 23(4).

12 The discrepancy between the number of responses and the number of concluded entries arises partly because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period. This also arises due to the committee's dialogue nature of communication, which mostly results in back and forth correspondence with a minister or agency to resolve an issue.

13 The committee's current principles are set out in guidelines available on its website: Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022).

Table 1: Issues identified by the committee in 2021 for instruments registered before 1 July 2021

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) ¹⁴											Total
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	
Ministerial	33	1	10	4	10	1	30	11	5	49	30	184
Agency	45	0	17	21	15	22	7	10	8	4	13	162
Total	78	1	27	25	25	23	37	21	13	53	43	346

Table 2: Issues identified by the committee in 2021 for instruments registered from 1 July 2021

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) ¹⁵													Total
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	
Ministerial	3	1	3	1	0	0	1	5	1	2	0	5	8	30
Agency	20	0	8	3	5	2	8	13	10	1	0	2	6	78
Total	23	1	11	4	5	2	9	18	11	3	0	7	14	108

2.12 As reflected in Table 1, the committee raised a similar number of scrutiny issues at the agency and ministerial levels prior to July 2021. However, Table 2 indicates that the number of issues raised at the agency level was significantly greater than at the ministerial level from July 2021.

2.13 As the committee did not consistently scrutinise instruments in relation to exemption from sunseting until 2022,¹⁶ no scrutiny concerns were raised under this principle in 2021, as indicated by Table 2.

Scrutiny concerns raised at the ministerial level

2.14 Where the committee is unable to resolve its scrutiny concerns by informal engagement with agencies via its secretariat, it will engage directly with the responsible minister.

2.15 As indicated by Tables 1 and 2, and consistently with the 2020 reporting period, the committee most frequently raised scrutiny concerns at the ministerial level in 2021 related to the inclusion in delegated legislation of matters more appropriate for parliamentary enactment,¹⁷ and instruments modifying primary

14 As individual instruments often raise more than one scrutiny principle, the number of issues raised are greater than the 197 instruments raising concerns in this period.

15 As individual instruments often raise more than one scrutiny principle, the number of issues raised are greater than the 68 instruments raising concerns in this period.

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

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

legislation.¹⁸ The committee raised these issues a total of 56 times in 2021, which is slightly higher than in 2020 when they were raised 51 times.

2.16 These principles are underpinned by the committee's concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight, rather than in delegated legislation. Significant matters may include, for example, where an instrument:

- establishes significant elements of a regulatory scheme;
- imposes significant penalties;
- imposes taxes or levies;
- has a serious impact on personal rights and liberties;¹⁹ or
- amends or modifies the operation of, or provides an exemption to, primary legislation.²⁰

2.17 During the 2021 reporting period, the committee identified numerous instruments raising scrutiny concerns because they either contained significant matters more appropriate for primary legislation or amended the effect of primary legislation.²¹ In the first quarter of 2021, many instruments raising these particular concerns were made under the Treasury portfolio. These instruments are discussed further in Chapter 3.

2.18 Concerns raised under principle (m) relating to other technical scrutiny grounds accounted for approximately 18 per cent of concerns raised by the committee at ministerial level in the 2021 reporting period. They were raised a total of 38 times (compared to 26 times in 2020).²²

2.19 The scope of specific concerns that the committee may raise under the principle of other technical scrutiny grounds is broad. However, each is underpinned by the protection and promotion of fundamental rule of law principles, including:

- access to justice;
- equality before the law;

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

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

20 Principle (l), modification of primary legislation, was previously subsumed under principle (j), matters more appropriate for parliamentary enactment, but was made a separate principle following the changes to the committee's standing orders from 1 July 2021. Senate Standing Committee for the Scrutiny of Delegated Legislation [Guidelines](#), 2nd edition (February 2022) p. 36.

21 Senate standing orders 23(3)(j) and 23(3)(l), as of 1 July 2021.

22 In Table 1, this principle falls under Senate standing order 23(3)(k), and in Table 2, under standing order 23(3)(m), due to the amendments to standing order 23 from 1 July 2021.

- legal certainty;
- parliamentary sovereignty;
- procedural fairness;
- protection of personal rights and liberties;
- separation of powers; and
- transparency and accountability.

