

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

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# Introduction

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

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

This Monitor details matters relating to the committee's scrutiny of **50** legislative instruments registered on the Federal Register of Legislation between **8 October** and **21 October 2022**. This includes **41** disallowable instruments and **nine** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

## Committee information

### Terms of reference

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

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

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

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

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

## **Nature of the committee's scrutiny**

### ***Technical legislative scrutiny***

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

#### *Resolving minor technical scrutiny concerns*

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

#### *Resolving significant technical scrutiny concerns*

Where the committee considers that an instrument raises significant technical scrutiny concerns, it details its concerns in Part I of the Monitor for the benefit of the Senate in its oversight of delegated law-making powers. The committee generally seeks a formal



response from the relevant minister in relation to concerns set out in this Part; however, in some circumstances the committee may report its scrutiny concerns to the Senate without seeking further information from the minister.

### *Undertakings*

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

### ***Matters of interest to the Senate***

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

### **Disallowance process<sup>1</sup>**

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

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

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

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

## **Publications**

### ***Delegated Legislation Monitor***

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

### ***Scrutiny News***

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

### ***Guidelines***

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

## **Other resources**

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

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

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

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

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## **Part I—Technical legislative scrutiny**

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## Part I: Introduction

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

### Chapter 1: New and ongoing matters

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

### Chapter 2: Concluded matters

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

### Chapter 3: Agency engagement

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

### Chapter 4: Undertakings

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

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



# Chapter 1

## New and ongoing matters

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

### New matters

1.2 At this time, the committee has not resolved to raise significant technical scrutiny concerns in relation to any instruments registered within this period. The committee is continuing to engage with relevant agencies in relation to the instruments listed in Chapter 3.

### Ongoing matters

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

## Australian Capital Territory Land (Lakes) Ordinance 2022

<b>FRL No.</b>	F2022L00468 <sup>1</sup>
<b>Purpose</b>	Regulates the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory, relating to lake areas located on National Land.
<b>Authorising legislation</b>	<i>Seat of Government (Administration) Act 1910</i>
<b>Portfolio</b>	Infrastructure, Transport, Regional Development, Communications and the Arts
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 26 July 2022) Notice of motion to disallow given on 25 October 2022

### Overview

1.4 The Australian Capital Territory National Land (Lakes) Ordinance 2022 (the instrument) regulates various matters relating to the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory (the ACT), including the grant of permits to use Lake Burley Griffin (the Lake) for various activities, regulation

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

of boating and the closure of the lake area for safety, maintenance and for approved events. The committee has identified several technical scrutiny concerns in the instrument, detailed below.

1.5 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 5 of 2022*, on 7 September 2022.<sup>2</sup> The Minister for Regional Development, Local Government and Territories (the minister) responded on 8 November 2022.<sup>3</sup>

## Scrutiny concerns

### ***Coercive powers;<sup>4</sup> significant matters in delegated legislation<sup>5</sup>***

1.6 Several provisions in the instrument contain search and seizure powers.<sup>6</sup> Specifically, Part 8 division 2 confers entry, search and seizure powers on inspectors to enter boats and seize evidence. Additionally, section 140 authorises the seizure of a boat if an inspector believes it is or has been involved in an offence under the instrument.

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

1.8 Where an instrument contains coercive powers, the committee will consider whether there are relevant limitations and safeguards on the powers, including who may exercise the powers,<sup>7</sup> and whether the powers unduly trespass on personal rights and liberties,<sup>8</sup> such that they are a matter more appropriate for parliamentary enactment.<sup>9</sup>

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2 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 3–15.

3 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

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

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

6 See, for example, part 8 division 2.

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

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

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



1.9 Accordingly, the committee requested information from the minister as to why search, entry and seizure powers are necessary and appropriate, and how the public interest is served by their inclusion in delegated legislation. The committee also requested information from the minister as to whether the provisions comply with Chapters 7 and 8 of the *Attorney-General's Department's Guide to Framing Commonwealth Offences* (the AGD Guide); the circumstances in which the search and seizure powers will be exercised; whether the individuals exercising these powers will be required to have the appropriate skills, qualifications and experience; and whether any safeguards or limitations contained within law or policy apply to the exercise of these powers.

*Minister's response*<sup>10</sup>

1.10 In her response of 8 November 2022, the minister advised that the entry, search and seizure powers conferred by the instrument are necessary for the effective and safe operation of the Lake, including for the protection of Lake users and the environment.

1.11 The minister also advised that the AGD Guide contemplates the inclusion of these powers where the objectives of the primary legislation will be frustrated unless the powers are included in delegated legislation. The minister added that the inclusion of such detailed matters in the primary legislation, the *Seat of Government (Administration) Act 1910* (the 1910 Seat of Government Act), would change the basic framework of the legislative scheme, which is fundamental to the administration of Commonwealth laws in the ACT.

1.12 The minister further noted that the Governor-General's power to make ordinances for the peace, order and good government of National Land is plenary and has historically been used by the government to make laws for the ACT. Further, she noted that ordinances made for the external territories generally deal with 'state-type matters', including those relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation.

