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25 November 2021

The Hon Greg Hunt MP
Minister for Health and Aged Care
Parliament House
CANBERRA ACT 2600

Via email: Minister.Hunt.DLO@health.gov.au

Dear Minister

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against scrutiny principles outlined in Senate standing order 23.

The committee considers that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding advice is set out in Chapter 1 of its *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc, and **attached** to this letter.

As set out in the Monitor, the committee maintains and reiterates its view that amendments should be made to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 to:

- amend section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance; and
- amend section 477 of the Biosecurity Act to provide that any determinations setting out emergency requirements in the future will be subject to disallowance.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

Part 2

Exempt instruments raising significant scrutiny issues

1.4 This Part details those instruments exempt from disallowance which raise particularly significant scrutiny concerns in relation to the appropriateness of their exemption from disallowance under Senate standing order 23(4A). Where necessary, the committee additionally raises scrutiny concerns in relation to its scrutiny principles set out in Senate standing order 23(3)(3).

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021

FRL No.	[F2021L01068] ¹
Purpose	To amend the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 to remove the automatic exemption for a person who ordinarily resides in another country and replace it with a discretionary exemption and make consequential amendments to the Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020.
Authorising legislation	<i>Biosecurity Act 2015</i>
Portfolio	Health
Source of exemption	Subsection 477(2) of the <i>Biosecurity Act 2015</i>

Overview

1.5 Subsection 477(1) of the *Biosecurity Act 2015* (Biosecurity Act) empowers the minister to make emergency requirements to prevent or control the spread of a listed human disease within Australia or to another country. The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (principal instrument) specifies such emergency requirements restricting overseas travel by Australian citizens or permanent residents and sets out some exemptions for certain classes of individuals.

1.6 The Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 (the instrument) amended the principal instrument to remove the automatic exemption for persons who ordinarily reside in another

1 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

country from the overseas travel ban. This has the effect of preventing such persons from travelling overseas unless another general exemption under section 6 of the principal instrument applies to them or they are granted an exemption due to exceptional circumstances by the Australian Border Force Commissioner or an Australian Border Force employee under subsection 7(1) of the principal instrument.

1.7 On 27 October 2021, the Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 2) Determination 2021 [F2021L01463] (second determination) was registered on the Federal Register of Legislation.²

1.8 This second determination further amended the principal instrument to include an automatic exemption for fully vaccinated Australian citizens and permanent residents to depart Australian territory, provided they meet the specified criteria. The second determination also removed the need for exemptions to be made in writing where a person is unable to be vaccinated for medical reasons or for those under 12 years of age at the time that their scheduled flight is due to depart.

Scrutiny concerns

1.9 The committee's detailed scrutiny concerns in relation to this instrument are set out in Chapter 1 of *Delegated Legislation Monitor 14 of 2021*.³

1.10 In summary, the committee raised concerns in relation to the following scrutiny matters:

- Freedom of movement;
- Conferral of discretionary powers;
- Consultation with experts and persons affected by the instrument
- Exemption from disallowance;
- Matters more appropriate for parliamentary enactment; and
- Modification of the operation of primary legislation.

Correspondence

1.11 The Minister responded to the committee on 19 October 2021. A summary of the Minister's response in relation to each matter raised in *Delegated Legislation Monitor 14 of 2021* is set out below.

2 This instrument is due to be considered by the committee in *Delegated Legislation Monitor 1 of 2022*.

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 14 of 2021*, 29 September 2021, pp. 14–21. Accessible at: https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor

Freedom of movement

1.12 In relation to the committee's concerns that the instrument may trespass unduly on personal rights and liberties, including the freedom of movement, the minister advised that he must be satisfied that the requirement is no more intrusive than is required in the circumstances.

1.13 The minister also expressed that the amendment to the principal instrument was necessary to reduce the risk of bringing overseas-acquired cases of COVID-19 into Australia until such a time that the vaccination rates allow for the reopening of Australia's borders, as outlined in the National Plan.

1.14 The minister did not address the committee's request in relation to what the expected impact of the measures implemented by the instrument would be on the freedom of movement of Australian citizens and permanent residents who ordinarily reside in another country, including the number of individuals who may be affected by the instrument.

Conferral of discretionary powers

1.15 In addressing the committee's comments about the conferral of discretionary powers provided for under subsection 7(1) of the principal instrument, the minister's response provided a link to the Department of Home Affairs website which sets out directives in relation to the outward travel restrictions that currently apply.

1.16 This advice indicates that an authorised officer of the Department of Home Affairs or the Australian Border Force can determine whether people are in an exempt category or can grant an individual exemption in order for the person to depart Australia. It also specifies the minimum classification level for decision-makers in specified situations.

1.17 Further, the advice states that determinations should be made with reference to a reasonable standard of evidence in the circumstances; and that it is up to the decision-maker to determine the appropriate level of evidence required.

1.18 This directive appears to have been updated since the minister's response was initially provided to the committee.

Consultation with experts and persons affected by the instrument

1.19 The minister's response explained that consultation is undertaken with relevant stakeholders when circumstances permit. The minister justified the lack of consultation on instruments of this type highlighting that consultation beyond government is not always possible where there is an immediate need to give effect to public health measures.

1.20 The minister's advised that the automatic exemption was in place for sufficient time:

Given the length of time that the automatic exemption operated (over 18 months), sufficient time was provided for persons falling into this category wishing to return to their usual place of residence, to do so.

1.21 The minister did not directly address consultation in relation to this particular instrument, as requested in the committee's *Delegated Legislation Monitor 14 of 2021*.

Exemption from disallowance

Matters more appropriate for parliamentary enactment

Modification of the operation of primary legislation

1.22 The minister's response acknowledged the important role that the parliamentary disallowance process plays in ensuring oversight of Commonwealth law. It also acknowledged the committee's concern that the human biosecurity emergency powers are not subject to disallowance.