2.20 In particular, the committee often raised this principle together with concerns that a particular instrument included matters more appropriate for parliamentary enactment.²³

2.21 The number of times the committee raised the principles concerning compliance of instruments with legislative requirements,²⁴ and the adequacy of explanatory materials,²⁵ at ministerial level appears to have significantly increased in 2021. However, this figure is artificially high compared to the 2020 reporting period, due to the delayed registration of 21 Charter of the United Nations Lists instruments under the Foreign Affairs and Trade portfolio, some of which were made almost 20 years ago.²⁶

2.22 In 2021, the committee raised scrutiny concerns at the ministerial level regarding the constitutional validity of two instruments: the Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021,²⁷ and the Industry Research and Development (Regional Decentralisation Agenda—Securing Raw Materials Program) Instrument 2021.²⁸ By contrast, the committee did not raise this issue at the ministerial level at all in 2020.

2.23 This principle requires the committee to scrutinise each instrument as to whether it appears to be supported by a constitutional head of legislative power. Under this principle, the committee may also consider whether an instrument raises issues in relation to the separation of powers doctrine or the implied right to

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

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

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

26 Further information on these instruments and links to the relevant correspondence with the minister can be accessed on the [Index of Instruments](#) page on the committee's website.

27 Senate standing order 23(3)(b). See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitors 10 of 21* (15 July 2021) p. 13; and [17 of 21](#) (1 December 2021) p. 17.

28 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitors 14 of 2021* (29 September 2021) p. 36, and [16 of 2021](#) (25 November 2021) p. 34.

freedom of political communication under the Constitution.²⁹ As the committee's view is that questions of legal validity are ultimately a question for the courts to determine, it generally only raises this matter in exceptional circumstances.

2.24 The remaining scrutiny principles made up approximately 23 per cent of all scrutiny concerns raised at the ministerial level. The committee raised concerns about the scope of administrative powers,³⁰ and adequacy of drafting,³¹ on slightly more occasions in 2021 than in 2020, while it raised concerns about the adequacy of consultation³² and availability of independent review less often.³³ More information on each of the committee's scrutiny principles is available in the committee's *Guidelines*.³⁴

Scrutiny concerns raised at the agency level

2.25 Tables 1 and 2 show how the scrutiny issues raised at the agency level were relatively evenly spread across the committee's scrutiny principles, with the exception of the principles regarding compliance with legislative requirements,³⁵ constitutional validity,³⁶ and matters more appropriate for parliamentary enactment.³⁷

2.26 The scrutiny principle regarding compliance with legislative requirements made up the largest percentage of scrutiny concerns raised with agencies, at almost 30 per cent, being raised a total of 65 times in 2021. The committee raised this principle almost twice as often in 2021 as it did in 2020, and it was the most raised principle at both the agency and ministerial levels in 2021. Specifically, this principle 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, including those set out in the *Legislation Act 2003* (the Legislation Act).³⁸

29 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 11.

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

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

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

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

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

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

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

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

38 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 10.

2.27 In practice, a significant number of issues raised under this principle relate to compliance with the Legislation Act. This includes paragraph 15J(2)(c), which requires the explanatory statement to an instrument that incorporates a document to contain a description of that document, including the manner in which it is incorporated and how it may be obtained. This incorporation issue is often raised simultaneously with the principle regarding access and use,³⁹ which made up 10 per cent of issues raised in 2021.

2.28 Scrutiny concerns about the issue of incorporation are often resolved following agency correspondence. Typically, agencies advise whether relevant documents are incorporated, where they can be accessed and whether, as requested by the committee's secretariat, they have updated the relevant explanatory statement to include this information.

2.29 Scope of administrative powers was the second largest scrutiny issue raised at the agency level in 2021, compared to 2020 when it was not raised at this level at all. This principle requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers, and is concerned with provisions which:

- broadly delegate administrative powers and functions;
- confer broad discretionary powers; or
- confer coercive powers on 'persons assisting' authorised officers.⁴⁰

2.30 The committee raised concerns relating to this principle more often at the agency level, at almost double the rate at which it was raised at the ministerial level. This was most common in instruments under the Finance portfolio, which frequently delegate administrative powers and functions. The committee generally expects that where an instrument delegates administrative powers and functions, its explanatory statement will address the following matters:

- the purpose and scope of the delegation;
- an explanation of who will be exercising the powers and functions; and
- the nature and source of any limitations and safeguards relevant to the delegation.⁴¹

2.31 Generally, these issues were resolved at the agency level via the inclusion of such further detail in the relevant accompanying explanatory statement.