1.13 The minister provided specific examples of situations where the entry, search and seizure powers would be used for the effective and safe operation of the Lake, to be exercised in "situations of emergency and serious danger to public health".<sup>11</sup>The

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10 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

11 The Minister provided the following example circumstances in which the powers are intended to be exercised:

- where a vessel is moored on the Lake in unsafe circumstances or in a manner that poses safety or environmental risks;
- where a vessel is freely floating in the Lake creating a navigation hazard;

situations were such that there was a need for inspectors to be able to respond swiftly to minimise endangerment to life, environment and property. The minister advised that the use of these powers is constrained by the need for consent and search warrants, except for where life or property is endangered.

1.14 The minister further advised that the Delegate for Lakes is appointed on the basis of having technical expertise, relevant qualifications and experience in water management roles. Members of the Australian Federal Police are also automatically defined to be inspectors and exercise entry, search and seizure powers on the lake. The minister also noted that internal frameworks and guidelines are currently being developed to monitor the exercise of coercive powers.

1.15 Finally, the minister made an undertaking to amend the explanatory statement to provide a more detailed explanation of these unique legal and administrative arrangements governing the Lake, which justify the inclusion of coercive powers in the Ordinance.

#### *Committee view*

1.16 The committee notes the minister's advice that protection of life, environment and property on the Lake are of great importance and that search, entry and seizure powers are required to ensure the safe and efficient operation of the Lake. The committee also notes the advice that these powers are delegated to a suitably qualified and experienced individual and the exercise of the powers is limited by the need for consent or warrants, except in cases requiring the protection of life or property. Additionally, the minister helpfully clarifies that the 1910 Seat of Government Act cannot be amended to include the relevant powers, as this may inadvertently change the basic framework of the legislative scheme, which is fundamental to the administration of Commonwealth laws in the ACT and would affect other ordinances made under the 1910 Seat of Government Act.

1.17 While acknowledging this advice, the committee would appreciate further detail about the nature of the relevant legislative framework and how amendments to the Act could detrimentally change the framework of the legislative scheme.

**1.18 The committee therefore requests the minister's further detailed advice as to what limitations prevent the 1910 Seat of Government Act from being amended to include certain powers.**

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- where activity on a vessel is unsafe or being operated under the influence of drugs or alcohol;
  - where a vessel is being operated in an unsafe way, is lacking appropriate safety equipment or does not have the required licences or permits to operate on the Lake; or
  - in other contentious circumstances such as seizing known dangerous equipment or goods.

### ***Significant penalties;<sup>12</sup> significant matters in delegated legislation<sup>13</sup>***

1.19 The instrument contains several offences which impose custodial penalties ranging from three to twelve months (sections 47, 48, 102, 104 and 105). For example, section 47 provides that a person who operates an unsafe boat on the lake may incur a penalty of imprisonment for six months or 38 penalty units (\$8 436), or both.

1.20 The committee requested more detailed advice from the minister as to the justification for including custodial penalties in sections 47, 48, 102, 104 and 105 of the instrument, as opposed to primary legislation, and whether the Attorney-General's Department was consulted in relation to the inclusion of custodial penalties in the instrument, in accordance with Part 3.3 of the AGD Guide.

#### *Minister's response<sup>14</sup>*

1.21 In her response of 8 November 2022, the minister advised that the legal and administrative arrangements governing the Lake are under the 1910 Seat of Government Act, which cannot be amended to include these offence provisions without changing the framework of the Act's legislative scheme and unintentionally limiting the scope of the ordinance-making power. The minister also noted that the Governor-General's plenary power authorises the making of ordinances and does not limit the size or nature of the penalties that can be imposed with respect to National Land.

1.22 The minister also confirmed that the Administrative and Criminal Law sections of the Attorney-General's Department were consulted in relation to the inclusion of custodial penalty provisions and provided recommendations accordingly. Further, the custodial penalties for offences under sections 102 to 105 are consistent with the *Lakes Act 1976* (ACT) (the Lakes Act), which relates to territory lakes.

1.23 Finally, the minister undertook to amend the explanatory statement to set out the unique legal and administrative arrangements governing the Lake and clarify that the penalties imposed are consistent with corresponding offences under the Lakes Act.

#### *Committee view*

1.24 It is the committee's view that serious criminal offences and significant penalties should ordinarily be included in primary legislation rather than delegated legislation to ensure appropriate parliamentary oversight of the scope of the relevant offence and penalty. The committee notes the minister's advice as to the need to

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

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

14 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

include the provisions relating to these offences and the associated penalties (including custodial penalties) in the ordinance, as the relevant primary legislation cannot be amended to include these provisions.

1.25 While the committee welcomes the minister's undertaking to amend the explanatory statement to explain the unique legal and administrative arrangements governing the Lake, the committee seeks further information about the barriers to amending the primary legislation to include provisions relating to serious criminal offences and significant penalties, including custodial penalties.