1.23 In justifying the exemption from disallowance of instruments made under the Biosecurity Act generally, the minister explained:

Subjecting these determinations to disallowance would undermine the decision-making and risk management processes. The possibility of disallowance would create considerable uncertainty for government, industry and individuals. Disallowance would also undermine the urgent response required to effectively manage emerging biosecurity risks. It is necessary and appropriate that these instruments be exempt from disallowance and not vulnerable to political considerations.

1.24 The minister also advised that the Biosecurity Act allows the government to quickly respond to emerging and continuing human biosecurity threats.

1.25 In relation to this instrument, the minister's response clarified that at the time of amendment, the severe and immediate threat to human health from COVID-19 was evident in the increasing global cases and that the government was particularly concerned with managing the capacity within, and preventing transmission from, hotel quarantine.

1.26 The minister's response also set out the accountability mechanisms applying to the government's actions under the Biosecurity Act, including Senate Estimates and the Senate Select Committee on COVID-19, as well as the specific legal tests which must be met in order for an emergency determination to be made.

1.27 More broadly, the minister suggested that the Biosecurity Act was passed following 'extensive community consultation and robust debate' in the Parliament.

1.28 The minister's response did not address several aspects of the committee's concerns set out in *Delegated Legislation Monitor 14 of 2021*, including why it is considered necessary and appropriate for the emergency requirements outlined in the instrument to override any Australian law.

1.29 Finally, the minister stated that he does not consider it necessary to amend the Act or the current explanatory statement, in any instances requested by the committee, as he considers that the exemptions from the disallowance process for emergency determinations are appropriately justified. The minister did note, however, that he would ask the department to take the committee's views into consideration when making any further changes to these instruments.

Committee view

1.30 The committee considers that the minister's response is inadequate as it does not address significant elements of the requests for information made in relation to this instrument, in particular, in relation to freedom of movement and the conferral of discretionary powers. The committee considers that information about the directive relating to outward travel restrictions should have been included in the explanatory statement to the instrument.

1.31 In relation to consultation, the committee considers the minister's response appears contradictory. On the one hand, the minister has advised that persons likely to be affected by the instrument had 18 months to return to their usual place of residence, should they wish to do so. On the other hand, the minister has advised generally that there was not sufficient time to consult because of the immediate need to give effect to these public health measures. It appears to the committee that there was sufficient time available for consultation on this instrument.

1.32 Nevertheless, the committee's most significant concern remains the instrument's status as exempt from disallowance; a concern which is augmented by the fact that the instrument applies despite any provision of any other Australian law.

1.33 In relation to these concerns, the committee highlights the minister's statement that the Biosecurity Act was passed following 'extensive community consultation and robust debate' in the Parliament. The committee does not agree with this statement. While the bill for the Biosecurity Act was the subject of inquiry by the Senate Rural and Regional Affairs and Transport Legislation Committee, it was only debated for approximately five hours in each of the Houses of Parliament. In addition, the focus of this debate was not related to those human biosecurity emergency provisions which are now rightly the subject of significant scrutiny.

1.34 As noted in *Delegated Legislation Monitor 14 of 2021*, the committee has long been concerned with provisions in delegated legislation which modify or override primary legislation. The committee considers that, at a minimum, such provisions should be soundly justified in the explanatory statement. In this instance, the explanatory statement does not appear to explain why it is necessary and appropriate to allow the relevant requirements to override any Australian law, and the minister has not provided any further information in this regard.

1.35 Further, the committee's longstanding view is that instruments which modify or override primary legislation should be time limited to ensure a minimum degree

of regular parliamentary oversight. The committee considers that limiting the duration of emergency delegated legislation is particularly necessary to guard against the risk that temporary extraordinary measures enacted in response to the emergency become an ongoing part of the law without appropriate parliamentary scrutiny.

1.36 The committee notes the minister's explanation as to why he considers it appropriate that the instrument is exempt from disallowance, however, the committee does not agree that the possibility of disallowance would create considerable uncertainty for government, industry and individuals, nor would it undermine the decision-making and risk management processes. In this regard, the committee notes that Senators, as elected representatives, would be well aware of any impact that disallowance would have and would consider such matters as part of their deliberations. The committee considers that the possibility that the Senate would disallow an instrument that would put at risk human health (or undermine Australia's agriculture sector) is so remote as to be fanciful.

1.37 Instead, the committee considers that the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to this instrument, and others made under the Biosecurity Act, the committee considers that the disallowance process is apt to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

1.38 The committee appreciates that during an emergency it is necessary for governments to take urgent and decisive action. However, Parliament must also have effective oversight of these critical decisions and retain the ability to scrutinise the actions of governments.

1.39 In undertaking its scrutiny, the committee assesses delegated legislation against a set of non-partisan scrutiny principles agreed to unanimously by the Senate that focus on compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight. The committee does not concern itself with political considerations in carrying out this critical mandate bestowed on it by the Senate.

1.40 The committee also reiterates that the disallowance procedure would not inhibit the immediate commencement of the instrument. The need to act urgently or potential uncertainty are equally not an adequate justification for the exemption of delegated legislation from parliamentary oversight. In this regard, the committee does not consider that making a legislative instrument subject to disallowance would prevent the government from taking immediate and decisive action in response to a significant emergency. The committee's views on the exemption of emergency related delegated legislation from disallowance have been well documented. In its interim report, tabled in December 2020, the committee found that such instruments should not be exempt from disallowance on the basis that:

- the disallowable status of delegated legislation does not impede the immediate commencement and enforceability of an instrument (that is, it does not prevent the government from acting quickly and decisively);
- the instances of the disallowance procedure resulting in disallowance by the Parliament is very low;
- COVID-19 delegated legislation in comparable overseas jurisdictions has largely been subject to a parliamentary scrutiny procedure;
- arguments against making delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals; and
- our system of representative democracy requires elected representatives to have an opportunity to scrutinise and, if necessary, repeal executive-made law.⁴

1.41 The committee notes that the government response to the interim report has now been tabled in the Senate, nearly 12 months after the report was tabled in December 2020.