39 Senate standing order 23(3)(f) or principle (f).

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

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

2.32 In the 2021 reporting period, the scrutiny principle concerning the adequacy of consultation was raised less often than in 2020, when it was the most commonly raised issue at the agency level.⁴² This principle requires the committee to consider:

- whether consultation occurred in relation to the specific instrument;
- whether persons likely to be affected by the instrument were consulted; and
- whether persons with expertise were consulted.⁴³

2.33 As with the incorporation principle, scrutiny concerns about this principle are typically resolved via agency correspondence. In corresponding with agencies regarding this principle, the most common outcome is that the agency responds to advise that consultation was undertaken. In these instances, the secretariat then requests the inclusion of further information in an updated explanatory statement. The decrease in the number of times this issue was raised in 2021 can be partly attributed to the improvement of explanatory statements more generally, as a result of the committee's scrutiny and high engagement on this issue through its secretariat in 2020.

2.34 As noted previously, the ability of the secretariat to seek information directly from agencies to assess whether it is necessary to address scrutiny issues at ministerial level has enabled the committee to focus its attention on raising only the most significant scrutiny issues at this level. For example, the committee raised significant scrutiny issues in relation to constitutional validity and matters more appropriate for parliamentary enactment in this reporting period at the ministerial level as opposed to raising such issues at agency level via its secretariat.

Ministerial and agency responses

2.35 In the 2021 reporting period, the committee received 92 responses from ministers (compared to 69 in 2020). Ministerial correspondence is published alongside the relevant Monitor on the committee's website.⁴⁴

2.36 In addition, the committee received 208 responses from agencies (compared to 128 in 2020). The committee does not publish the content of any correspondence with an agency. However, it does publish a concise record of the instruments in relation to which it is engaging at agency level in the Monitor. This record includes the name of the instrument and the relevant scrutiny principle(s). It also records any undertakings that an agency makes to address committee concerns in the Monitor.

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

43 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 16.

44 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitors](#).

COVID-19 instruments

2.37 In addition, in 2020, the committee began scrutinising all instruments registered on the Federal Register of Legislation which were made in response to the COVID-19 pandemic. To facilitate public scrutiny of COVID-19 related delegated legislation, the committee listed all of these instruments on its website. In 2021, the committee identified 220 such instruments that were registered in that calendar year. Of these 220 instruments, 42 were exempt from disallowance, which is approximately 19 per cent.

2.38 Chapter 3 includes more information in relation to the scrutiny of COVID-19 instruments.

Disallowance notices

2.39 The Chair, on behalf of the committee, gave 71 'protective' notices of motion to disallow an instrument in the 2021 reporting period. This is significantly greater than the 22 'protective' disallowance notices given in 2020.

2.40 The committee generally gives a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of a disallowable instrument before the original 15 sitting day disallowance period expires. This protects the Senate's ability to subsequently disallow the instrument in question.⁴⁵

2.41 The committee may otherwise give notice of a motion to disallow an instrument where it considers that the instrument raises serious, unresolved scrutiny concerns and should be drawn to the Senate's attention or disallowed.

2.42 All but four of the notices given by the Chair in 2021 were withdrawn that year, generally following the receipt of a satisfactory ministerial or agency response or an undertaking that addressed the committee's concerns. Three of the four unresolved notices were subsequently withdrawn in 2022. The remaining unresolved notice in relation to the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] was not withdrawn and the instrument was subsequently taken to have been disallowed on 28 March 2022, pursuant to section 42(2) of the *Legislation Act 2003*.⁴⁶

2.43 Details of all disallowance motions given during the reporting period are available on the *Disallowance Alert* webpage for 2021.⁴⁷

45 [Odgers' Australian Senate Practice](#), 14th edition (2016) p. 438.

46 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) pp. 8–13.

47 Parliament of Australia, [Disallowance Alert 2021](#).

Undertakings

2.44 The committee generally requests three types of undertakings from ministers and agencies, regarding: amendments to explanatory statements, amendment or revocation of an instrument, and amendment to an Act.