**1.26 Accordingly, the committee requests the minister's further advice as to the limitations preventing the 1910 Seat of Government Act from being amended to include the above significant penalties.**

***Strict liability;*<sup>15</sup> *absolute liability*<sup>16</sup>**

1.27 The instrument provides for several strict liability offences.<sup>17</sup> For example, section 14 provides that a person commits an offence of strict liability if they put a boat in a lake or take a boat from a lake (other than a personal watercraft) at a place that is not in a prescribed launching area. Section 104 similarly creates a strict liability offence for persons who operate a boat on a lake whilst having a prescribed drug in their oral fluid or blood. However, subsection 104(2) provides that a person cannot rely on a defence of mistake of fact about the identity of the prescribed drug in their oral fluid or blood. Excluding the defence of mistake of fact appears to apply absolute liability to this component of the offence. In addition to these offences on the face of the instrument, section 106 appears to apply certain strict liability offences in the *Road Transport (Alcohol and Drugs) Act 1977* (the Road Transport Act) to persons operating a boat on a lake.<sup>18</sup> Sections 102 and 104 of the instrument include a maximum penalty of 12 months and three months imprisonment respectively.

1.28 In this regard, the explanatory statement does not appear to outline why the strict and absolute liability offences are necessary and appropriate. While the Statement of Compatibility with Human Rights notes that 'many of the strict liability

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

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

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

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

offences in the Ordinance relate to safety on the lake', it was unclear to the committee if all of the offences were related to lakes safety.<sup>19</sup>

1.29 Accordingly, the committee requested the minister's advice as to why it is necessary and appropriate for the instrument to contain offences of strict and absolute liability, with reference to the principles set out in part 2.2.6 of the AGD Guide, particularly in relation to offences that include custodial penalties, offences in the Road Transport Act applied by section 106 of the instrument, and offences that do not relate to lake safety.

#### *Minister's response*<sup>20</sup>

1.30 In her response of 8 November 2022, the minister advised that the ordinance contains 65 offences of strict liability and no absolute liability offences. The offences, with the exception of the offences under sections 102 and 104, do not include penalties of imprisonment and, in accordance with the AGD Guide, these offences are under 60 penalty units. The minister's advice notes that the offences are regulatory in nature, apart from those under sections 102 and 104, and are therefore appropriate as strict liability offences as enforcement officers can readily assess the truth of a matter and determine if an offence has been committed.

1.31 The minister advised that strict liability offences are imposed only where necessary and proportionate to the conduct being regulated, which includes for reasons of public safety and ensuring the enforcement of a regulatory scheme. Strict liability offences can also deter relevant conduct, and are necessary to ensure the integrity of the regulatory regime over the Lake. The minister also advised that, due to the safety implications of operating a boat while intoxicated for the operator, other passengers and other lake users, it is reasonable that these offences are strict liability. These penalties are consistent with equivalent offences under the Lakes Act and the Road Transport Act.

1.32 The minister also confirmed that the offence under section 104 is not an offence of absolute liability although it excludes a defence of mistake of fact in one circumstance. This is where the defendant has mistaken a controlled drug for a prescribed drug. All other defences of mistake of fact are still available.

#### *Committee view*

1.33 The committee thanks the minister for her advice about the appropriateness of the provisions regulating the Lake to include offences of strict liability. The

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

20 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

committee also thanks the minister for confirming the strict liability offences are applicable in cases that involve lake safety, such as operating a boat while under the influence of drugs or alcohol and, with the exception of two serious offences, they are subject to a maximum of 60 penalty units.

1.34 The committee also notes the minister's advice that there are significant safety risks involved for the operator in operating a boat whilst intoxicated, and the offences are equivalent to other offences of strict liability that relate to operating vehicles whilst intoxicated. The committee further notes the minister's advice that the offence under section 104 is not an offence of absolute liability but rather only excludes the defence of mistake of fact in a narrow set of circumstances.

**1.35 In light of the information provided by the minister, the committee concludes its examination of the instrument in relation to this matter.**

### ***Reverse burden of proof***<sup>21</sup>

1.36 Several offences in the instrument contain defences which impose an evidential burden of proof,<sup>22</sup> or legal burden of proof,<sup>23</sup> on the defendant. For example, subsection 15(1) creates an offence for swimming or diving in a lake in an area where swimming or diving is not permitted. Subsection 15(2) provides a defence where the swimming or diving is authorised by a regulated activity permit, and a note to the provision provides that a defendant bears an evidential burden in relation to the matter. Subsection 29(1) makes it an offence to anchor a boat on a lake at night. Subsection 29(4) provides a defence if the defendant proves that the boat was anchored for the purpose of viewing a fireworks display and the defendant or someone else was on the boat for that purpose when the boat was anchored. A note to the provision provides that a defendant bears a legal burden in relation to this matter. In addition to these offences, section 106 of the instrument appears to apply certain provisions in the Road Transport Act which reverse the legal burden of proof to persons operating a boat on a lake.<sup>24</sup>

1.37 The committee was concerned that the explanatory statement provides limited information as to why it is necessary and appropriate to reverse the evidential burden of proof in relation to some offences and no explanation as to why it is necessary and appropriate to reverse the legal burden of proof.