1.42 The committee notes that of the 18 recommendations made in the interim report, the government has only agreed with one recommendation—related to the importance of parliamentary sittings in facilitating parliamentary oversight of delegated legislation in times of emergency.

1.43 The committee is deeply concerned that the government has advised that it does not support any of the committee's recommendations related to providing that instruments made under the Biosecurity Act be made subject to disallowance.

1.44 As noted previously, the committee intends to rigorously pursue this matter in accordance with the mandate provided by the Senate when on 16 June 2021 it agreed to amend standing order 23 to allow the committee to consider exempt instruments. At this time the Senate also resolved:

- that delegated legislation should be subject to disallowance and sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances; and
- 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.⁵

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Exemption of delegated legislation from parliamentary oversight: Interim Report](#), December 2020, pp. 61-63.

5 *Senate resolution 53B: Delegated legislation—disallowance and sunseting*, agreed to on 16 June 2021, https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/Resolutions_expressing_opinions_of_the_Senate/.

1.45 In light of the above, the committee maintains and reiterates its view that amendments should be made to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 to:

- amend section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance; and
- amend section 477 of the Biosecurity Act to provide that any determinations setting out emergency requirements in the future will be subject to disallowance.

1.46 The committee notes that if the government is not amenable to moving such amendments it may consider moving its own amendments to the bill.



25 November 2021

The Hon David Littleproud MP
Minister for Agriculture and Northern Australia
Parliament House
CANBERRA ACT 2600

via email: minister.littleproud@agriculture.gov.au; DLO-MO@agriculture.gov.au
cc: Senator the Hon Simon Birmingham, Minister for Finance
financeminister@finance.gov.au; DLO-Finance@finance.gov.au

Dear Minister,

Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against scrutiny principles outlined in Senate standing order 23.

The committee considers that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concerns are set out in Chapter 1 of its *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc, and **attached** to this letter.

As set out in the Monitor, the committee requests your further advice as to:

- whether an undertaking can be made to the committee that the 2024 statutory review will give consideration to the appropriateness of the exemption from disallowance of instruments made under subsection 9(1) of the *Northern Australia Infrastructure Facility Act 2016*, with specific regard given to the committee's final report of the inquiry into the exemption of delegated legislation from parliamentary oversight; and
- whether the explanatory statement to the instrument can be amended to set out the information provided in your letter of 14 October 2021 in relation to the justification for the instrument's exemption from disallowance.

In order to facilitate the committee's timely consideration of the matters outlined in the *Delegated Legislation Monitor* the committee would appreciate a response by **9 December 2021**.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation

Northern Australia Infrastructure Facility Investment Mandate Direction 2021

FRL No.	[F2021L00942] ⁶
Purpose	To provide a direction to the Northern Australia Infrastructure Facility's Board in relation to the performance of the functions of the Facility.
Authorising legislation	<i>Northern Australia Infrastructure Facility Act 2016</i>
Portfolio	Infrastructure, Transport, Regional Development and Communications
Source of exemption	Item 2 of section 9 of Legislation (Exemptions and Other Matters) Regulation 2015

Overview

1.47 The Northern Australia Infrastructure Facility (the NAIF) provides financial assistance to States, Territories and other entities to develop economic infrastructure in Northern Australia.

1.48 The Northern Australia Infrastructure Facility Investment Mandate Direction 2021 (the instrument) provides an investment mandate to the Facility to guide the functions of the Facility and how it invests.

Scrutiny concerns

Exemption from disallowance

1.49 The committee's detailed scrutiny concerns in relation to this instrument's exemption from disallowance are set out in Chapter 1 of *Delegated Legislation Monitor 14 of 2021*.

1.50 In summary, the committee raised concerns that the explanatory statement to the instrument does not justify why it is appropriate for this ministerial direction to be exempt from parliamentary disallowance. The committee considers that instruments which guide how public money will be spent or invested must be accorded parliamentary oversight by being subject to disallowance.

Recent correspondence

1.51 The minister wrote to the committee on 14 October 2021 in response to the concerns set out in *Delegated Legislation Monitor 14 of 2021*.

6 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

1.52 The minister advised that the investment mandate has been exempt from disallowance since the establishment of the NAIF in 2016. The minister explained that the exemption ‘provides certainty for NAIF project proponents who invest significant time and resources to demonstrate eligibility for NAIF financial assistance’, and explained that the parties with which NAIF operates are subject to commercial timeframes which do not align with the parliamentary sitting calendar.

1.53 The minister also advised that oversight of the NAIF’s investment activities has been strengthened in 2021 with the addition of the Finance Minister as a jointly responsible minister. Further, the minister advised there are safeguards in the *Northern Australia Infrastructure Facility Act 2016* (the NAIF Act) to prevent ministers from ‘issuing an investment mandate that seeks to influence or affect the investment of funds in particular projects or to particular cohorts.’

1.54 In relation to the exemption from disallowance, the minister advised that it would not be possible to delay commencement of the instrument until a potential disallowance period expired, as this would have negatively impacted on the NAIF’s operations and prevented it from being able to provide financial assistance until early August 2021.

1.55 Finally, the minister advised that it is a requirement of the NAIF Act that a statutory review of the NAIF be conducted as soon as possible after 30 June 2024, and the minister suggested that ‘an evaluation of the potential impacts of making the Investment Mandate disallowable could be considered as part of this review.’

Committee view

1.56 The committee thanks the minister for his detailed advice. The committee welcomes the minister’s advice on the additional oversight measures in place for this instrument including the joint ministerial responsibility and the safeguards in the NAIF Act. However, the committee is not persuaded that these oversight measures, or the potential for some level of uncertainty, negate the need for effective parliamentary oversight. In this respect, the committee maintains its view that instruments which guide how public money will be spent or invested must be accorded parliamentary oversight by being subject to disallowance.

1.57 In relation to the 2024 review of the Act, the committee welcomes the minister’s suggestion that such a review could evaluate whether instruments made under subsection 9(1) of the Act are appropriate to be exempt from parliamentary disallowance.