2.45 The committee expects that such undertakings will be implemented in a timely manner. Accordingly, the committee records all ministerial and agency undertakings in its Monitor, and also records the undertakings implemented since the previous Monitor.

2.46 Table 3 below outlines the number of undertakings that were implemented in 2021, as well as those that remained outstanding at the end of this reporting period. There were 199 undertakings made and/or implemented in the 2021 reporting period (compared to 82 in 2020).

Table 3: Undertakings addressing the committee's concerns

Status	Type of undertaking			Total
	Amend ES	Amend/revoke instrument	Amend Act or enabling legislation	
Implemented	122	19	3	144
Outstanding	40	15	0	55
TOTAL	162	34	3	199

2.47 A total of 122 replacement explanatory statements were tabled in response to the committee's scrutiny concerns, which is almost three times the number of replacement explanatory statements tabled in 2020 (44).

2.48 In 2021, 19 undertakings to amend or revoke instruments were implemented, which is an increase by four from the previous year.

2.49 At the end of the 2020 reporting period, there were three outstanding undertakings to amend an Act which were subsequently implemented in the 2021 reporting period.

2.50 Examples of significant undertakings made and implemented in 2021 are discussed in Chapter 3.

Other aspects of the scrutiny process

2.51 In addition to the committee's influence resulting from its engagement with ministers and agencies on scrutiny issues about particular instruments, the committee's work also contributed to more informed consideration of relevant issues in other parliamentary committees' reports, and more informed debate relating to delegated legislation in Parliament more broadly.

2.52 The committee's influence is also reflected in formal guidance available to departments and agencies as part of the legislative drafting process. In particular, the Office of Parliamentary Counsel's *Instruments Handbook* draws attention to the committee's long-standing scrutiny concerns.⁴⁸

48 Office of Parliamentary Counsel, [Instruments Handbook](#) (reissued September 2022). See also Office of Parliamentary Counsel, [Drafting Direction No. 3.8: Subordinate Legislation](#) (9 December 2021).

Chapter 3

Significant scrutiny issues

Overview

3.1 This chapter outlines the most significant scrutiny issues that the committee identified in 2021. It focuses on:

- case studies related to the committee's role in promoting compliance with its scrutiny principles; and
- key ongoing scrutiny concerns that the committee will continue to monitor in the future, including the use of delegated legislation to respond to the COVID-19 pandemic.

Significant case studies and implemented undertakings

3.2 The following section outlines the most significant undertakings implemented during 2021 to address the committee's scrutiny concerns. The examples provided illustrate the committee's approach to its scrutiny role and identify significant issues as assessed against the scrutiny principles outlined in Senate standing order 23(3).

3.3 The relevant scrutiny principle is identified in relation to each case study.

Exemptions or modifications to primary legislation in the Treasury portfolio

Principle (j) exemption from primary legislation¹

Principle (k) parliamentary oversight²

3.4 In 2021 the committee continued engagement with the Treasurer in relation to the significant number of Treasury portfolio instruments, particularly instruments made by the Australian Securities and Investments Commission (ASIC), which modify or exempt persons or entities from the operation of primary legislation, predominantly the *Corporations Act 2001*. The committee was particularly concerned about the duration of the exemptions and modifications affected by these instruments. They generally appeared to be subject to the standard sunset regime under the *Legislation Act 2003* (Legislation Act), such that they would remain in force for ten years.

3.5 The committee raised these systemic concerns in relation to a substantial number of Treasury portfolio instruments in 2020 and 2021.

1 Principle (l), modification of primary legislation, was previously subsumed under principle (j), matters more appropriate for parliamentary enactment, but was made a separate principle following the change to the committee's standing orders from 1 July 2021.

2 Principle (k), other technical scrutiny grounds, was renamed principle (m), other technical scrutiny grounds, following the change to the committee's standing orders from 1 July 2021.

3.6 The committee's detailed views in this regard are set out in Chapter 1 of *Delegated Legislation Monitor 2 of 2021* and *Delegated Legislation Monitor 4 of 2021*.³ These views are also set out in the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight, tabled in March 2021.⁴

3.7 Whilst acknowledging the former Treasurer's considered approach to finding a way forward to ensure more regular parliamentary oversight of Treasury portfolio instruments, the committee remained strongly of the view that instruments which modify or exempt persons or entities from the operation of primary legislation should not continue in force for more than three years. The committee's expectation about such instruments is informed by its longstanding view that delegated legislation should not continue in force for such a period as to act as a de facto amendment to primary legislation. The committee informed the Treasurer that its views have been formalised in its guidelines since February 2020.