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

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

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

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

1.38 Accordingly, the committee requested the minister's more detailed advice as to:

- why it is necessary and appropriate to reverse the evidential burden of proof for the relevant offences, with reference to the relevant guidance in the AGD Guide;
- why it is necessary and appropriate to reverse the legal burden of proof in sections 29, 60, 75, 78, 89 and 103 of the instrument, with reference to the relevant guidance in that guide;
- why it is necessary and appropriate to reverse the legal burden of proof in sections 29, 60, 75, 78, 89 and 103 of the instrument, as opposed to the evidential burden of proof; and
- why it is necessary and appropriate to apply provisions reversing the legal burden of proof in the Road Transport Act to persons who operate a boat on a lake within the meaning of the instrument.

#### *Minister's response*<sup>25</sup>

1.39 In her response of 8 November 2022, the minister advised that the nature of the relevant offences relate to serious matters of safety, primarily aimed at the protection or preservation of life of the person involved and of others, such as bystanders. The minister's advice also notes that these offences involve matters that are specifically in the minds of the defendant, in which case, the defendant would only need to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. It would be significantly more costly for the prosecution to disprove the existence of the relevant matter.

1.40 The minister also advised that these offences contain low penalty units, well under the 60 penalty unit threshold recommended for strict liability offences in the AGD Guide and, for a number of the offences, the conduct proscribed by the offence poses a grave danger to public health or safety. Additionally, for a number of these offences, the matters raised in relation to the defence are not central to the question of culpability for the offence.

1.41 Finally, the minister advised that for offences where the legal burden of proof has been reversed, the elements of the defence that must be positively proved are within the reasonable power of the defendant to establish and outside of the reasonable power of the prosecution to disprove. If the prosecution were required to disprove these matters beyond reasonable doubt (and the defendant were only required to meet an evidential burden) as part of the process of upholding the law, the prosecution would find it extremely difficult to perform the role necessary to

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25 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

support the operation and public safety purposes of those measures. Finally, the minister noted that these provisions align with equivalent provisions in the Lakes Act.

#### *Committee view*

1.42 The committee notes the minister's advice that the offences contain low penalty units, relate to serious matters of safety and protection of life and relate to matters that are specifically in the minds of the defendants, which require the defendant to only adduce or point to evidence that suggests a reasonable possibility that the matter does or does not exist.

1.43 The committee's view is that the right to be presumed innocent is a fundamental principle of the Australian legal system and this right is undermined by provisions that reverse the burden of proof and require the defendant to raise evidence about or to positively prove a matter. However, in this instance, the committee acknowledges that the nature of the offences relates to matters of public safety and protection of life, that the penalties for the offences are low and that the matters that are to be raised as part of either a legal or evidential burden of proof are matters that are specifically within the defendant's mind and are within the defendant's reasonable power to raise evidence about or positively prove.

**1.44 In light of the information provided by the minister, the committee concludes its examination of the instrument in relation to this matter.**

#### ***Conferral of discretionary powers<sup>26</sup>***

1.45 The instrument contains several provisions which confer broad discretionary powers on specified decision-makers, including the minister and Delegate for Lakes.<sup>27</sup>

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

1.47 Additionally, subsection 42(1) of the instrument provides that the minister may authorise the Delegate for Lakes to charge for admission to a lake area or a part of a lake area during a period and specify the amount of the admission charged. The instrument does not appear to provide any additional guidance as to the factors to be considered by the Delegate for Lakes in specifying the admission charge. As noted

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

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



previously,<sup>28</sup> section 150 of the instrument empowers the minister to appoint either the Chief Executive of the National Capital Authority or a member of the staff of the National Capital Authority as the Delegate for Lakes.

1.48 The committee requested the minister's advice as to:

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

#### *Minister's response<sup>29</sup>*

1.49 The minister advised that in making the decisions regarding the matters highlighted by the committee, the National Capital Authority delegate must refer to criteria set out in the internal operating procedures and policies, so that decisions are made in a consistent manner with reference to evidence, based on merit and subject to internal review mechanisms. The minister also advised that the delegation of these powers to non-SES officials is appropriate, given their specific expertise and qualifications in water management, asset maintenance and planning, which will allow for the Lake to be administered efficiently for public benefit. Further, the agency's size and resources do not allow for changes to this practice as it would be a significant operational impediment and could risk effective administration of the ordinance.

#### *Committee view*

1.50 The committee notes the minister's advice that delegates must make decisions in accordance with criteria established in policy, with reference to evidence, and must provide reasons for decisions, which are also subject to review. The committee further notes the minister's advice that delegations to officers below SES level are appropriate as they are required to possess the specific qualifications and expertise described by the minister.

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28 See [1.4].