1.58 In light of the above, the committee requests the minister’s further advice as to:

- **whether an undertaking can be made to the committee that the 2024 statutory review will give consideration to the appropriateness of the exemption from disallowance of instruments made under subsection 9(1) of the *Northern Australia Infrastructure Facility Act 2016*, with specific**

regard given to the committee's final report of the inquiry into the exemption of delegated legislation from parliamentary oversight; and

- whether the explanatory statement to the instrument can be amended to set out the information provided in the minister's letter of 14 October 2021 in relation to the justification for the instrument's exemption from disallowance.



25 November 2021

The Hon Greg Hunt MP
Minister for Health and Aged Care
Parliament House
CANBERRA ACT 2600

Senator the Hon Richard Colbeck
Minister for Senior Australians and Aged Care Services
Parliament House
CANBERRA ACT 2600

Via email: Minister.Hunt.DLO@health.gov.au; Minister.Colbeck.DLO@health.gov.au

Dear Ministers,

**Aged Care Legislation Amendment (Royal Commission Response No.1) Principles 2021
[F2021L00923]**

Thank you for your response of 15 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021 and has resolved to seek your further advice about the issues outlined below.

Clarity of drafting

Conferral of discretionary powers

Thank you for your further advice about the training and experience that delegates of the Aged Care Quality and Safety Commissioner are required to have in order to exercise the relevant powers and functions to determine compliance requirements. Based on this information, the committee has concluded its consideration of this issue.

The committee also welcomes your advice that, in response to the committee's concerns, a replacement explanatory statement has been prepared which further clarifies the meaning of the term 'emergency'. The committee notes that the replacement explanatory statement was registered on the Federal Register of Legislation on 18 October 2021.

The replacement explanatory statement clarifies that the term is intended to have its ordinary meaning, and may include an unforeseen occurrence, or sudden or urgent occasion for action. Further, it notes that in aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency. The explanatory statement also notes that situations where restrictive practices are required in residential aged care in the event of an emergency should be rare.

The explanatory statement states that the term emergency is not defined in the instrument, so as not to speculate or limit the term, as not all circumstances are known or predictable.

While the committee appreciates the additional information provided in the revised explanatory statement, it retains concerns that a key term, which will allow these restrictive practices to take place under the instrument, is not defined in the instrument itself.

In particular, the committee acknowledges the concerns set out in the replacement explanatory statement that including a prescriptive definition in the instrument could potentially lead to unintended consequences. It is, however, the committee's view that a non-prescriptive, inclusive definition of the term 'emergency' should be included in the instrument, noting its significance to the measures in this instrument, and again noting these involve the use of coercive powers against vulnerable persons in residential aged care.

The committee therefore requests your advice as to whether the instrument could be amended to include a high-level, inclusive definition of the term 'emergency' to provide guidance in relation to the scope of this key term on the face of the instrument.

Clarity of drafting

The committee welcomes your acknowledgement that the requirement to be 'not inconsistent with' the Charter of Aged Care Rights (the Charter) is generally a lower threshold than requiring consistency with the Charter. You have advised that this lower threshold was used in the instrument so that it is consistent with the terminology and threshold used in the *Aged Care Act 1997* (Aged Care Act). The committee also notes your advice that you are hesitant to make amendments to the Aged Care Act without carefully considering the implications, considering the broad nature of the rights in the Charter.

While the committee welcomes your undertaking to consider this issue carefully in the context of the new Aged Care Act, the committee considers this issue should be considered now, while the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 is before the Parliament. This bill could facilitate the relevant amendments to the Aged Care Act, in addition to amendments to the instrument, to ensure consistency across the legislative framework.

The committee therefore requests your advice as to whether the implications of amending the *Aged Care Act 1997* and the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 to require consistency with the Charter of Aged Care Rights can be considered immediately and as a matter of urgency.

The committee considers that amendments to the *Aged Care Act 1997* and the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 to require consistency with the Charter of Aged Care Rights should be progressed before the commencement of the new Aged Care Act and ideally via government amendments to the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021, which is currently before the Parliament.

Please note that the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, on 18 October 2021 the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **9 December 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your ongoing assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: Committeescrutiny@treasury.gov.au

Dear Treasurer,

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]

Thank you for your response of 22 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021 and has resolved to seek your further advice about the issues outlined below.

Exemptions from the operation of primary legislation

Parliamentary oversight

The committee notes your advice that due to the nature of the exemptions from certain requirements of the *Corporations Act 2001* (the Corporations Act) set out in the instrument, and the fact that the exemptions do not apply to all persons who are offering to sell or issue financial products, it is necessary and appropriate for these measures to be contained in delegated legislation.

Further, you have advised that it would not be appropriate for the instrument to cease after three years as the measures would no longer give effect to the policy intent and would create uncertainty for businesses relying on the exemptions, noting that the cessation for these measures could give rise to significant commercial risks for affected businesses.

As you are aware, the committee has significant long-standing concerns about provisions which exempt persons or entities from the operation of primary legislation in delegated legislation. If such provisions are included in delegated legislation, it is the committee's view that the instrument should operate no longer than strictly necessary. This view was clearly set out in the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight, tabled in the Senate on 16 March 2021, and discussed with Treasury officials at a private briefing with the committee on 28 April 2021.

The committee considers that in most cases, this means that such instruments should cease to operate no more than three years after it commences to ensure a minimum degree of regular parliamentary oversight. In this case, the committee is particularly concerned as the Corporations Regulations 2001 are exempt from sunseting and there is therefore the potential for the exemptions to remain in force indefinitely through delegated legislation.

In recent months, the committee has been pleased to see that the majority of Treasury portfolio instruments have been accompanied by a thorough justification regarding the appropriateness of including modifications to or exemptions from primary legislation in delegated legislation, and shorter durations for instruments which contain such provisions. Therefore, it is unclear to the committee why a similar approach has not been taken in relation to this instrument. If a shorter duration is not appropriate in these circumstances as the measures are intended to be ongoing, the committee considers the measures are more appropriately contained in primary legislation. In this regard, the committee notes that including the exemptions in primary legislation would provide even greater certainty for affected businesses, while at the same time facilitating full parliamentary scrutiny of the exemptions.