3.8 The committee acknowledged that there are circumstances where it may be appropriate for ASIC to quickly address anomalous or inconsistent outcomes in the application of primary legislation by delegated legislation when authorised to do so by the Parliament. However, the committee considers that generally a three-year timeframe for such instruments is appropriate, as it allows for ASIC to rapidly address such issues while providing a significant period of time while the instrument is in force to consider whether the modification or exemption provided by the instrument will be required for a longer period. If it is determined that a modification or exemption is required for a longer period, the committee considers that certainty for business and the market can be best provided by incorporating the modification or exemption onto the face of the primary legislation. However, if this is not deemed appropriate in the circumstances, the committee considers that the Parliament should at least be given a regular opportunity to review and scrutinise modifications or exemptions to primary legislation that it has enacted.

3.9 As part of this correspondence, the Treasurer proposed to engage with the committee on an ongoing and good-faith basis to resolve the committee's systemic concerns. As a result, the committee held a private briefing with officials from the Treasury, ASIC and the Treasurer's office on 28 April 2021.

3.10 The committee noted a significant improvement in the quality of delegated legislation in the Treasury portfolio registered in mid to late 2021. The committee was pleased that its scrutiny indicated that many Treasury instruments which amend the operation of primary legislation have a duration of five years or less, and that their accompanying explanatory statements explained the measures in detail.

3 The committee's Delegated Legislation Monitors are available on the [committee's website](#).

4 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.

3.11 The committee thanks the former Treasurer and the Treasury for their genuine and constructive engagement on this issue.

Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]

Principle (b) implied freedom of political communication

Principle (c) conferral of discretionary powers

Principle (e) clarity of drafting

3.12 The Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 (the instrument) amends the Australian Charities and Not-for-profits Commission Regulation 2013 to alter certain governance standards relating to charities' engagement in, or promotion of, unlawful activities. These amendments included providing that a registered entity must:

- not engage in conduct or omit to engage in conduct that may be dealt with as a summary offence under an Australian law relating to certain types of actions; and
- maintain reasonable internal control procedures to ensure its resources are not used to actively promote another entity's acts or omissions that may be dealt with as such an offence.

3.13 The committee was concerned that the amendments made by the instrument appeared to enable the Australian Charities and Not-for-profits Commission (ACNC) Commissioner to exercise a broad discretion in determining compliance with the governance standard and risked impermissibly burdening the implied freedom of political communication. The committee was also concerned that charities' ability to understand their obligations under the instrument might be impeded by a lack of clarity in drafting.⁵

3.14 On raising these concerns, the committee received considerable correspondence from numerous charities and non-government organisations in both writing and by telephone. This correspondence heightened the committee's scrutiny concerns about the conferral of discretionary powers on the ACNC Commissioner and the potential impact the instrument may have on the implied freedom of political communication.

3.15 Despite engaging in extensive correspondence with the then Assistant Treasurer, the committee was unable to resolve its scrutiny concerns. Accordingly, in *Delegated Legislation Monitor 14 of 2021* (tabled 29 September 2021),⁶ the committee advised the Senate and Assistant Treasurer that it intended to give notice

5 A summary of all prior correspondence on this instrument is set out in [Delegated Legislation Monitor 12 of 2021](#) (11 August 2021) pp. 1–7.

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) pp. 2–7.

of motion to disallow the instrument and recommended that the Senate disallow the instrument.

3.16 The Senate subsequently disallowed the instrument on 25 November 2021, as the result of a separate disallowance motion brought by Senator Rex Patrick.

High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021 [F2021L00391]

Principle (c) conferral of discretionary powers

Principle (e) clarity of drafting

Principle (g) adequacy of explanatory materials

3.17 The High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021 (the instrument) was registered on the Federal Register of Legislation in March 2021. The instrument is made under subsection 19(2) of the *High Court of Australia Act 1979* and regulates the conduct of persons in the building and precincts of the High Court in Canberra.