29 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

1.51 The committee's view is that when delegations are made below the SES level, the explanatory statement should include an explanation of the scope and nature of the delegated power and what specific skills or qualifications the delegate will require. In this instance, the committee notes the minister's advice that the delegate, while not at SES level, must possess technical expertise in water management, asset maintenance and planning, which are necessary for the exercise of the conferred power, and that the delegate must exercise this power in accordance with criteria established in the National Capital Authority's internal operating procedures and policies.

**1.52 The committee therefore requests the minister's advice as to whether the explanatory statement can be amended to include the further advice provided to the committee about this matter.**

### *Clarity of drafting*<sup>30</sup>

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

1.54 Accordingly, the committee requested the minister's more detailed advice as to the meaning of dangerous conduct in relation to section 60 of the instrument.

### *Minister's response*<sup>31</sup>

1.55 The minister advised that 'dangerous to the public' includes anything that causes, or is likely to cause, injury or death to a person, damage to property or threaten public safety. The minister's advice also provides examples of behaviours that are contemplated to encompass dangerous conduct.

1.56 Further, the minister gave an undertaking to amend the explanatory statement to include guidance on the proper interpretation of 'dangerous to the public'.

### *Committee view*

1.57 The committee welcomes the minister's advice and undertaking to amend the explanatory statement to include the meaning of 'dangerous conduct'.

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

31 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

**1.58 In light of the minister's advice and undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this matter.**

***Availability of independent merits review***<sup>32</sup>

1.59 The instrument empowers decision-makers to make certain discretionary decisions with the capacity to affect rights, liberties, obligations or interests.<sup>33</sup> For example, section 10 empowers the minister to determine the amount of compensation to be paid to land owners if their land is 'injuriously affected' as a result of an act authorised by the minister under section 9. The explanatory statement advises that:

provisions providing for administrative review of the Minister's decisions have not been included at this time. This is due to doubt regarding the ability of the Administrative Appeals Tribunal (AAT) to review decisions made under ACT ordinances.

1.60 For this reason, the committee asked the minister whether the Attorney-General's advice had been or would be sought regarding the progress of amendments to the *Administrative Appeals Tribunal Act 1975* (the AAT Act) to ensure the availability of merits review in relation to the instrument.

***Minister's response***<sup>34</sup>

1.61 The minister advised that the government was currently developing the Australian Capital Territory Legislation Amendment (Ordinances and Reserved Laws) Bill 2022, which is proposed to amend the AAT Act, such that decisions that are administrative in character and made under ACT ordinances will be subject to review by the AAT, as well as judicial review in the Federal Court and Federal Circuit Court.

***Committee view***

1.62 The committee welcomes the minister's advice that a bill is in development which will allow for the availability of independent review of administrative decisions made under ACT ordinances, including such decisions under this instrument. The committee would appreciate an update on the progress of this matter when this is available.

**1.63 In light of the minister's advice about the legislative developments in progress to address this issue, the committee concludes its examination of the**

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

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

34 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

instrument in relation to this matter but seeks an update on the progress of this matter when this is available.

***Compliance with Legislation Act 2003—incorporation;<sup>35</sup> incorporated materials freely accessible<sup>36</sup>***

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

1.65 The committee expects that where an instrument incorporates a document, its explanatory statement explains that it is incorporated, the manner of incorporation and how it may be freely accessed.<sup>37</sup>

1.66 Therefore, the committee requested the minister's advice as to whether the Australian Standard is incorporated by reference in the instrument, and, if so, how it may be freely obtained.

***Minister's response<sup>38</sup>***

1.67 In her response of 8 November 2022, the minister advised that the Australian Standard is incorporated by reference and can be accessed at the National Capital Authority office during business hours upon request.

***Committee view***

1.68 The committee thanks the minister for her advice and notes that this information would be useful to include in the instrument's explanatory statement.

**1.69 The committee therefore requests the minister's advice as to whether the explanatory statement can be amended to include this additional information about the incorporation of the Australian Standard and where it can be freely accessed.**

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

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

37 Senate standing order 23(3)(a); Senate standing order 23(3)(f).

38 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

### ***Legal certainty***<sup>39</sup>

1.70 Section 106 of the instrument is an application provision, which states that certain provisions of the Road Transport Act and 'any relevant regulation', as in force at the commencement of the instrument, apply to a person who operates a boat on a lake.

1.71 The committee generally considers that provisions which impose obligations on a person should be drafted with sufficient clarity to enable them to understand those obligations and considers that failure to do so may undermine legal clarity and certainty.<sup>40</sup>

1.72 In this instance, the committee was concerned that neither the instrument nor its explanatory statement indicate which regulations under the Road Transport Act apply or where this information can be accessed. The committee's concern regarding the lack of legal certainty was heightened by the inclusion of offences and the application of penalties in the Road Transport Act. In this regard, it was unclear whether the penalty units that are brought across from the Road Transport Act into the instrument are subject to the amount determined by Commonwealth law or ACT law.

1.73 For this reason, the committee requested the minister's advice as to which regulations, if any, apply under section 106 of the instrument and whether an individual subject to an offence under the Road Transport Act or regulations made under it are subject to the penalty units set under Commonwealth or ACT law.