The committee appreciates your advice that the Australian Law Reform Commission (ALRC) will undertake a review of Chapter 7 of the Corporations Act, which should consider whether exemptions such as these should be included in delegated legislation, with a final report due by 30 November 2023. Based on this timeframe, if these exemptions cannot be included in primary legislation prior, the committee considers that a three-year repeal date is appropriate to coincide with the findings of the ALRC's review.

This is in line with the committee's view that this instrument should be amended to specify that the exemptions set out in this instrument cease to operate three years after they commence. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to parliamentary scrutiny.

In light of the above, the committee reiterates its request for your advice as to:

- **whether the Corporations Regulations 2001 can be amended to provide that the exceptions set out in the instrument cease to operate three years after they commence, noting that this 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; and**
- **if the measures are intended to be in force for a longer term, whether the exemptions can be included in primary legislation.**

Please note that the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, on 22 November 2021, the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **9 December 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your ongoing assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Sussan Ley MP
Minister for the Environment
Parliament House
CANBERRA ACT 2600

Via email: DLOley@environment.gov.au
CC: legislation@environment.gov.au

Dear Minister,

**Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021
[F2021L00843]**

Thank you for your response of 12 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021 and has resolved to seek your further advice about the issues outlined below.

***Compliance with the Legislation Act 2003
Parliamentary oversight***

Thank you for your advice that your view is that decisions to declare no-anchoring areas under the Great Barrier Reef Marine Park Regulations 2019 (Principal Regulations) are administrative in character. You advised that declaring these zones by notifiable instrument 'facilitates appropriate regulation of activities' and allows for the inclusion of maps to support and regulate activities in the Marine Park.

You further advised that the Principal Regulations also provided the option of making no-anchor area declarations by notifiable instrument, and that anchoring in such an area was a strict liability offence prior to this instrument. You suggested that it may have been more appropriate for the committee to raise these concerns in relation to the Principal Regulations in 2019.

Finally, you advised that if the instrument were to be disallowed then the no-anchoring areas would nevertheless be contained in notifiable instruments, however, 'without the improvements introduced by the Amending Regulations'.

While acknowledging this advice, the committee takes a different view in relation to a number of points raised in your letter.

First, it is not clear to the committee how declaring no-anchor zones in a notifiable instrument, as opposed to a legislative instrument, would better facilitate regulation of Marine Park activities. It is not uncommon, for example, for legislative instruments to include maps or diagrams to assist the reader in understanding and implementing the measures in an instrument, and this feature is therefore not unique to notifiable instruments.

Secondly, the committee does not consider that it is precluded from raising these concerns in relation to the current instrument by the fact that it did not raise these concerns in relation to the Principal Regulations. In this regard, the committee's 2020-21 inquiry into the exemption of delegated legislation from parliamentary oversight has amplified the committee's scrutiny concerns about exemptions from the usual disallowance process.

The committee also notes that the explanatory statement to the instrument confirms that prior to the amendments being made by this instrument, no anchoring areas were set out either in Schedule 3 to the Principal Regulations or in a notifiable instrument. In this regard, the committee's view is that parliamentary oversight of the Principal Regulations is being diminished by this instrument, and thus the committee's scrutiny concerns are more prevalent in relation to this instrument as opposed to the Principal Regulations.

Thirdly, while the committee does have the option of pursuing disallowance (including in relation to a provision of an instrument rather than an entire instrument), it also utilises these processes to synthesise its scrutiny concerns and bring them to the attention of relevant ministers and departments, to inform the parliament, and to work collaboratively to improve legislation. To that effect, disallowance of an instrument (or a provision of an instrument) which raises concerns is not necessarily the primary goal of the committee.

Finally, the committee notes that you have stated your view that the instrument is administrative as opposed to legislative in character. However, your response does not provide detail to support this point of view, nor does it engage in the analysis of section 8 of the *Legislation Act 2003* set out by the committee in its letter of 30 September 2021.

The committee reiterates its longstanding concerns about the use of notifiable instruments to provide for significant matters. This is because, in contrast to legislative instruments, notifiable instruments are not subject to tabling, disallowance, sunseting, or other parliamentary processes.

In light of the above, the committee would appreciate your further advice as to:

- **how the measures in the instrument are administrative in character with reference to section 8 of the *Legislation Act 2003* and the committee's views set out in its letter of 30 September 2021; and**
- **whether the Principal Regulations can be amended to provide that no-anchor areas may only be declared in a legislative instrument as opposed to a notifiable instrument..**

Please note that the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, on 18 October 2021 the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **9 December 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your ongoing assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



28 October 2021

The Hon Angus Taylor MP
Minister for Industry, Energy and Emissions Reduction
Parliament House
CANBERRA ACT 2600

Via email: Angus.Taylor@energy.gov.au

CC: DLOTaylor@industry.gov.au; IndustryDLO@industry.gov.au;
legislation@industry.gov.au

Dear Minister,

Industry Research and Development instruments [F2021L00610] [F2021L00536] [F2021L00539] [F2021L00547] [F2021L00567]

Thank you for your response of 21 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instruments.

Parliamentary oversight

Matters more appropriate for parliamentary enactment

The committee welcomes your recognition of the importance of ensuring that instruments and explanatory statements contain sufficient information to provide for effective parliamentary scrutiny. However, the committee reiterates its concerns that significant details regulating the operation of the programs prescribed by the instruments are being set out in non-legislative policy guidance.

The committee acknowledges that it may not be feasible to address eligibility criteria for the programs comprehensively in explanatory statements; however, it remains unclear why at least high-level details in relation to the criteria cannot be included in the statements. This is especially important in light of your advice that it is possible program criteria could change, as the committee considers that Parliament should at least be made aware of key, enduring criteria while the relevant instrument is still subject to disallowance.

In light of the above, the committee again requests your advice as to whether the explanatory statements to all five industry research and development instruments can be amended to include high-level detail in relation to the eligibility criteria for the relevant programs.