3.18 Paragraph 5(i) of the instrument provides that a person shall not behave in a 'disorderly or offensive manner' within the High Court building or precincts. Similarly, paragraph 5(xii) provides, in part, that a person shall not 'light any fire or deposit any litter or create any nuisance' within the High Court building or precincts. The committee considered that these are subjective concepts with a potentially broad application and noted that there is no guidance on either the face of the instrument or its explanatory statement as to how these discretionary concepts are to be interpreted and applied in practice. In addition, there is no clause-by-clause analysis of the instrument in its accompanying explanatory statement as registered to assist in interpreting these concepts.

3.19 The committee raised these concerns with the Chief Executive and Principal Registrar of the High Court noting that, from a scrutiny perspective, key terms and concepts should be clearly defined to remove any potential confusion or misunderstanding.⁷ In this regard, the committee was concerned, for example, that celebrations or peaceful protests within the precincts may potentially be caught within the broad scope of these provisions, noting that the High Court has a distinguished history of such events taking place in its precinct.

7 See correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation to the Chief Executive and Principal Registrar of the High Court of Australia on [24 June 2021](#) and [5 August 2021](#), available via the [Index of Instruments](#) on the committee's website.

3.20 In response to the committee's scrutiny concerns, the High Court directed the Office of Parliamentary Counsel to amend the instrument to clarify and provide guidance as to the interpretation of the relevant sections.⁸

Charter of the United Nations Lists

Principle (a) compliance with the Legislation Act 2003—registration of instruments

Principle (g) adequacy of explanatory materials

3.21 The committee raised concerns that 21 Charter of the United Nations Listings instruments made under section 15 of the *Charter of the United Nations Act 1945* or regulation 7 of the Charter of the United Nations (Anti-terrorism Measures) Regulations 2001 had been inappropriately exempted from disallowance.

In correspondence with the Minister for Foreign Affairs (the minister), the committee noted that the explanatory statements to the instruments indicated that they were exempt from disallowance due to the operation of subsection 44(1) of the Legislation Act.⁹ However, the committee considered that there was nothing in the wording of subsection 44(1) (which refers to intergovernmental bodies or schemes involving the Commonwealth and one or more States or Territories) to indicate that these instruments are exempt from disallowance. In response, the minister advised that the instruments are in fact subject to disallowance and amended the explanatory statements to each to that effect. The minister also advised that all future instruments made under these provisions would be made subject to disallowance.¹⁰

3.22 The committee also noted concerns raised by the Parliamentary Joint Committee on Human Rights (PJCHR) that the instruments' registration on the Federal Register of Legislation was delayed until 2021 even though some of the instruments had been made as long ago as 2001.¹¹ The PJCHR noted that, due to the operation of subsection 12(2) of the Legislation Act, the effect of this delayed registration appears to have been that before they were registered the listings instruments did not apply to a person to the extent that they disadvantaged or

8 See [correspondence](#) from the Chief Executive and Principal Registrar of the High Court of Australia to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 16 September 2021, pp. 30–33, available via the [Index of Instruments](#) on the committee's website.

9 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 14 July 2021, available via the [Index of Instruments](#) on the committee's website.

10 See [correspondence](#) from the Minister for Foreign Affairs, available via the [Index of Instruments](#) on the committee's website.

11 See correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation on [26 August 2021](#), available via the [Index of Instruments](#) on the committee's website.

imposed liabilities on the person.¹² The committee reiterated these concerns and raised its own questions with the minister as to the validity of any actions taken under the instruments and queried why they look so long to be registered. In response the minister amended the explanatory statements so that they consistently explained that any disadvantage or liabilities imposed by the instruments on a person other than the Commonwealth do not apply until after the instruments were registered on the Federal Register.¹³

Amendments to Acts of Parliament

3.23 In 2021 the impact of the committee's work was seen through amendments to the Acts of Parliament in implementation of undertakings made to the committee in 2020 and 2019 regarding the following instruments:

- Taxation Administration (Private Ancillary Fund) Guidelines 2019 [F2019L01227];
- Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018 [F2018L01674]; and
- Contingence Aids Payment Scheme 2020 [F2020L00758].

3.24 In response to the committee's concerns about the Taxation Administration (Private Ancillary Fund) Guidelines 2019,¹⁴ the Assistant Minister for Finance, Charities and Electoral Matters successfully progressed amendments to primary legislation that would enable merits review of decisions made under the instrument, within the framework provided for in the *Taxation Administration Act 1953*.