### ***Minister's response***<sup>41</sup>

1.74 The minister advised that there is one regulation in force, the Road Transport (Alcohol and Drugs) Regulation 2000 (ACT), as well as several notifiable instruments, and the penalty units set under ACT laws are applicable in this instance.

1.75 The minister also advised that specific provisions of the Road Transport Act, which are based on Part 6 of the Lakes Act, are incorporated to ensure a consistent framework for the enforcement of drug and alcohol offences.

### ***Committee view***

1.76 The committee thanks the minister for her advice that the applicable regulation is the Road Transport Act, along with several notifiable instruments. The

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

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

41 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

committee also thanks the minister for her advice that penalty units set under ACT laws are the applicable penalty units under the instrument. However, it is the committee's view that this information should be included in the instrument.

**1.77 The committee therefore requests the minister's advice as to whether the instrument can be amended to include this additional information.**

## Chapter 2

### Concluded matters

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

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

<b>FRL No.</b>	F2021L01080 <sup>1</sup>
<b>Purpose</b>	Amends the Corporations Regulations 2001 to partially implement recommendations 3.4 and 4.1 of the Financial Services Royal Commission in relation to the hawking of financial products.
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 26 July 2022) <sup>2</sup>  Notice of motion to disallow given on 25 October 2022

#### Overview

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

2.3 The committee engaged extensively with the former Treasurer about its scrutiny concerns in the instrument in the previous Parliament.<sup>3</sup> Despite this, the

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

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

committee's scrutiny concerns were not resolved and, in *Delegated Legislation Monitor 3 of 2022*, it recommended to the Senate that the instrument be disallowed.<sup>4</sup>

2.4 The committee's notice of motion to disallow the instrument lapsed at the prorogation of the 46<sup>th</sup> Parliament.<sup>5</sup> The *Legislation Act 2003* provides that where an instrument is subject to an unresolved disallowance motion at prorogation, it is deemed to be tabled on the first sitting day of the new Parliament, so that the 15 sitting day period for giving a notice of motion to disallow the instrument begins anew.<sup>6</sup>

2.5 The committee raised its scrutiny concerns with the new Treasurer in *Delegated Legislation Monitor 5 of 2022*.<sup>7</sup> The Assistant Treasurer responded on 7 October 2022.<sup>8</sup> The committee held a private briefing with the Assistant Treasurer to discuss the instrument on 24 November 2022, and the Assistant Treasurer wrote again to the committee on 29 November 2022.<sup>9</sup>

## Scrutiny concerns

### ***Exemptions from the operation of primary legislation;<sup>10</sup> parliamentary oversight<sup>11</sup>***

2.6 Item 2 of Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* amended the Corporations Act to prohibit hawking

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

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

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

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

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 50–53.

8 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 7 October 2022, pp. 37–38.

9 This correspondence was tabled with this monitor and will be accessible via the [Index of Instruments](#) on the committee's website.

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

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



of financial products. As amended, section 992A of the Corporations Act provides that a person cannot offer to sell or issue a financial product to a consumer if the offer is made in the course of, or because of, unsolicited contact with the consumer.

2.7 The instrument inserts exemptions to this prohibition in certain circumstances and these measures are not subject to sunseting.

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

2.9 The committee's longstanding view, in accordance with Senate standing order 23(3)(l), is that provisions which amend or modify the operation of primary legislation, or exempt persons or entities from the operation of primary legislation, should be included in primary rather than delegated legislation.<sup>12</sup> If the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. The committee considers that in most cases, this means the instrument should cease to operate no more than three years after it commences to ensure a minimum degree of regular parliamentary oversight. This view was clearly set out in the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>13</sup>

2.10 Accordingly, the committee sought the former Treasurer's advice about the exemptions from primary legislation in the instrument, including whether the duration of the exemptions could be limited in accordance with the committee's guidelines.<sup>14</sup> The former Treasurer advised that it was necessary and appropriate to include the exemptions in delegated legislation due to the specific nature of the exemptions, and the fact that they do not apply to all persons who are offering to sell or issue financial products.<sup>15</sup> The former Treasurer indicated that it would 'not be appropriate for the provisions to cease to have effect after three years, as they are

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

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

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

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

made under a specifically delegated power rather than a general exemption or modification power'.<sup>16</sup>

2.11 The committee remained of the view that such exemptions should be time-limited to preserve Parliament's capacity to review the ongoing necessity and appropriateness of the exemptions, including whether they should continue to be included in delegated legislation. Following extended correspondence with the former Treasurer, the committee recommended that the instrument be disallowed. Noting the change of government following the prorogation of the 46<sup>th</sup> Parliament, the committee resolved to seek the new Treasurer's advice as to whether amendments could be progressed to provide that the relevant exemptions cease to operate three years after they commence.<sup>17</sup>

#### *Assistant Treasurer's response*<sup>18</sup>

2.12 In his correspondence of 29 November 2022, the Assistant Treasurer undertook to amend the instrument to provide that the exemptions in the instrument cease after three years. The Assistant Treasurer noted that this period would operate prospectively from amendment, due to the passage of time since the commencement of the instrument.

#### *Committee view*

2.13 The committee thanks the Assistant Treasurer for his engagement with the committee on this matter and welcomes his undertaking to provide that the exemptions in the instrument will cease to operate after three years, noting that the three-year period will operate prospectively from amendment.

**2.14 In light of the Assistant Treasurer's undertaking to amend the instrument to provide that the exemptions in the instrument cease operation after three years, the committee concludes its examination of the instrument.**

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

17 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 53.

18 This correspondence was tabled with this monitor and will be accessible via the [Index of Instruments](#) on the committee's website.

# Chapter 3

## Agency engagement

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

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

### New matters

3.3 Of the instruments registered on the Federal Register of Legislation between 8 October and 21 October 2022, the committee commenced engaging with the relevant agency via its secretariat about the following **15** instruments.<sup>1</sup>

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#### Instrument

Financial Sector (Collection of Data) (reporting standard) determination No. 12 of 2022 [F2022L01350]

Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2022 [F2022L01344]

Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2022 [F2022L01348]

Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2022 [F2022L01346]

Financial Sector (Collection of Data) (reporting standard) determination No. 16 of 2022 [F2022L01353]

Financial Sector (Collection of Data) (reporting standard) determination No. 17 of 2022 [F2022L01349]

Financial Sector (Collection of Data) (reporting standard) determination No. 18 of 2022 [F2022L01366]

Financial Sector (Collection of Data) (reporting standard) determination No. 19 of 2022 [F2022L01364]

Financial Sector (Collection of Data) (reporting standard) determination No. 20 of 2022 [F2022L01369]

Military Rehabilitation and Compensation (Defence, Veterans' and Families' Acute Support Package) Instrument 2022 [F2022L01341]

Nuclear Non-Proliferation (Safeguards) Amendment Regulations 2022 [F2022L01340]

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

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## Instrument

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Safety, Rehabilitation and Compensation (Defence-related Claims) (Defence, Veterans' and Families' Acute Support Package) Instrument 2022 [F2022L01343]

Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022 [F2022L01333]

Veterans' Entitlements (Defence, Veterans' and Families' Acute Support Package) Instrument 2022 [F2022L01342]

Work Health and Safety (Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace) Code of Practice 2022 [F2022L01368]

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## Ongoing matters

3.4 Since the last Monitor was tabled, the committee has concluded all outstanding matters involving agencies that were listed as ongoing in *Delegated Legislation Monitor 8 of 2022*. These instruments are listed below as concluded agency matters.

## Concluded matters

3.5 The committee has concluded its consideration of the following 17 instruments after engagement with relevant agencies via its secretariat.<sup>2</sup>

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## Instrument

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Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022 [F2022L01276]

Education Services for Overseas Students (Calls on the OSTF—requirements for payments) Instrument 2022 [F2022L01302]

Education Services for Overseas Students (Notice Requirements) Instrument 2022 [F2022L01298]

Education Services for Overseas Students (Requirements for Notice to Immigration Secretary) Instrument 2022 [F2022L01303]

Education Services for Overseas Students (Suitable Alternative Courses) Instrument 2022 [F2022L01299]

Financial Sector (Collection of Data) (reporting standard) determination No. 12 of 2022 [F2022L01350]

Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2022 [F2022L01344]

Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2022 [F2022L01348]

Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2022 [F2022L01346]

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

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**Instrument**

**Financial Sector (Collection of Data) (reporting standard) determination No. 16 of 2022 [F2022L01353]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 17 of 2022 [F2022L01349]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 18 of 2022 [F2022L01366]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 19 of 2022 [F2022L01364]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 20 of 2022 [F2022L01369]**

**Industry Fellowships Program (IFP) Grants Guidelines [F2022L01187]**

**National Health (Eligible Midwives) Determination 2022 [F2022L01262]**

**Veterans' Affairs (Treatment Principles—Extending Access to Allied Health and Rehabilitation Appliances for Residential Care Recipients) Amendment Determination 2022 [F2022L01287]**

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## Chapter 4

### Undertakings

4.1 This Chapter contains a summary of undertakings that the committee is aware have been implemented or remain outstanding since the committee's last Monitor.

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

#### Implemented undertakings

4.3 Since the last Monitor was tabled, amendments were made to two explanatory statements in response to the committee's scrutiny concerns. The committee is not aware of any undertakings to amend an Act or legislative instrument or to conduct a review that have been implemented since the last Monitor was tabled.

#### Outstanding undertakings

4.4 During this period, two new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. One new undertaking was made to amend an Act or legislative instrument or to conduct a review.

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4.5	Instrument	Undertaking	Date of Undertaking
	<b>Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]</b>	The Assistant Treasurer undertook to amend the principal regulations in response to the committee's scrutiny concerns.	29/11/2022

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

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





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## **Part II—Matters of interest to the Senate**

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## Part II: Introduction

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

- contain significant issues;
- specify, prescribe or otherwise provide for Commonwealth expenditure or taxation; and
- do not meet the committee's expectations in relation to the source and appropriateness of exemptions from disallowance and sunseting, following scrutiny under standing orders 23(4A) and 23(3)(k).

### Chapter 5: Instruments raising significant issues

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

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

### Chapter 6: Expenditure and taxation in delegated legislation

This Chapter identifies the instruments registered in the relevant period which specify, prescribe or otherwise provide for Commonwealth expenditure or the levying of taxation, noting the importance of parliamentary oversight of these matters.

### Chapter 7: Exemptions from disallowance and sunseting

This Chapter identifies the instruments registered in the relevant period which are exempt from disallowance and sunseting, and which do not satisfy the committee's expectations in relation to the source and appropriateness of those exemptions under standing order 23(4A) and 23(3)(k).<sup>1</sup>

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



# Chapter 5

## Instruments raising significant issues

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

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

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

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



# Chapter 6

## Expenditure and taxation in delegated legislation

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

### Commonwealth expenditure

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

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

### ***Advance to the Finance Minister determinations***

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

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

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

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

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

6.5 The committee did not identify any AFM determinations registered during the relevant period.

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

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

6.7 The committee did not identify any instruments specifying expenditure made under the FF(SP) Act and IRD Act registered during the relevant period.

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

6.8 The *Federal Financial Relations Act 2009* (the Federal Financial Relations Act) is a key source of legislative authority for funding provided by the Commonwealth to

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

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

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

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



the states and territories. It empowers the relevant minister to make determinations providing for payments of general revenue assistance to the states and territories (under section 9) and specific purposes agreed with a state or territory (under section 16). Such instruments are not subject to disallowance by Parliament.<sup>7</sup>

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

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

*General revenue assistance – section 9, Federal Financial Relations Act*

Instrument	Amount	Description
<b>Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 4) Determination 2022 [F2022L01351]</b>	\$130 158 528.38	Determines amounts of general purpose financial assistance to be paid to Western Australia and the Australian Capital Territory.

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7 *Federal Financial Relations Act 2009*, sections 9(5) and 16(5).

### ***Instruments providing for expenditure pursuant to special accounts***

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

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

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

6.14 The committee did not identify any instruments providing for or related to expenditure pursuant to special accounts in this period.

### **Levying of taxation in delegated legislation**

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

6.16 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). This includes where an instrument imposes, or sets the rate of, a tax or levy. The committee has not identified any such instruments in this period.

# Chapter 7

## Exemptions from disallowance and sunseting

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

### Exemptions from disallowance

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

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

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

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>2</sup>
- is exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the *Legislation Act 2003*;<sup>3</sup>

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

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

- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money, including Advance to the Finance Minister determinations; or
- otherwise contains a matter requiring parliamentary oversight.

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

7.6 Further information about the committee's expectations regarding the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>4</sup>

### ***Instruments which do not meet the committee's expectations***

7.7 The following instruments do not meet the committee's expectations under standing order 23(4A):

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#### **Instrument**

**Biosecurity (Foot and Mouth Disease Biosecurity Response Zone) Amendment (Extension) Determination 2022 [F2022L01370]**

**Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2022–23 financial year for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed referred to in section 4 of the Military Superannuation and Benefits Act 1991 [F2022L01347]**

**Torres Strait Fisheries Tropical Rock Lobster (Total Allowable Catch) Determination 2022 [F2022L01361]**

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3 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2<sup>nd</sup> edition (February 2022) pp. 47–49; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 61–72; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 99–123.

## Exemptions from sunseting

7.8 Senate standing order 23(3)(k) requires the committee to scrutinise instruments which are exempt from the sunseting provisions of the *Legislation Act 2003* (the Legislation Act), including whether it is appropriate for these instruments to be exempt from sunseting.

7.9 The sunseting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. Sunseting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

7.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.<sup>5</sup>

7.11 Where an instrument is exempt from sunseting, Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether the exemption is appropriate. Noting the Senate's concern about the exemption of delegated legislation from sunseting, this section identifies instruments which do not satisfy the committee's expectations regarding the appropriateness of their exemption from sunseting.

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

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>6</sup>

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

6 Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunseting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- is exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003*;<sup>7</sup>
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

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

7.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>8</sup>

### ***Instruments which do not meet the committee's expectations***

7.15 Instruments listed below do not meet the committee's expectations under standing order 23(3)(k).

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#### **Instrument**

**Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 4) Determination 2022 [F2022L01351]**

**Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2022–23 financial year for recipients of certain pensions under the Defence Force Retirement and Death Benefits Act 1973 and the Trust Deed referred to in section 4 of the Military Superannuation and Benefits Act 1991 [F2022L01347]**

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7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2<sup>nd</sup> edition (February 2022) pp. 34–35; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 87–88 and 99–123.

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**Instrument**

**Nuclear Non-Proliferation (Safeguards) Amendment Regulations 2022 [F2022L01340]**

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**Senator Linda White**

**Chair**

**Senate Standing Committee for the Scrutiny of Delegated Legislation**