Furthermore, in relation to the Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021, you advised that while the Modern Manufacturing Initiative Program is a significant program, the level of detail included in the instrument and the explanatory statement is sufficient to ensure parliamentary oversight of this program.

While the committee acknowledges this advice, the committee reiterates its heightened concerns in relation to instruments which prescribe programs involving a substantial amount of Commonwealth expenditure, as is the case with the funding of \$1.3 billion provided for the Modern Manufacturing Initiative Program. The grant opportunity guidelines included in your response specify that investment under the program will be targeted at supporting projects within the National Manufacturing Priorities of resources technology and critical minerals processing, food and beverage, medical products, recycling and clean energy, defence, and space.

In the committee's view, parliamentary oversight of this significant program and expenditure could be improved if the instrument included this further detail, that is, that the program will be targeted at the six National Manufacturing Priorities. The committee considers that such an amendment to the instrument would ensure a minimum degree of parliamentary oversight of this significant program by ensuring that any future changes to the scope of the program as a result of changes to the National Manufacturing Priorities will be subject to parliamentary scrutiny through the making of an amending instrument.

Recently, table item 470 in Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 was amended to clarify the scope of the \$1.45 billion Commonwealth Disability Support for Older Australians Program following scrutiny by the committee.¹ Noting the significance of the Modern Manufacturing Initiative, the committee considers that further detail as to the scope of this program should similarly be set out on the face of the Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021.

The committee therefore requests that the Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021 be amended to:

- **set out the six National Manufacturing Priorities; and**
- **provide that investment under the Modern Manufacturing Initiative Program will be targeted at projects supporting those priorities.**

Please note that the committee expects to be in a position to finally report on this instrument while it is still subject to disallowance. Therefore, on 11 August 2021 the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Please note that if the notice of motion to disallow this instrument is not considered in the Senate on or before 23 November 2021 the instrument will be deemed to have been disallowed under subsection 42(2) of the *Legislation Act 2003*. Nothing this, the committee would appreciate your response by **4 November 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

¹ See Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2021 [F2021L01357].

Thank you for your ongoing assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator the Hon Michaelia Cash
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au

Dear Attorney-General,

Civil Dispute Resolution Regulations 2021 [F2021L01031]

Thank you for your response of 14 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021.

The committee welcomes your undertaking to make an amending regulation which will provide that this instrument will repeal three years after the date of commencement, to address the committee's scrutiny concerns. On the basis of your undertaking, the committee has concluded its examination of the instrument and has resolved to withdraw its notice of motion to disallow the instrument.

The committee notes that where an instrument contains modifications to or exemptions from the operation of primary legislation it is best practice to include the justification for the inclusion of the measures in delegated, rather than primary legislation, in the instrument's explanatory statement.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Alan Tudge MP
Minister for Education and Youth
Parliament House
CANBERRA ACT 2600

Via email: alan.tudge.mp@aph.gov.au

CC: DLO.Tudge@dese.gov.au

Dear Minister,

Education Services for Overseas Students (Exempt Courses) Instrument 2021 [F2021L00877]

Thank you for your response of 13 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021.

The committee notes your advice that the National Register serves only as a manner of describing a class that is prescribed by the instrument, in the same way that other units and courses specified by the instrument are described by their name and unit or course code.

The committee welcomes your undertaking to amend the explanatory statement to the instrument to include the relevant information. In light of this, the committee has concluded its examination of the instrument and has resolved to withdraw its notice of motion to disallow the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator the Hon Bridget McKenzie
Minister for Regionalisation, Regional Communications and Regional Education
Parliament House
CANBERRA ACT 2600

Via email: minister.mckenzie@infrastructure.gov.au

Dear Minister,

Industry Research and Development (Regional Decentralisation Agenda—Securing Raw Materials Program) Instrument 2021 [F2021L00973]

Thank you for your response of 25 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021.

On the basis of your advice on the constitutional validity of the instrument, and the further information you have provided in relation to the Regional Decentralisation Agenda—Securing Raw Materials Program eligibility criteria, the committee has concluded its examination of the instrument and has resolved to withdraw its notice of motion to disallow the instrument.

As a matter of best practice, the committee notes that the further information you have provided in relation to the instrument's constitutional validity is the type of information that should be included in the explanatory statement to facilitate proper parliamentary scrutiny.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



15 November 2021

The Hon Angus Taylor MP
Minister for Industry, Energy and Emissions Reduction
Parliament House
CANBERRA ACT 2600

Via email: Angus.Taylor@energy.gov.au
CC: DLOTaylor@industry.gov.au; legislation@industry.gov.au

Dear Minister,

Industry Research and Development Instruments [F2021L00536] [F2021L00539] [F2021L00547] [F2021L00567] [F2021L00610]

Thank you for your response of 4 November 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instruments.

The committee considered your response at a private meeting on 12 November 2021. The committee welcomes your undertaking to amend the Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021 [F2021L00539] to:

- set out the six National Manufacturing Priorities (that is, resources technology and critical minerals processing, food and beverage, medical products, recycling and clean energy, defence, and space); and
- provide that investment under the Modern Manufacturing Initiative Program will be targeted at projects supporting these priorities.

In light of this undertaking and the information provided in your response, the committee has concluded its examination of the instruments. The committee has also resolved to withdraw its notices of motion to disallow the instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Alex Hawke MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

Via email: dlo.immi@homeaffairs.gov.au

Dear Minister,

Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030]

Thank you for your response of 11 November 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November 2021.

The committee welcomes your undertaking to amend the *Migration Regulations 1994* (the Regulations) to expressly provide that employers may make submissions prior to being listed in a legislative instrument. The committee also notes your advice that until such time as the requirements under the Regulations are amended, any employer you may consider for exclusion will be afforded procedural fairness under policy.