3.25 In response to the committee's concerns about the Water Amendment (Murray Darling Basin Agreement—Basin Salinity Management) Regulations 2018,¹⁵ the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management successfully progressed amendments to the *Water Act 2007* to remove doubt as to whether the Basin Salinity Management Procedures may be incorporated as in force from time to time.

12 Parliamentary Joint Committee on Human Rights, [Human rights scrutiny report 8 of 2021](#) (23 June 2021), pp. 28 and 34.

13 See [correspondence](#) from the Minister for Foreign Affairs on 2 September 2021, pp. 26–27, available via the 2019 [Index of Instruments](#) on the committee's website.

14 See, in particular, Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitors* 9/19 (13 February 2019), pp. 68–70; [2 of 2019](#) (3 April 2019), pp. 65–69; [4 of 2019](#) (31 July 2019); and [6 of 2019](#) (18 September 2019), pp. 1–4.

15 See [correspondence](#) between the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Assistant Minister for Finance, available via the via the 2020 [Index of Instruments](#) on the committee's website.

3.26 In response to the committee's concerns about the Continence Aids Payment Scheme 2020,¹⁶ the Minister for Aged Care and Senior Australians successfully progressed amendments to the *National Health Act 1953* to facilitate the provision of independent merits review.

Significant ongoing scrutiny concerns

3.27 In 2021, the committee noted several ongoing scrutiny issues which it would continue to monitor in the future. The following sections of this chapter outline the most significant ongoing concerns.

COVID-19 instruments

3.28 The committee began monitoring all instruments registered on the Federal Register of Legislation in 2020 which purported to be made in response to the COVID-19 pandemic.¹⁷

3.29 As noted in Chapter 2, between 1 January 2021 and 31 December 2021, 220 instruments related to COVID-19 were registered on the Federal Register of Legislation. Of these 220 instruments, 42 were exempt from disallowance, which is approximately 19 per cent. The committee's experience has been that the most significant delegated legislation made in response to COVID-19, such as the overseas travel ban for Australian citizens, was made exempt from disallowance.

3.30 In addition to listing these instruments on its website, the committee referred instruments of significance to the government's response to COVID-19 to the Senate Select Committee on COVID-19 for further consideration.

3.31 As discussed in Chapter 1, the prevalence of delegated legislation made in response to COVID-19 and the significance of the measures contained in these laws contributed to the committee's decision to commence an own-motion inquiry into the exemption of delegated legislation from parliamentary oversight.¹⁸

3.32 The interim inquiry report focused on delegated legislation made in times of emergency, particularly during the COVID-19 pandemic.¹⁹ The committee found that, during the pandemic, the reliance on delegated legislation that is exempt from

16 See [correspondence](#) between the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Minister for Aged Care and Senior Australians, available via the 2020 [Index of Instruments](#) on the committee's website.

17 The committee published its list of COVID-19 instruments on its [website](#) to promote transparency.

18 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Exemption of delegated legislation from parliamentary oversight](#) (2020).

19 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (2 December 2020).

parliamentary disallowance and other forms of scrutiny shone a light on systemic issues that diminish the Parliament's ability to effectively scrutinise such legislation.²⁰

COVID-19 instruments made under the Biosecurity Act 2015

3.33 Since the changes to the committee's standing orders took effect on 16 June 2021, the committee has been empowered to scrutinise delegated legislation exempt from disallowance. In 2021, the committee began to scrutinise instruments made under the *Biosecurity Act 2015* that were exempt from disallowance and related to COVID-19. The committee drew these instruments to the attention of the Senate in 2022 due to their inadequate justification for their exemption from disallowance. The committee also recommended that the *Biosecurity Act 2015* be amended to ensure these significant instruments are subject to rigorous parliamentary scrutiny.

3.34 The committee set out its significant scrutiny concerns in relation to exemption of legislative instruments made under the Biosecurity Act from disallowance in *Delegated Legislation Monitors 14 and 16 of 2021*.²¹ The committee's broader concerns about the exemption from disallowance of emergency legislative instruments are set out in detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight.²²

3.35 It remains the committee's view that emergency delegated legislation should be subject to appropriate parliamentary oversight, with limited exemptions from disallowance. Where an instrument is exempt from disallowance, the committee expects that a detailed justification will be included in the explanatory statement.

3.36 As the committee has previously emphasised, this approach upholds the Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.

Committee's proposed amendments to the Biosecurity Act 2015

3.37 In late 2021, the committee Chair proposed amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 on behalf of the committee

20 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (2 December 2020) p. 3.

21 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) pp. 14–21; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 16 of 2021](#) (25 November 2021) pp. 3–10. The committee also commented on these matters in 2022: Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2022](#) (25 January 2022) pp. 6–9; and Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2022](#) (9 February 2022) pp. 2–7.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (2 December 2020).

after repeatedly calling on the government to do so. The amendments sought to ensure that instruments made under the *Biosecurity Act 2015* are subject to disallowance and therefore appropriate parliamentary scrutiny and oversight.²³

3.38 The bill lapsed on the prorogation of the 46th Parliament before the Senate had the opportunity to consider the amendments.

Exemption of delegated legislation from disallowance

3.39 Table 3 below sets out the total number of instruments registered in each calendar year since 2013, including the proportion of instruments exempt from disallowance.²⁴ While the committee was pleased to observe the reduced percentage of exemptions, it remains concerned by the significant and repeated peaks in the proportion of instruments exempt from disallowance.

Table 3: Instruments exempt from disallowance 2013-2021

Year	Exempt	Disallowable	Total	Percentage exempt
2021	246	1667	1913	12.9%
2020	299	1416	1715	17.4%
2019	330	1345	1675	19.7%
2018	256	1630	1886	13.6%
2017	265	1436	1701	15.6%
2016	347	1698	2045	17.0%
2015	361	1840	2201	16.4%
2014	277	1609	1886	14.7%
2013	639	3086	3725	17.2%

23 Biosecurity Amendment (Enhanced Risk Management) Bill 2021, [amendments](#) to be moved by Senator Fierravanti-Wells, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, in committee of the whole.

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (16 March 2021) p. 8.

3.40 On 16 June 2021, the Senate resolved to insert new standing order 23(4A) into the standing orders, with effect from 1 July 2021.²⁵ This standing order 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. For such instruments the committee may also consider whether it is appropriate for the instrument be exempt from disallowance.

3.41 The Senate also adopted the following resolution of continuing effect emphasising the importance of the disallowance of delegated legislation to parliamentary scrutiny:

- (a) delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
- (b) any claim that circumstances justify exemption from disallowance and sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.²⁶

3.42 Following these changes, the committee began scrutinising delegated legislation that is exempt from disallowance. The committee assesses these instruments against the new standing order 23(4A) as well as the committee's other legislative scrutiny principles set out in standing order 23. The committee's scrutiny concerns under standing order 23(4A) will be heightened where an instrument also engages the committee's scrutiny concerns under principles (a) to (m) of standing order 23(3).

3.43 The committee expects explanatory statements to instruments that are exempt from disallowance to identify the source of that exemption. This includes identifying the specific provision of the Act or instrument which provides for the exemption (including the relevant table item, where applicable). The committee does not consider general statements identifying that an exemption is provided under the Legislation Act or under the Legislation (Exemptions and Other Matters) Regulation 2015 to be sufficient.

3.44 Between 1 July 2021 and 31 December 2021, the committee raised 66 legislative instruments with the relevant minister due to concerns about their

25 *Journals of the Senate*, [No. 101](#) (16 June 2021) p. 3582. The standing order was inserted on the recommendation of the committee in the final report of its inquiry into the exemption of delegated legislation from parliamentary oversight: Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) p. 121 (recommendation 10).

26 *Journals of the Senate*, [No. 101](#) (16 June 2021) p. 3581.

exemption from disallowance.²⁷ Of the 67 total instruments exempt from disallowance since 1 July 2021, only one instrument was accompanied by what the committee considered to be an acceptable justification for its exemption.

3.45 The committee will continue to monitor this issue in 2022 and beyond, in recognition of Parliament's constitutionally mandated role with respect to the exercise of legislative power.

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation

27 This figure also includes consideration of one disallowable instrument, the Radiocommunications (Spectrum Licence Allocation – 850/900 MHz Band) Determination 2021 [F2021L01155], given parts of that instrument were exempt.