On the basis of your undertaking and advice, the committee has concluded its examination of the instrument and has resolved to withdraw its notice of motion to disallow the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Paul Fletcher MP
Minister for Communications, Urban Infrastructure, Cities and the Arts
Parliament House
CANBERRA ACT 2600

Via email: dlo@communications.gov.au

Dear Minister,

Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021 [F2021L00651]

Thank you for your response of 29 October 2021 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered your response at its private meeting on 24 November.

On the basis of your undertaking to amend the explanatory statement, and the ongoing consultation with stakeholders in relation to limiting the instrument duration to three years, the committee has concluded its examination of the instrument and has resolved to withdraw its notice of motion to disallow the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator Andrew Bragg
Chair
Senate Environment and Communications Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: ec.sen@aph.gov.au

Dear Chair,

Matters of interest to the Senate

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23.

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. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

Noting that the following instrument appears to contain significant matters relating to the rules for calculating, crediting and reporting the greenhouse gas abatement from projects undertaking carbon capture and storage activities, the committee has determined that the instrument engages standing order 23(4) and accordingly has resolved to draw it to the attention of your committee:

Instrument	Purpose	Last day to lodge disallowance notice
Carbon Credits (Carbon Farming Initiative— Carbon Capture and Storage) Methodology Determination 2021 [F2021L01379]	To set out the detailed rules for implementing and monitoring offsets projects that capture greenhouse gases, transport those gases and inject them into geological formations for permanent storage, preventing the captured emissions from being released into the atmosphere.	4 th sitting day in 2022

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to

your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that the table above identifies, where applicable, the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator Paul Scarr
Chair
Senate Economics Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23.

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.

The instrument listed in the table below, in combination with its enabling Act, authorises the Commonwealth to spend public money on the Digital Atlas of Australia Program. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instrument listed below engages standing order 23(4), and accordingly has resolved to draw it to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Industry Research and Development (Digital Atlas of Australia Program) Instrument 2021 [F2021L01298]	Digital Atlas of Australia Program	\$40.2 million over the next four years	Funding will be provided to Geoscience Australia for the development and maintenance of a Digital Atlas of Australia. The three-dimensional Digital Atlas of Australia's geography will bring together government data on people, the economy, employment, infrastructure, health, land and the environment into a single national data asset—making better use of Australia's over 90,000 open datasets to create a secure, dynamic, location-based and collaborative public data platform.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine the above instrument, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in the Senate expires on the 4th sitting day in 2022.

Further details about the instrument are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator Andrew Bragg
Chair
Senate Environment and Communications Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: ec.sen@aph.gov.au

Dear Chair,

Legislative instruments specifying Commonwealth expenditure

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation which assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23.

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.

The instruments listed in the table below, in combination with their enabling Acts, authorise the Commonwealth to spend public money on the identified grants or programs. The committee considers that the scrutiny of such instruments is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. Noting this, the committee has determined that the instruments listed below engage standing order 23(4), and accordingly has resolved to draw them to the attention of your committee:

Instrument	Grant/Program	Amount	Description
Industry Research and Development (Refinery Upgrades Program) Instrument 2021 [F2021L01258]	Refinery Upgrades Program	Funding will be provided through two rounds: <ul style="list-style-type: none">• Desulfurisation grants: \$250 million• Enabling Euro 6d Equivalent Fuels grants: \$52 million, plus any unspent funds from the desulfurisation grants round	Funding will be provided to support upgrades at domestic refineries to assure the domestic production and supply of better quality fuel, and allow for the earlier introduction of ultra-low sulfur gasoline from 2027 to 2024. Funding will be available to the entities with ownership of the Lytton refinery in Queensland and the Geelong refinery in Victoria to undertake planning and infrastructure upgrades.

Instrument	Grant/Program	Amount	Description
			<p>Activities that may be funded through the program include:</p> <ul style="list-style-type: none"> • planning, design and engineering; • site preparation activities directly related to the project; • upgrading infrastructure; and • designing, buying, constructing, installing and/or commissioning of infrastructure including plant and equipment.
Industry Research and Development (Supporting Critical Transmission Infrastructure Program) Instrument 2021 [F2021L01312]	Supporting Critical Transmission Infrastructure Program	Not stated	<p>Funding will be provided to support electricity transmission projects that have potential to benefit electricity price, reliability and/or security outcomes.</p> <p>This includes the following projects that may be supported initially:</p> <ul style="list-style-type: none"> • HumeLink (which will increase the capacity of the southern NSW transmission system) • VNI West (which will link New South Wales to Victoria) • Project EnergyConnect (which will link South Australia to New South Wales) and • Marinus Link (which will provide a second link between Tasmania and Victoria).
Industry Research and Development (Daintree Microgrid Program) Instrument 2021 [F2021L01305]	Daintree Microgrid Program	\$18.75 million over three years	<p>Funding will be provided to support the deployment of a renewable energy microgrid (including hydrogen) in and around Cape Tribulation, Diwan, and Cow Bay in the Daintree region of northern Queensland. The program aims to improve the affordability, reliability and security of energy supply in the community, deploy a priority</p>

Instrument	Grant/Program	Amount	Description
			emerging technology and drive down emissions.

I note that under standing order 25(2)(a) your committee is empowered to conduct own-motion inquiries into legislative instruments which relate to the portfolios allocated to your committee, although there is no requirement to do so. Should your committee decide to further examine any of the above instruments, I note that (based on the current sitting pattern) the time for lodging a disallowance notice in the Senate for each instrument listed in the table expires on the 4th sitting day in 2022.

Further details about the instruments are published on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Please note that in the interests of transparency this correspondence will be published on the Scrutiny of Delegated Legislation Committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Michael Sukkar MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Via email: dlosukkar@treasury.gov.au
CC: Minister.sukkar@treasury.gov.au

Dear Assistant Treasurer,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instruments in your portfolio which do not meet the committee's expectations under standing order 23(4A):

- Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 3) Determination 2021 [F2021L01262]
- Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 4) Determination 2021 [F2021L01380]

These instruments are being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage, however the explanatory statements to these instruments should be amended as a matter of best practice. In addition, all future explanatory statements to exempt instruments should include substantive justifications for why the exemption is appropriate in the specific context of the instrument. This is in recognition of the important role that explanatory statements play in facilitating parliamentary scrutiny of legislative instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation**



25 November 2021

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: tsrdlos@treasury.gov.au
CC: Committeescrutiny@treasury.gov.au

Dear Treasurer,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instruments in your portfolio which do not meet the committee's expectations under standing order 23(4A):

- Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2021 [F2021L01292]
- Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2021 [F2021L01291]
- Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2021 [F2021L01287]
- Financial Sector (Collection of Data) (reporting standard) determination No. 16 of 2021 [F2021L01284]

- Financial Sector (Collection of Data) (reporting standard) determination No. 17 of 2021 [F2021L01288]
- Financial Sector (Collection of Data) (reporting standard) determination No. 18 of 2021 [F2021L01289]
- Financial Sector (Collection of Data) (reporting standard) determination No. 19 of 2021 [F2021L01293]
- Financial Sector (Collection of Data) (reporting standard) determination No. 20 of 2021 [F2021L01282]
- Financial Sector (Collection of Data) (reporting standard) determination No. 21 of 2021 [F2021L01280]
- Financial Sector (Collection of Data) (reporting standard) determination No. 22 of 2021 [F2021L01285]

These instruments are being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage, however the explanatory statements to these instruments should be amended as a matter of best practice. In addition, all future explanatory statements to exempt instruments should include substantive justifications for why the exemption is appropriate in the specific context of the instrument. This is in recognition of the important role that explanatory statements play in facilitating parliamentary scrutiny of legislative instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator the Hon Michaelia Cash
Attorney-General
Parliament House
CANBERRA ACT 2600

Via email: attorney@ag.gov.au

CC: DLO@ag.gov.au

Dear Attorney-General,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instruments in your portfolio which do not meet the committee's expectations under standing order 23(4A):

- Legislation (Deferral of Sunsetting—Guide to the Assessment of the Degree of Permanent Impairment Instruments) Certificate 2021 [F2021L01344]
- Legislation (Deferral of Sunsetting—National Recovery Plan for Threatened Albatrosses and Giant Petrels 2011-2016) Certificate 2021 [F2021L01362]
- Legislation (Deferral of Sunsetting—Product Stewardship (Oil) Instruments) Certificate 2021 [F2021L01373]

These instruments are being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage, however the explanatory statements to these instruments should be amended as a matter of best practice. In addition, all future explanatory statements to exempt instruments should include substantive justifications for why the exemption is appropriate in the specific context of the instrument. This is in recognition of the important role that explanatory statements play in facilitating parliamentary scrutiny of legislative instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation**



25 November 2021

The Hon Alan Tudge MP
Minister for Education and Youth
Parliament House
CANBERRA ACT 2600

Via email: alan.tudge.mp@aph.gov.au

CC: DLO.Tudge@dese.gov.au

Dear Minister,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instruments in your portfolio which do not meet the committee's expectations under standing order 23(4A):

- Linkage Program Grant Guidelines (2021 edition) Variation No.1 [F2021L01376]
- Linkage Program Grant Guidelines ARC Centres of Excellence commencing in 2023 Variation No.1 [F2021L01361]

These instruments are being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage, however the explanatory statements to these instruments should be amended as a matter of best practice. In addition, all future explanatory statements to exempt instruments should include substantive justifications for why the exemption is appropriate in the specific context of the instrument. This is in recognition of the important role that explanatory statements play in facilitating parliamentary scrutiny of legislative instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Alex Hawke MP
Minister for Immigration, Citizenship, Migrant Affairs and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

Via email: dlo.immi@homeaffairs.gov.au

Dear Minister,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instrument in your portfolio which does not meet the committee's expectations under standing order 23(4A):

- Migration (arrangements for Visitor (Class FA) visa applications) Instrument (LIN 21/056) 2021 [F2021L01339]

This instrument is being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage, however the explanatory statement to the instrument should be amended as a matter of best practice. In addition, all future explanatory statements to exempt instruments should include substantive justifications for why the exemption is appropriate in the specific context of the instrument. This is in recognition of the important role that explanatory statements play in facilitating parliamentary scrutiny of legislative instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

The Hon Greg Hunt MP
Minister for Health and Aged Care
Parliament House
CANBERRA ACT 2600

Via email: Minister.Hunt.DLO@health.gov.au

Dear Minister,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, as is the case with the instrument listed below, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instrument in your portfolio which does not meet the committee's expectations under standing order 23(4A):

- Poisons Standard October 2021 [F2021L01345]

This instrument is being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



25 November 2021

Senator the Hon Simon Birmingham
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: financeminister@finance.gov.au

CC: DLO-Finance@finance.gov.au

Dear Minister,

Instruments exempt from disallowance

Under Senate standing order 23(4A) the Standing Committee for the Scrutiny of Delegated Legislation is empowered to scrutinise delegated legislation which is exempt from disallowance. Under this new standing order, the committee scrutinises instruments exempt from disallowance to determine whether the exemption is appropriate.

At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and to substantively justify why the exemption is appropriate in the specific context of the instrument.

In addition, even where a substantive explanation is provided, an instrument may not meet the committee's expectations under standing order 23(4A). This may be because the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases. This requirement is set out in Senate resolution 53B, agreed to on 16 June 2021.

The committee has identified the following instruments in your portfolio which do not meet the committee's expectations under standing order 23(4A):

- Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2020-2021 (No. 6) [F2021L01338]
- Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2021-2022 (No. 1) [F2021L01337]

These instruments are being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 16 of 2021*, available on the committee's website at www.aph.gov.au/senate_sdlc.

In light of the fact that standing order 23(4A) is new, the committee does not request a response to these concerns at this stage, however the explanatory statements to these instruments should be amended as a matter of best practice. In addition, all future explanatory statements to exempt instruments should include substantive justifications for why the exemption is appropriate in the specific context of the instrument. This is in recognition of the important role that explanatory statements play in facilitating parliamentary scrutiny of legislative instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation**