

Monitor 3 of 2022 - Committee correspondence

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10 March 2022

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 7 February 2022 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 9 March 2022. Whilst noting your advice, the committee remains of the view that the 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 3 of 2022*, available on the committee's website at www.aph.gov.au/senate_sdlc and **attached** to this letter. As set out in the Monitor, noting the significance of its outstanding scrutiny concerns, the committee has resolved to recommend that the Senate disallow the instrument.

As you would be aware, on 22 November 2021 the committee gave a notice of motion to disallow the instrument. As the committee retains significant scrutiny concerns in relation to the instrument, the committee has resolved not to withdraw the notice of motion to disallow the instrument to provide the Senate with additional time to consider the instrument and the committee's recommendation that it be disallowed.

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 1

Disallowable instruments raising significant scrutiny issues

1.3 This part details those instruments subject to disallowance which raise particularly significant scrutiny concerns. Where necessary, the committee may give a notice of motion to disallow an instrument contained in Part 1 to emphasise its scrutiny concerns or to provide the Senate and the committee with additional time to consider the instrument while it is still subject to disallowance.

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

FRL No.	F2021L01080 ¹
Purpose	To amend the Corporations Regulations 2001 to partially implement recommendations 3.4 and 4.1 of the Financial Services Royal Commission in relation to the hawking of financial products.
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	A disallowance notice was given on 22/11/2021

Overview

1.4 The Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080] ('the Regulations') in conjunction with Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the Act), amends the Corporations Regulations 2001 (the Corporation Regulations) to implement recommendations 3.4 and 4.1 of the Financial Services Royal Commission in relation to the hawking of financial products.

1.5 Schedule 5 to the 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. The Regulations insert exemptions to the prohibition under Schedule 5 in circumstances where a consumer is expected to have enough knowledge to adequately assess the suitability of the product or where another part of the law already provides a consumer with adequate protection from being hawked a financial product. The exemptions appear intended to remain in

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

force for an unspecified period of time as the Corporations Regulations are not subject to sunseting.

Scrutiny concerns

Exemptions from the operation of primary legislation

Parliamentary oversight

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

1.7 The committee's longstanding scrutiny view 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. 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, tabled in the Senate on 16 March 2021 (see pages 120-121).

1.8 In addition, as per the committee's guidelines, the committee considers that the explanatory statement should indicate whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

1.9 The explanatory statement to the Regulations does not address the reason these exemptions are provided for in delegated, rather than primary, legislation. In addition, the explanatory statement does not appear to address why it is appropriate for the exemptions to continue in force for an unspecified period of time.

Actions to date

Initial correspondence

1.10 In its initial letter to the Treasurer of 30 September 2021,² the committee requested the Treasurer's advice as to:

- the use delegated legislation to introduce the exemptions;
- whether the Regulations could cease to have effect after three years; and

2 Copies of committee correspondence and ministerial responses are available on the committee's [website](#).

- whether there was any intention to conduct a review of the Regulations to determine if they remain necessary and appropriate, including the appropriateness of their inclusion in delegated legislation.

1.11 The Treasurer's first response of 22 October 2021 explained that 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, it is necessary and appropriate for the exemptions to be contained in delegated legislation.

1.12 The Treasurer advised that it would "not be appropriate for the provisions to cease to have effect after three years, as they are made under a specifically delegated power rather than a general exemption or modification power." Further, the Treasurer noted that if the Regulations ceased to operate, the hawking prohibitions contained in the Act would no longer apply only to situations where there is a risk of consumer harm.

1.13 The Treasurer also advised that the Australian Law Reform Commission (ALRC) had undertaken to conduct a review of the potential reframing and restructuring of Chapter 7 of the Corporations Act. The Treasurer advised that he expected the framing and structure of the Regulations, including whether it is appropriate for these provisions to be included in delegated legislation, will be considered as part this process.

Further correspondence

1.14 The committee responded to the Treasurer's first letter on 25 November 2021 to request further information as to:

- whether the Regulations could 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.

1.15 In his second response of 10 December 2021, the Treasurer reiterated his view that it was not appropriate for the exemptions to cease after three years as they give effect to the policy intention that the hawking prohibitions should only apply in situations where there is a risk of consumer harm. The Treasurer also noted that it was not appropriate for the exemptions to cease after three years because of the significant commercial risks and compliance costs to business.

1.16 The Treasurer also confirmed his view that it is appropriate for the exemptions to be included in the Corporations Regulations. Specifically, this was because the exemptions relate to the sale or offer of specific financial products, and in his view, applied to a niche and defined group.

Recent correspondence

1.17 The committee responded to the Treasurer's second letter on 25 January 2022 to request further information as to:

- how the exemptions applied to a 'niche and defined group' when it appeared the exemptions in s 7.8.21A are in their totality quite broad in application;
- noting the Treasurer's previous response emphasised the importance of providing certainty to business, whether the exemptions can be included in primary legislation; and
- should the Treasurer maintain his view that the exemptions should not be included in primary legislation, whether the Regulations could cease to have effect after five years, as opposed to the previously suggested three years.

1.18 In his third response of 7 February 2022, the Treasurer again reiterated his view that each of the exemptions related to the sale or offer of specific financial products, and as such apply to a niche and defined group, rather than to all persons who make offers to sell or issue financial products. In contrast, the Treasurer advised the prohibition against hawking itself is broad and applies to all financial products. Therefore, as each of the exemptions apply to a niche or defined group, the exemptions are an appropriate use of the regulations making power under section 992A of the Corporations Act.

1.19 The Treasurer also reiterated his view that it was appropriate for the exemptions to be included in the Corporations Regulations, rather than the Corporations Act and it would be inappropriate for these exemptions to be subject to a period of self-repeal.

Committee comment

1.20 The committee thanks the Treasurer for his engagement with the committee in relation to the Regulations. However, the committee retains significant concerns regarding the Regulations.

1.21 As the committee has been unable to resolve these technical scrutiny concerns with the Treasurer, the committee has resolved to draw its concerns to the attention of the Senate. The committee's comments with regard to these unresolved concerns are outlined below.

Exemptions from the operation of primary legislation

Parliamentary oversight

1.22 While the committee acknowledges the Treasurer's view that it is important to provide certainty for business, the committee considers it would be more appropriate to provide for these continuing exemptions to the prohibition on hawking of financial products through primary legislation. As the committee noted in the final report of its inquiry into the exemption of delegated legislation from parliamentary oversight, the committee considers that certainty for business can be best provided by incorporating exemptions or modifications onto the face of the

primary legislation.³ The power in paragraph 992A(2)(c) of the Corporations Act to prescribe exemptions would remain available to quickly respond to new and different financial products as required.

1.23 The committee's scrutiny concerns in this instance are heightened by the fact that the exemptions will remain in force until they are repealed or amended as the Corporations Regulations are exempt from sunseting.

1.24 The committee also remains of the view that the exemptions set out in the instrument do not appear to apply only in limited circumstances or to a 'niche and defined group'. For example, paragraph 7.8.21A(a) sets out a broad exemption from the prohibition on hawking financial products for 'an offer for the issue or sale of listed securities or an interest in a listed managed investment scheme that is made by telephone by a financial services licensee'. In addition, the committee considers that the ten exemptions in regulation 7.8.21A of the Regulations appear, in their totality, to be broad and far reaching.

1.25 In light of the comments above, the committee draws the attention of the Senate to the committee's significant scrutiny concerns in relation to providing for continuing exemptions from the prohibition on hawking of financial products through the Regulations. The committee considers that these exemptions should instead be provided for in primary legislation or, at a minimum, the exemptions set out in the Regulations should cease to operate after five years to provide the Parliament with an opportunity to review and scrutinise the exemptions if they are remade.

1.26 Noting the significance of its technical scrutiny concerns, the committee recommends that the Senate disallow the Regulations.

1.27 On 22 November 2021, the committee gave a notice of motion to disallow the Regulations. As the committee retains significant scrutiny concerns in relation to the Regulations, the committee has resolved not to withdraw the notice of motion to disallow the Regulations to provide the Senate with additional time to consider the Regulations and the committee's recommendation that they be disallowed.

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, p. 121.



10 March 2022

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,

Australian Renewable Energy Agency (General Funding Strategy) Determination 2021 [F2021L01191]

Thank you for your response of 9 February 2022 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 9 March 2022. Whilst noting your advice, the committee remains of the view that the instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding comments in relation to the instrument are set out in Chapter 1 of its *Delegated Legislation Monitor 3 of 2022*, available on the committee's website at www.aph.gov.au/senate_sdlc and **attached** to this letter.

I will also write separately in relation to the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043], which you referred to in your letter.

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

1.28 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).

Australian Renewable Energy Agency (General Funding Strategy) Determination 2021

FRL No.	F2021L01191 ⁴
Purpose	This instrument enacts the Australian Renewable Energy Agency's General Funding Strategy for the 2021/22 – 2023/24 financial years as a legislative instrument. It also repeals the Australian Renewable Energy Agency (General Funding Strategy) Determination 2019.
Authorising legislation	<i>Australian Renewable Energy Agency Act 2011</i>
Portfolio	Industry, Science, Energy and Resources
Source of exemption	Subsection 20(2) of the <i>Australian Renewable Energy Agency Act 2011</i>

Overview

1.29 The Australian Renewable Energy Agency (General Funding Strategy) Determination 2021 [F2021L01191] (the instrument) sets out the general funding strategy (GFS) for the Australian Renewable Energy Agency (the ARENA) for the 2021/22 – 2023/24 financial years.

Scrutiny concerns

Exemption from disallowance

1.30 Senate standing order 23(4A) empowers the committee to scrutinise delegated legislation that is exempt from disallowance against the scrutiny principles set out in standing order 23. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.

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

1.31 The committee's scrutiny concerns in relation to this instrument's exemption from disallowance are set out in detail in *Delegated Legislation Monitor 15 of 2021*, which were brought to the attention of the minister by letter on 21 October 2021.

Compliance with authorising legislation

1.32 The committee also raised concerns about the instrument's compliance with its enabling Act, the *Australian Renewable Energy Agency Act 2011* (ARENA Act). The committee's scrutiny concerns in this regard are also set out in detail in *Delegated Legislation Monitor 15 of 2021*. In summary, the committee raised concerns that the instrument is made beyond the powers of the ARENA Act.

Correspondence and committee comment

1.33 The minister responded to the committee's concerns in a letter dated 9 February 2022. The minister disagreed with the committee's position that this instrument is inappropriately exempt from disallowance, stating:

It would be inappropriate for the Parliament to now seek a power of disallowance over the GFS. The Parliament does not routinely claim powers of disallowance over the strategic planning documents of other statutory entities, so it is not clear why this would be appropriate in the case of ARENA. Opening up the GFS to disallowance would infringe upon ARENA's independence, create ongoing uncertainty as to ARENA's strategic direction, and dampen market confidence by creating a risk that ARENA's funding decisions might be subject at any time to unexpected Parliamentary interference. Disallowance could also impede ARENA's ability to implement the Act because of the limitations imposed by section 10.

1.34 While noting this advice, the committee remains concerned that these substantive measures are exempt from parliamentary disallowance.

1.35 The general financial strategy guides the provision of financial assistance by the ARENA. This means that the instrument guides the way Commonwealth money will be spent. As outlined in *Delegated Legislation Monitor 15 of 2021*, the committee is firmly of the view that it is the role of Parliament to scrutinise government expenditure and that therefore this instrument should be subject to disallowance.

1.36 The minister also indicated that a range of other accountability mechanisms apply to the measures in this instrument, including that the ARENA requires the minister's permission for grants over \$50 million, and that the minister may comment on the ARENA's annual work plan before finalisation. While recognising these accountability mechanisms, the committee is primarily concerned with ensuring that Parliament, not the government, has the ability to appropriately scrutinise the expenditure of the ARENA, and does not consider these mechanisms facilitate appropriate parliamentary scrutiny.

1.37 The minister also advised that he had already made clear his view that the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] (and therefore the instrument) are made in compliance with their authorising legislation.

1.38 The committee considers that the role of disallowance in relation to this instrument is of particular importance given the committee's concerns about the expansion of the ARENA's remit by delegated legislation to empower the ARENA to foster low emissions technologies. As noted in *Delegated Legislation Monitor 14 of 2021*, the committee is of that view that this expansion goes beyond the objects of the ARENA Act. The Parliament's supervisory role over delegated legislation is especially important in light of any potential validity concerns.

1.39 Noting the above, the committee considers that it is inappropriate for this instrument to be exempt from disallowance. The committee therefore draws this instrument to the Senate as it sets out significant matters relating to the expenditure of public money by the ARENA without the opportunity for appropriate parliamentary oversight through the disallowance process.



10 March 2022

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,

Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043]

Thank you for your letter of 9 February 2022 to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Australian Renewable Energy Agency (General Funding Strategy) Determination 2021 [F2021L01191] (the General Funding Strategy Determination).

The committee considered your letter at its private meeting on 9 March 2022 and noted that your letter also raised matters relating to the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] (the Regulations). In particular, you advised that:

I do not intend to repeat the arguments I have already made as to why the Regulation is validly made under the Act. One disallowance motion in the House of Representatives and two disallowance motions in the Senate have already been defeated. I would note further that the majority of the Committee's membership have voted against disallowance on the floor of the Senate.

As advised in my letter of 30 September 2021, the committee remains concerned that the Regulations raise significant technical scrutiny concerns regarding the inclusion of significant matters in delegated legislation and the compliance of the Regulations with its authorising legislation. I also advised at that time that the committee would give notice of a motion to disallow the Regulations on 18 October 2021, to be moved 15 sitting days after that day. As such, the committee's disallowance motion is scheduled to be considered in the Senate on 29 March 2022.

As the 14th edition of *Odgers' Australian Senate Practice* notes, disallowance motions moved other than at the initiation of the committee are often motivated by opposition to the policy manifested by the delegated legislation. On the other hand, disallowance motions moved by the committee are on the basis that the committee retains significant technical scrutiny concerns in relation to an instrument and it has therefore recommended that the Senate disallow the instrument.

In this regard, the committee notes that the previous disallowance motions moved by non-committee parliamentarians have been brought before the Parliament on a separate basis to the committee's disallowance motion. The previous voting record of the committee's membership is therefore not relevant to the committee's consideration of the Regulations from a technical scrutiny perspective. Disallowance motions based on a recommendation of the committee have been, without exception, adopted by the Senate.

I will also write separately in relation to the committee's consideration of the General Funding Strategy Determination.

In the interests of transparency, I note that this correspondence 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 at sdlc.sen@aph.gov.au.

Yours sincerely,

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



10 March 2022

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

Via email: minister.littleproud@agriculture.gov.au

CC: DLO-MO@agriculture.gov.au

Dear Minister,

Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]

Thank you for your response to the Senate Standing Committee for the Scrutiny of Delegated Legislation received on 8 February 2022 in relation to the above instrument.

The committee considered your response at its private meeting on 9 March 2022. Whilst noting your advice, the committee remains of the view that the instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding comments in relation to the instrument are set out in Chapter 1 of its *Delegated Legislation Monitor 3 of 2022*, available on the committee's website at www.aph.gov.au/senate_sdlc and **attached** to this letter.

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 ⁵
Purpose	This instrument is 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	Table item 2 of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015

Overview

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

1.41 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

1.42 Senate standing order 23(4A) empowers the committee to scrutinise delegated legislation that is exempt from disallowance against the scrutiny principles set out in standing order 23. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.

1.43 The committee's scrutiny concerns in relation to this instrument's exemption from disallowance were first set out in detail in *Delegated Legislation Monitor 14 of 2021*.

Initial correspondence

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

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

1.45 The minister advised that the exemption ‘provides certainty for NAIF project proponents who invest significant time and resources to demonstrate eligibility for NAIF financial assistance’.

1.46 The minister also advised that oversight of the NAIF’s investment activities were 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.’

1.47 In relation to the exemption from disallowance, the minister advised that it would not have been 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.

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

1.49 The committee set out its response to the minister's advice in *Delegated Legislation Monitor 16 of 2021*. In particular, the committee requested that the minister make an undertaking 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 NAIF Act, with specific regard given to the committee’s final report of the inquiry into the exemption of delegated legislation from parliamentary oversight.⁶ The committee also requested that the minister amend the explanatory statement to the instrument 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.

Recent correspondence

1.50 The minister responded to the committee in a letter received on 8 February 2022. The minister made an undertaking that the 2024 statutory review of the NAIF Act would consider whether it is appropriate for the NAIF's investment mandate to be exempt from disallowance.

1.51 However, the minister did not agree to the committee's request to amend the explanatory statement to the instrument to set out the information provided in the letter of 14 October 2021 in relation to the justification for the instrument’s exemption from disallowance. The minister advised that he considers it is

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

unnecessary to do so, given that the exemption from disallowance is permitted by the enabling legislation and the *Legislation Act 2003*.

Committee view

1.52 The committee welcomes the minister's undertaking that the 2024 statutory review will consider whether it is appropriate for NAIF's investment mandate to be exempt from disallowance.

1.53 While noting the minister's advice in relation to the explanatory statement, the committee reiterates its view that at a minimum, all explanatory statements to exempt instruments should identify the source of the exemption and justify why the exemption is appropriate in the specific context of the instrument. The committee does not consider general statements identifying that an exemption is provided under the Legislation (Exemptions and Other Matters) Regulation 2015 is sufficient. The committee considers that the inclusion of this information in explanatory statements helps to improve parliamentary oversight over delegated legislation made by the executive.

1.54 The committee considers that, in the future, explanatory statements to instruments that are exempt from disallowance must set out in detail the exceptional circumstances that are said to justify the exemption in accordance with the committee's guidelines.⁷ The committee will continue to closely scrutinise such instruments and their accompanying explanatory statements under standing order 23(4) into the future.

1.55 The committee welcomes the minister's undertaking that the 2024 statutory review of the *Northern Australia Infrastructure Facility Act 2016* will consider whether it is appropriate for the NAIF's investment mandate to be exempt from disallowance. In the meantime, the committee draws this instrument to the attention of the Senate as it sets out significant matters relating to the operation of the NAIF, including eligibility criteria for the provision of financial assistance, without the opportunity for appropriate parliamentary oversight through the disallowance process.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, Guideline on standing order 23(4): instruments exempt from disallowance, February 2022, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines.



10 March 2022

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

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

Via email: minister.littleproud@agriculture.gov.au; DLO-MO@agriculture.gov.au
Minister.Hunt.DLO@health.gov.au

Dear Ministers,

Various instruments made under the *Biosecurity Act 2015*: [F2021L01758]; [F2021L01807]; [F2021L01863]; [F2021L01864]; [F2021L01885]; [F2021L01894]; [F2022L00001]; [F2022L00019]

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 instruments raise significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding comments are set out in Chapter 1 of its *Delegated Legislation Monitor 3 of 2022*, 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:

- section 174 of the Biosecurity Act to provide that any future determinations of 'conditionally non-prohibited goods' that must not be brought into Australia unless specified conditions are complied with will be subject to disallowance;
- sections 395 and 398 of the Biosecurity Act to provide that any future biosecurity activity zone determinations and revocations of those determinations will be subject to disallowance;
- section 477 of the Biosecurity Act to provide that any future determinations specifying emergency requirements during human biosecurity emergencies will be subject to disallowance; and
- section 524A of the Biosecurity Act to provide that any future determinations listing goods for the purposes of infringement notices 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.

Yours sincerely,

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

Various instruments made under the *Biosecurity Act 2015*

FRL No.	F2021L01758 ; F2021L01807 ; F2021L01863 ; F2021L01864 ; F2021L01885 ; F2021L01894 ; F2022L00001 ; F2022L00019 ⁸
Purpose	Various purposes
Authorising legislation	<i>Biosecurity Act 2015</i>
Portfolio	Health: F2021L01758; F2021L01863, F2021L01885 and F2022L00019 Agriculture, Water and the Environment: F2021L01807; F2021L01864, F2021L01894 and F2022L00001
Source of exemption	Subsections 174(5), 395(4), 398(2), 477(2) and 524A(4) of the <i>Biosecurity Act 2015</i>

Overview

1.56 Subsection 477(1) of the *Biosecurity Act 2015* (the Biosecurity Act) empowers the minister to determine emergency requirements during a human biosecurity emergency period. The Biosecurity (Emergency Requirements—High Risk Country Travel Pause) Amendment Determination (No. 1) 2021 [F2021L01758], Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863] and the Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2021 [F2021L01885] were made in response to the COVID-19 pandemic and relate to a range of measures, including extending the 'high risk' country travel pause until 15 December 2021 and preventing persons from travelling to and from certain remote communities in the Northern Territory. The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (COVID-19 Rapid Antigen Tests) Determination 2022 [F2022L00019] prohibits price gouging in relation to COVID-19 rapid antigen test kits and, subject to exemptions, prohibits the export of COVID-19 rapid antigen test kits during the human biosecurity emergency period.

1.57 Subsection 174(1) of the Biosecurity Act empowers the Director of Biosecurity and the Director of Human Biosecurity to jointly determine that specified classes of goods must not be brought or imported into Australian territory unless specified conditions (including conditions for administrative purposes) are complied with. The Biosecurity (Conditionally Non-prohibited Goods) Amendment (Khapra Beetle) Determination 2021 [F2021L01807] amends the Biosecurity (Conditionally

⁸ Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

Non-prohibited Goods) Determination 2021 to provide additional alternative conditions for goods posing biosecurity risks associated with khapra beetle.

1.58 Subsection 395(1) of the Biosecurity Act provides that the Director of Biosecurity may determine that a specified area in Australian territory is a biosecurity activity zone. The Biosecurity (Biosecurity Activity Zones) Determination 2021 [F2021L01894] determines that the part of 135 Donnybrook Road Mickleham, Victoria that is used as the post entry quarantine facility is a biosecurity activity zone.

1.59 Section 398 of Biosecurity Act provides that the Director of Biosecurity must revoke a biosecurity activity zone determination if they are satisfied that it is no longer necessary for powers to be exercised in, or in relation to, the zone in accordance with section 399 of the Act. The Biosecurity (Biosecurity Activity Zones) Repeal Determination 2021 [F2022L00001] repeals the Biosecurity (Biosecurity Activity Zones) Determination 2016.

1.60 Subsection 524A(1) of the Biosecurity Act provides that the Director of Biosecurity may make a determination listing goods, or classes of goods, for the purposes of section 524 of the Act relating to infringement notices. The Biosecurity (2022 Infringement Notices) Determination 2021 [F2021L01864] lists the goods, and classes of goods, that the Director of Biosecurity is satisfied have a high level of biosecurity risk associated with them, which will attract different penalty units under the Biosecurity Regulation 2016.

1.61 These instruments are exempt from disallowance by subsections 174(5), 395(4), 398(2), 477(2) and 524A(4) of the Biosecurity Act.

Scrutiny concerns

Exemption from disallowance⁹

1.62 The committee has on numerous occasions set out its significant scrutiny concerns in relation to legislative instruments made under the Biosecurity Act which are exempt from disallowance.¹⁰ The committee's broader concerns about the exemption from disallowance of emergency legislative instruments are set out in

9 Scrutiny principle: Senate standing order 23(3)(4A).

10 See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 14 of 2021*, 29 September 2021, pp. 14–21; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 16 of 2021*, 25 November 2021, pp. 3–10; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2022*, 25 January 2022, pp. 6–9; and Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 2 of 2022*, 9 February 2022, pp. 2–7. Accessible at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight.¹¹

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

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

1.65 The explanatory statements for the Biosecurity (Biosecurity Activity Zones) Determination 2021 [F2021L01894], the Biosecurity (Biosecurity Activity Zones) Repeal Determination 2021 [F2022L00001], the Biosecurity (2022 Infringement Notices) Determination 2021 [F2021L01864] and the Biosecurity (Conditionally Non-prohibited Goods) Amendment (Khapra Beetle) Determination 2021 [F2021L01807] provide that they are appropriately exempt from disallowance because the decision to make these determinations relies on technical, operational and scientifically-based evidence, and in some instances, the judgement of the Director of Biosecurity.

1.66 The committee does not consider that scientific or technical decisions should be exempt from disallowance on that basis alone. Notwithstanding that fact that it is rare for a decision to be *purely* scientific or technical, without any other considerations required, it is unclear to the committee why parliamentarians would be incapable of taking into account scientific and technical evidence when considering the appropriateness of an instrument.

1.67 As the Senate Standing Committee for the Scrutiny of Bills has noted, parliamentarians have access to considerable specialist expertise and parliamentarians regularly deal with legal, scientific and technical complexity while undertaking their law-making functions. In addition, parliamentarians are accountable to their electors in relation to how they exercise their law making functions, including the power to disallow a legislative instrument and any resulting outcomes that flow from that disallowance.¹²

11 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of delegated legislation from parliamentary oversight: Interim Report*, 2 December 2020. Accessible at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, p. 80. In relation to instruments made under section 524A of the Biosecurity Act such as the Biosecurity (2022 Infringement Notices) Determination 2021 [F2021L01864], see also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 10 of 2020*, 26 August 2020, pp. 3–5.

1.68 The committee agrees that disallowance of an instrument that is well-supported by scientific and technical evidence is unlikely. The mere fact that a decision may be based on scientific and technical grounds is not, of itself, a sufficient justification for an exemption from the usual disallowance process.

1.69 The remaining four instruments made under the Biosecurity Act during this period are the Biosecurity (Emergency Requirements—High Risk Country Travel Pause) Amendment Determination (No. 1) 2021 [F2021L01758], the Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863], the Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2021 [F2021L01885] and the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (COVID-19 Rapid Antigen Tests) Determination 2022 [F2022L00019].

1.70 These instruments introduce significant measures which impact the public, including temporarily imposing requirements to travel and preventing entry into Australian territory, restricting the movement of people in and out of certain remote communities in the Northern Territory, effectively 'locking down' identified areas, and imposing restrictions on the sale and export of COVID-19 rapid antigen test kits. The justification provided for the exemption from disallowance of these instruments remains the same—that the risk of disallowance would inhibit the Commonwealth's ability to act urgently on public health advice to manage a human biosecurity risk that could threaten or harm human health, as it would create uncertainty as to whether the instrument might be disallowed.¹³

1.71 As set out in the committee's previous Delegated Legislation Monitors, the committee does not accept the need to act urgently or to avoid potential uncertainty on their own to be an adequate justification for the exemption of delegated legislation from parliamentary oversight. In particular, the committee notes that the disallowance procedure would not inhibit the immediate commencement of the instruments. In this regard, the committee does not consider that making a legislative instrument subject to disallowance would, of itself, prevent the government from taking immediate and decisive action in response to a significant emergency.

1.72 The committee considers the disallowance process to be 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 these instruments, which impose significant requirements

13 In addition, for the Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 2) 2021 [F2021L01863] and the Biosecurity (Emergency Requirements—Remote Communities) Determination (No. 3) 2021 [F2021L01885], the justification for the exemption also indicates that the risk of disallowance is more significant as the 'remote communities are made up of Aboriginal and Torres Strait Islander peoples who are at a high risk of adverse human health outcomes as a result of exposure to a listed human disease'.

on the Australian public, the committee considers that the disallowance process is necessary to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

1.73 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.

1.74 The committee notes that to date, the government has failed to substantively engage with the committee's significant concerns and continues to make instruments under the Biosecurity Act which are exempt from disallowance and fails to provide an adequate explanation for why it is necessary to do so.

1.75 Further, the committee is deeply concerned that the government has advised that it does not support any of the committee's recommendations in relation to providing for the disallowance of instruments made under the Biosecurity Act as set out in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight. Of the 18 recommendations in the interim report, the committee regrets that the government only agreed to one.

1.76 The committee will continue to rigorously pursue this matter in accordance with the mandate provided by the Senate when it agreed to amend standing order 23 to allow the committee to consider exempt instruments and report on instruments made the Biosecurity Act which are exempt from disallowance.

1.77 In light of the above, the committee reiterates its view that amendments should be made to:

- **section 174 of the Biosecurity Act to provide that any future determinations of 'conditionally non-prohibited goods' that must not be brought into Australia unless specified conditions are complied with will be subject to disallowance;**
- **sections 395 and 398 of the Biosecurity Act to provide that any future biosecurity activity zone determinations and revocations of those determinations will be subject to disallowance;**
- **section 477 of the Biosecurity Act to provide that any future determinations specifying emergency requirements during human biosecurity emergencies will be subject to disallowance; and**
- **section 524A of the Biosecurity Act to provide that any future determinations listing goods for the purposes of infringement notices will be subject to disallowance.**

1.78 If the government is not amenable to moving such amendments, the committee intends to move its own amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 which is currently before the Parliament, to

ensure that future legislative instruments made under the Biosecurity Act are subject to disallowance.¹⁴

1.79 Additionally, the committee will continue to draw legislative instruments made under the Biosecurity Act which are exempt from disallowance to the attention of the Senate in future Delegated Legislation Monitors, as necessary.

14 The committee's proposed amendments to the bill were circulated in the Senate on 2 December 2021, see [sheet 1475](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r6776) available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r6776.



10 March 2022

The Hon Barnaby Joyce MP
Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Parliament House
CANBERRA ACT 2600

Via email: dlo.joyce@infrastructure.gov.au
CC: minister.joyce@infrastructure.gov.au

Dear Minister,

**Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021
[F2021L01768]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument.

Automated decision-making

Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes where an instrument provides for automated decision-making.

This instrument amends the Air Navigation (Aircraft Noise) Regulations 2018 to control the noise impacts of Remotely Piloted Aircraft (RPA) by requiring owners and operators of certain RPAs to obtain approval for the RPA to engage in air navigation.

New section 16A provides that the Secretary may approve an application for an aircraft to engage in air navigation. The Secretary must include in the approval the period during which the aircraft may engage in air navigation and any conditions with which the applicant must comply with.

New section 22A provides that the Secretary may arrange for the use, under the Secretary's control, of computer programs for the purposes of making a decision under section 16A. The Secretary may make a decision in substitution for a decision they are satisfied that the decision made by the operation of the computer program is incorrect.

Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. The committee is concerned that a failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error.

In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account. The committee draws your attention to the requirements of the best practice principles identified in the Administrative Review Council report, *Automated Assistance in Administrative Decision Making*, which suggests that discretionary decisions should not be made through automated decision-making.¹

Where an instrument provides for automated decision-making, the committee expects that the explanatory statement justifies why this is necessary and appropriate. The committee also expects an explanation of the extent to which discretion is involved in the making of the relevant decisions and what safeguards are in place, including whether there are any safeguards to ensure appropriate review rights are available.

In this regard, section 16A sets out no factors that have to be considered or conditions for the decision, including in relation to deciding the period during which an aircraft may engage in air navigation, and what conditions must be complied with by the applicant. There is no detail in the explanatory statement about why automated decision-making is necessary or appropriate in this circumstance or the factors that should be considered when making the decision, or any relevant safeguards, except to state that the Secretary may make a decision in substitution for a decision, if they are satisfied that the decision made by the operation of the computer program is incorrect.

Additionally, the explanatory statement notes that owners or operators may seek to have a decision by the Secretary reviewed by the Administrative Appeals Tribunal. However, the committee does not consider this an adequate safeguard to redress the risk of error created by enabling computer programs to make discretionary decisions, nor does it rationalise the appropriateness of this form of decision-making. Further, it is unclear if there are any review avenues available to those other than the owner or operator of the RPA, for example a member of the public who may have concerns about the Secretary's approval based on a noise or privacy issue.

The committee therefore requests your advice as to:

- **why it is considered necessary and appropriate for section 22A of the instrument to provide for automated decision-making in relation to decisions made under section 16A;**
- **the extent to which discretion is involved in relation to decisions made under section 16A;**
- **what safeguards are in place to ensure that the decision-maker exercises their discretionary powers personally and without fetter;**
- **whether any review rights or complaints mechanisms exist for those who are not the owner or operator of a relevant RPA, and if so, details of this; and**
- **whether the automated assistance in the decision-making process complies with the best practice principles set out in the Administrative Review Council's report on *Automated Assistance in Administrative Decision Making*, and, if not, why not.**

1 Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No. 46, November 2004, see in particular Part 3.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee will give 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 **24 March 2022**.

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 assistance with this matter.

Yours sincerely,

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



10 March 2022

Senator the Hon Marise Payne
Minister for Foreign Affairs
Parliament House
CANBERRA ACT 2600

Via email: foreign.minister@dfat.gov.au

CC: legislation@dfat.gov.au

Dear Minister,

Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021 [F2021L01855]

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

At the outset, the committee wishes to acknowledge the importance of an effective autonomous sanctions regime. It is not the role of the committee to express any view in relation to the policy merits of an instrument. Instead, the committee is bound to carefully consider all instruments that come before it against its technical scrutiny principles. Following this consideration, the committee has identified technical scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Matters more appropriate for parliamentary enactment

Personal rights and liberties

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. Further, Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness.

The instrument introduces cyber incident, human rights and corruption thematic criteria by which the minister can list persons or entities for the purposes of the autonomous sanctions regime.

The instrument provides for broad ministerial discretion over the listing of persons or entities. The outcome of being designated for targeted financial sanctions or declared a person for a travel ban can have a significant impact on the personal rights and liberties of an individual and their family members.

In this regard, the explanatory statement does not indicate why it is considered necessary and appropriate to set out the criteria for the thematic designation of persons or entities or the declaration of persons in delegated legislation, rather than primary legislation. The committee

notes that the power for the minister to list individuals and entities was first introduced in the Autonomous Sanctions Regulations 2011 (the principal regulations) but nevertheless regards the introduction of new thematic criteria upon which the minister may list individuals and entities to be significant. Designating a person can mean they are subject to restrictions on trade, restrictions on engaging in commercial activities and the freezing of assets. Declaring a person prevents a person from travelling to, entering or remaining in Australia which significantly impacts on an individual's freedom of movement.

More broadly, the autonomous sanctions regime engages privacy concerns in relation to the kinds of information required or kept regarding the listing of individuals, any application by an individual to have a designation or declaration revoked, or application by an individual for a permit to make assets available to them. From a technical scrutiny perspective, the committee is concerned that, by expanding the autonomous sanctions regime through the introduction of new thematic criteria, this instrument is likely to have a significant impact on the personal rights and liberties of listed individuals. In light of this, the committee considers that setting out the criteria for the thematic designation of persons or entities or the declaration of persons for the purposes of the autonomous sanctions regime may be a matter more appropriate for parliamentary enactment.

The committee therefore requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for new thematic sanctions and the criteria upon which the minister can list an individual or entity.

Scope of administrative powers

Procedural fairness

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers on a person. Further, Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness.

In this regard, the committee notes that regulation 6A of the instrument confers a broad discretionary power on the minister to list an individual or entity. The minister may list someone if satisfied of broadly defined criteria. Regulation 26 of the principal regulations also provides that the minister may delegate their powers and functions to the secretary of the department or an SES employee or acting SES employee in the department.

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

While the committee acknowledges that the instrument sets out some factors that the minister or their delegate may have regard to in exercising their discretion to list a person or entity, the explanatory statement does not explain the scope of the discretionary power and whether any limitations and safeguards exist beyond those set out in the instrument. From a technical scrutiny perspective, the committee considers this is particularly important given, as noted above, the significant consequences listing an individual has on personal rights and liberties and the factors to be considered by the minister are non-exhaustive.

In relation to procedural fairness, the common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who is adversely affected by a decision to be given an adequate opportunity to put their case before the decision is made. In a national security context where urgent decisions may need to be made without notice to the affected party, the committee considers this may impact how procedural fairness is provided but that it should not exclude procedural fairness entirely.

Noting this, from a technical scrutiny perspective, the committee considers that the instrument does not appear to adequately provide for procedural fairness. For example, the statement of compatibility explains that persons are not consulted in advance of a first listing. However, it is not clear why it is not possible for an urgent listing to be made, and then subsequent notification and an opportunity to be heard provided.

Where an instrument limits or does not provide for procedural fairness, the committee expects the explanatory statement to provide a comprehensive justification for the relevant limitation or exclusion. In this regard, the explanatory statement does not justify why procedural fairness is excluded. The lack of procedural fairness provided to listed persons heightens the committee's scrutiny concerns regarding the broad ministerial discretion to list individuals.

The committee's technical scrutiny concerns are further heightened noting that there is no opportunity for any post-listing independent review. While listed persons may apply to the minister to have a listing revoked this is not equivalent to independent review.

The committee notes that the explanatory statement clarifies that judicial review is available, however judicial review is limited in that it allows a court to only consider the lawfulness of a decision and not undertake a review of the merits of a decision. From a scrutiny perspective, the committee does not consider that the provision of judicial review alone is a sufficient safeguard in circumstances where procedural fairness is limited or excluded.

In light of the above, the committee requests your advice as to:

- **whether any safeguards or limitations beyond those set out in the instrument apply to the exercise of the power to list a person or entity in regulation 6A, and whether these safeguards are contained in law or policy; and**
- **why procedural fairness is not provided in relation to listing decisions**

Clarity of drafting

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

The instrument introduces new thematic listing criteria including in relation to 'significant cyber incidents'. The committee notes that 'cyber incident' is not defined in the instrument. Further, while the criteria in subregulation 6A(3) go to whether a 'cyber incident' is significant or not, paragraph 6A(3)(d) provides that the minister may have regard to 'any other matters the Minister considers relevant', which introduces a lack of clarity in what amounts to a significant cyber incident.

The instrument also introduces the new thematic listing criteria in relation to 'serious corruption'. While the instrument provides a definition of 'corruption', it is not clear what amounts to 'serious corruption'.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by

them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding.

The committee therefore requests your advice as to the meaning of the terms 'significant cyber incident' and 'serious corruption'.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee will give 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 **24 March 2022**.

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 assistance with this matter.

Yours sincerely,

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



10 March 2022

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

The Hon Greg Hunt MP, Minister for Health and Aged Care,
Minister.Hunt.DLO@health.gov.au

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 [F2021L01823]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Parliamentary oversight

Matters more appropriate for parliamentary enactment

Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes where an instrument or its explanatory statement does not disclose the amount of Commonwealth funding for programs authorised under the *Financial Framework (Supplementary Powers) Act 1997*. Additionally, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation.

This instrument provides legislative authority for government spending on the development and maintenance of Australia's onshore capability to manufacture mRNA (Messenger Ribonucleic Acid) products. However, neither the instrument nor the explanatory statement contain any indication of the amount of funding authorised for spending under the instrument, or a maximum cap on the spending authorised.

The committee considers that the scrutiny of instruments made under the *Financial Framework (Supplementary Powers) Act 1997* is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure and has long been concerned about any uncertainty surrounding the funding authorised as this inhibits Parliament's capacity to effectively scrutinise such instruments.

In this instance, the explanatory statement to the instrument states that:

The capability will be initially founded through a partnership with one or more suppliers. The partnership is expected to be underpinned by agreements commencing in 2021-22 that would establish a population-scale mRNA manufacturing capability and guarantee the supply of locally manufactured mRNA vaccines, including COVID-19 vaccines, as well as provide future pandemic readiness. The cost of the agreements will depend on the outcome of ongoing commercial negotiations, the timeframe for completing an mRNA manufacturing facility in Australia by one or more suppliers, the number of mRNA products to be manufactured, and domestic requirements for COVID-19 vaccines and any other mRNA products.

At this stage, the Commonwealth's final funding commitment is subject to ongoing commercial-in-confidence negotiations with one or more suppliers and potential state government funding partners. The Regulations will enable the Commonwealth to enter into agreements with one or more suppliers (including any other suppliers of locally manufactured mRNA products) within the total funding commitment, subject to future decisions by the Government.

While acknowledging this explanation, the committee does not consider that mere statements that information is commercial-in-confidence or the fact that the scope of a program is uncertain are acceptable justifications for limiting parliamentary oversight. The committee therefore remains concerned that neither the instrument nor its explanatory statement specify the amount of funding that is being authorised for spending on this nationally significant program. Moreover, not even a high-level indication of the funding authorised or a cap is specified.

It is also concerning to the committee that spending on such a significant national program is being authorised by delegated legislation rather than primary legislation, particularly noting that the purpose of the program is very broadly drafted.

The committee therefore requests your advice as to:

- **whether it is intended at any point in the future to inform the Parliament as to the amount of funding that is expected to be expended on the program to develop and maintain Australia's onshore capability to manufacture mRNA products; and**
- **why it is considered necessary and appropriate to provide authority for spending on the program by delegated legislation, instead of primary legislation, noting the significance and broadly drafted scope of this program.**

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee will give 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 **24 March 2022**.

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 assistance with this matter.

Yours sincerely,

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



10 March 2022

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

The Hon Alex Hawke MP, Minister for Immigration, Citizenship,
Migrant Services and Multicultural Affairs,
dlo.immi@homeaffairs.gov.au

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021 [F2021L01824]

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 has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Clarity of drafting

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

The instrument establishes legislative authority for government spending on certain activities administered by the Department of Home Affairs, including the Community Refugee Integration and Settlement Pilot, the Economic Pathways to Refugee Integration program, the Assisted Passage Program and the National Cybercrime Capability Fund.

The instrument inserts item 514 into the table in Part 4 of Schedule 1AB to include the Economic Pathways to Refugee Integration program. This table item provides authority for funding to support refugees to, among other things, directly access employment with a 'large employer'. However, neither the instrument nor the explanatory statement clarifies what constitutes a 'large employer'.

The committee is typically concerned with instruments which are not drafted clearly to the extent that this affects the meaning or interpretation of the instrument. Instruments and their explanatory statements should be clear and intelligible to all persons interested in or affected by them, not only those with particular knowledge or expertise. Key terms should be clearly defined to remove any potential confusion or misunderstanding.

In light of the above, the committee requests your advice as to whether the instrument can be amended to clarify the intended meaning of 'large employer'.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee will give 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 **24 March 2022**.

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 assistance with this matter.

Yours sincerely,

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



10 March 2022

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

The Hon Ken Wyatt AM MP, Minister for Indigenous Australians,
DLOwyatt@pmc.gov.au

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021 [F2021L01825]

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 has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

This instrument amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on certain activities to be administered by the National Recovery and Resilience Agency and the National Indigenous Australians Agency (the NIAA). The matters raised in this letter relate to the Territories Stolen Generations Redress Scheme (the Scheme) to be administered by the NIAA.

Matters more appropriate for parliamentary enactment

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation.

The instrument provides for the establishment and maintenance of a financial and wellbeing redress scheme for Stolen Generations survivors who were removed as children in the Northern Territory or the Australian Capital Territory prior to their respective self-government, or the Jervis Bay Territory. The Scheme was announced by the Prime Minister and the Minister for Indigenous Australians on 5 August 2021 as a significant element of the Commonwealth's first Closing the Gap Implementation Plan. As such, the Scheme can be considered of national significance. The explanatory statement states that it is expected around 3,600 survivors will be eligible for the Scheme. It provides for financial payments of up to \$75,000 per person for survivors, as well as non-monetary redress such as the opportunity for survivors to tell their stories to government officials and have their stories and the harm caused acknowledged. The government has committed \$378.6 million over five years to 2025-26 for the Scheme.

In this regard, although the committee considers this Scheme to be a matter of national significance, the explanatory statement does not indicate why it is considered necessary and appropriate to provide legislative authority for the Scheme through delegated legislation, rather than primary legislation.

The committee raised similar concerns about the inclusion of significant matters in delegated legislation in correspondence dated 6 December 2021 and 10 February 2022 in relation to the COVID-19 Vaccine Claims Scheme provided for in Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021 [F2021L01430]. The committee is generally concerned about the provision of significant compensation and redress schemes in regulations made under the *Financial Framework (Supplementary Powers) Act 1997*, where such matters are clearly more appropriate for parliamentary consideration and enactment.

The committee therefore requests your advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for the Territories Stolen Generations Redress Scheme.

Parliamentary oversight

Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation, including whether it is subject to sufficient parliamentary oversight.

The committee has further scrutiny concerns in relation to parliamentary oversight of the Scheme. In this regard the committee notes that the instrument does not specify key elements of the Scheme, including the eligibility criteria, evidentiary requirements, or the maximum payment that may be provided to survivors. The explanatory statement does not indicate why such significant aspects of the Scheme have not at least been included in delegated legislation to provide some level of parliamentary oversight.

The committee therefore requests your advice as to why crucial aspects of the Territories Stolen Generations Redress Scheme, including the eligibility criteria, evidentiary requirements and the maximum payment that may be provided to survivors, have not at least been provided for in delegated legislation subject to disallowance by the Parliament.

Delegation of administrative powers and functions

Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers.

Where administrative powers or functions are delegated, the committee expects that the explanatory statement will address the purpose and scope of the delegation, including why it is considered necessary to delegate these powers or functions. The explanatory statement should also identify who will be exercising the powers or functions and whether they possess the appropriate qualifications and skills, and the nature and source of any limitations and safeguards and whether they are contained in law or policy.

In this regard, the explanatory statement explains that 'The Chief Executive Officer, who is the accountable authority of the NIAA, or a delegate will be responsible for making decisions on who will receive payments under the Scheme.' In relation to the selection and funding of services for the Scheme, the explanatory statement explains that 'Final spending decisions will be made by the accountable authority or an appropriate delegate.' Further, 'Decisions associated with the approval to enter into grant arrangements and legally commit funding will be made by the appropriate decision maker based on the NIAA's financial delegations and assessment of risk.'

While noting this information, the explanatory statement does not address who these delegated powers and functions will be exercised by, and whether these delegates will be required to possess the appropriate skills, qualifications and experience, and whether any safeguards apply to the exercise of these power or functions.

In light of the above, the committee requests your advice as to:

- **who will exercise the power to make decisions in relation to who will receive payments under the Territories Stolen Generations Redress Scheme, including whether those persons will be required to have the appropriate skills, qualifications and experience to exercise the powers or functions;**
- **who will exercise the power to make decisions in relation to the selection and funding of services for the Scheme, including whether those persons will be required to have the appropriate skills, qualifications and experience to exercise the powers or functions; and**
- **whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.**

Privacy

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

The committee notes that, in addition to redress payments, the Scheme provides for the facilitation of truth-telling and the recounting of survivors' experiences and impact of removal to senior government officials. The Scheme will therefore involve the collection of sensitive personal information.

The committee's view is that provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the committee expects that the explanatory statement should explain the nature and scope of the provisions. The explanatory statement should also address the nature and extent of the information that may be disclosed and the persons or entities to whom disclosure is permitted.

The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, and what safeguards are in place to protect this personal information, and whether these safeguards are in law or policy. Explanatory statements should also indicate whether the safeguards in the *Privacy Act 1988* apply.

In this regard, there is no information in the instrument or the explanatory statement on how this sensitive personal information will be documented and stored. The committee's scrutiny concerns in this regard are heightened due to the sensitivity of the information likely to be collected under the Scheme and the lack of information regarding how the information will be collected and used, who has access to the information and how long the information will be stored for. Further, the statement of compatibility with human rights does not comment on the right to privacy and whether it is permissibly limited by the Scheme.

In light of the above, the committee requests your advice as to:

- **the nature, scope and extent of personal information that may be collected under the Scheme;**
- **who, or which entities, this information can be disclosed to;**

- **whether any statutory safeguards apply to protect this personal information, including whether the *Privacy Act 1988* applies; and**
- **whether the right to privacy is permissibly limited by the instrument and whether this information should be reflected in the instrument's Statement of Compatibility with Human Rights.**

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests.

The committee notes the Scheme does not provide for independent merits review of an application for redress. While the explanatory statement states that an independent assessor will make a recommendation to the accountable authority on eligibility, and the Scheme may include a formal internal merits review process, the committee does not consider that these review mechanisms are a sufficient alternative to independent merits review.

The explanatory statement provides the following justification as to why independent merits review is not available:

decisions on whether an applicant is to receive a payment under the Scheme are not considered suitable for independent merits review, as this could result in delays to delivery of the Scheme. As many of Stolen Generations survivors are now elderly and suffering life-threatening illnesses, a delay in the provision of payments involves a significant public interest element.

In this regard, the committee notes that the explanatory statement justifies the exclusion of merits review on the basis that financial decisions with a significant public interest element fit within an exception to merits review, as outlined in paragraphs [4.34]-[4.38] of the Administrative Review Council's guide, *What decisions should be subject to merit review?*. However, the committee is of the view that as the issue of redress for the Stolen Generations has been known for many years, the age of the applicants and the timing of establishing the Scheme should not justify the lack of independent merits review for decisions made under the Scheme. The committee also notes that independent review does not necessarily mean there will be extensive delays to the administration of the Scheme.

Accordingly, the committee requests your advice as to whether independent merits review, whether by the Administrative Appeals Tribunal or another person or body, can be provided for in relation to redress decisions made under the Territories Stolen Generations Redress Scheme.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee will give 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 **24 March 2022**.

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 assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



10 March 2022

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,

**Greenhouse and Energy Minimum Standards (Registration Fees) Instrument (No. 1) 2021
[F2022L00020]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses legislative instruments against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument.

Levying of taxation in delegated legislation

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. In addition, 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.

This instrument specifies the fees for each regulated product class that must be paid when a person applies to register a model of a regulated product covered by a Greenhouse and Energy Minimum Standards Determination. Subsection 8(2) of the *Greenhouse and Energy Minimum Standards (Registration Fees) Act 2012* provides that such registration fees are imposed as taxes.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, it does not appear there is a cap on the face of the Act as to the amount of tax that may be imposed, which compounds the committee's scrutiny concerns in relation to this tax due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 3 of 2022*. However, the committee is not seeking any further information or advice from you in relation to this particular 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



10 March 2022

The Hon Karen Andrews MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Via email: dlo@homeaffairs.gov.au

Dear Minister,

Telecommunications (Interception and Access) Amendment (2021 Measures No. 1) Regulations 2021 [F2021L01622]

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 has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

Compliance with authorising legislation

Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act. Where the enabling legislation prescribes any conditions which must be satisfied in making the instrument, the explanatory statement should explain how those conditions are met.

The instrument amends the Telecommunications (Interception and Access) Regulations 2017 to specify the matters a court is to have regard to in determining whether an act or thing done by a person for the purposes of identifying and blocking malicious SMS messages was reasonably necessary in order for the person to perform their duties effectively.

The instrument is made under the regulation-making power in section 300 of the *Telecommunications (Interception and Access) Act 1979* (the Act). Subsection 7(1) of the Act prohibits the interception of communications passing over a telecommunications system. Subsection 7(2) sets out exceptions to this prohibition, including where the act is done by an employee of a carrier in the course of his or her duties for or in connection with the installation of any equipment used or intended for use in connection with a telecommunications service, or the operation or maintenance of a telecommunications system.

The committee understands from informal correspondence that your department's position is that the screening of malicious SMS messages forms part of the ongoing maintenance of telecommunications systems and is therefore falls within the exceptions set out in paragraph 7(2)(a) of the Act.

However, it is not clear to the committee how identifying and blocking malicious SMS messages falls within the exceptions in paragraph 7(2)(a) of the Act. These exceptions, when read in context, appear to generally relate to the maintenance of telecommunications infrastructure. In this regard it is unclear how blocking malicious SMS messages relates to the operation or maintenance of the telecommunications system itself, as the measures in the instrument appear to be aimed rather at the content of messages transmitted through the system. This raises the possibility that the measures in the instrument may not be authorised by the enabling legislation.

The committee notes that similar issues arise in relation to whether the measures in the instrument fall within the exceptions in paragraph 108(2)(d) of the Act regarding access to stored communications.

In light of the above, the committee requests your advice as to how the specific measures in the instrument are authorised and within the scope of the *Telecommunications (Interception and Access) Act 1979*.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee will give 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 **24 March 2022**.

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 assistance with this matter.

Yours sincerely,

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



10 March 2022

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

CC: parliamentary.committees@health.gov.au

Dear Ministers,

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

Thank you for your response of 3 March 2022 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 9 March 2022.

The committee appreciates the further information and context you have provided about why the definition of 'emergency' will not be included in the instrument at this time, noting the explanatory statement has already been updated to include further detail.

The committee also noted your advice that a new Aged Care Act is expected to take effect from 1 July 2023, subject to parliamentary processes. In this process, you have advised that the department will consider the restrictive practices framework, including ensuring that restrictive practices will only be used as a last resort. The committee expects that the concerns it has raised regarding this instrument will be considered as part of the process.

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

The committee will closely scrutinise any future instruments made in relation to this matter under its scrutiny principles in Senate standing order 23.

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



10 March 2022

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,

**Australian Citizenship (special residence requirement) Instrument (LIN 21/069) 2021
[F2021L01422]**

Thank you for your response of 8 February 2022 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 9 March 2022.

Thank you for your advice that the S&P/ASX 200 share market index is not incorporated by reference in the instrument; in particular, the committee notes your advice that the instrument is not purporting to give the index the status of law, but rather serves as a criterion relevant to the operation for the instrument.

On the basis of this 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



10 March 2022

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 9 February 2022 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 9 March 2022.

On the basis of your undertaking to amend the Great Barrier Reef Marine Park Regulations 2019 to provide that no-anchor areas may only be declared in a disallowable legislative instrument, the committee has concluded its examination of the instrument.

In light of this, the committee has also 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 constructive engagement with the committee in relation to this matter.

Yours sincerely,

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



10 March 2022

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 (Humanitarian Response to Events in Afghanistan) Regulations 2021
[F2021L01546]**

Thank you for your response of 8 February 2022 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 9 March 2022.

On the basis of your advice, the committee has concluded its examination of the instrument. The committee will scrutinise any future instruments made in relation to this matter under its scrutiny principles in Senate standing order 23.

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



10 March 2022

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

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

CC: regords@health.gov.au

Dear Minister,

Therapeutic Goods (Standard for Human Cell and Tissue Products—Donor Screening Requirements) (TGO 108) Order 2021 [F2021L01326]

Thank you for your response of 13 February 2022 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 9 March 2022.

The committee welcomes your undertaking to redraft the terms and phrases that appear in items 7, 12 and 15 of the table in Schedule 1 to the instrument as detailed in your letter.

The committee understands that an amending instrument, the Therapeutic Goods (Standard for Human Cell and Tissue Products—Donor Screening Requirements) (TGO 108) Amendment Order 2022 [F2022L00284], was registered on 8 March 2022 and this implements your undertaking.

On this basis the committee has concluded its examination of the instrument and has resolved to list your undertaking as implemented in *Delegated Legislation Monitor 3 of 2022*. The committee has also resolved to withdraw its notice of motion to disallow the instrument.

The committee would also like to thank you and your agency's staff for their engagement and responsiveness on this matter.

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.

Yours sincerely,

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



21 March 2022

Senator the Hon Eric Abetz
Chair
Senate Foreign Affairs Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

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

Dear Chair,

Matters of interest to the Senate—Autonomous Sanctions Regulations

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 policy matters relating to introduction of new thematic listing criteria for the purposes of Australia's autonomous sanctions regime, 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
Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021 [F2021L01855]	To introduce new thematic listing criteria to enable the Minister for Foreign Affairs to list persons and entities for the purposes of applying targeted financial sanctions and travel bans.	9 June 2022

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



11 March 2022

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—Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021 [F2021L01254]

I write on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) 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 policy matters relating to offsets projects for the purposes of the Emissions Reduction Fund, 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—Electricity Generation from Landfill Gas) Methodology Determination 2021 [F2021L01254]	<p>To set out the methodology to earn carbon credits for emissions reductions achieved from the capture and combustion of landfill gas generated from decomposing waste.</p> <p>The Determination credits emissions reductions achieved through the destruction of methane from decomposing waste at a landfill site where the landfill operator intends to generate electricity. Organic waste produces methane when decomposing under anaerobic conditions, such as in landfill. Methane is a greenhouse gas 28 times more potent than carbon dioxide over a 100-year period.</p>	29 March 2022

Instrument	Purpose	Last day to lodge disallowance notice
	Capturing and combusting waste methane converts the methane into carbon dioxide, reducing net emissions from landfills. The Determination covers landfill projects that intend to generate electricity from combusting landfill gas, either exclusively or in conjunction with flaring.	

Should your committee decide to further examine the above instrument, I note that the table above identifies the last day (based on the current sitting pattern) for lodging a disallowance notice in the Senate.

The committee has also received correspondence from the Australia Institute regarding the above instrument. The committee has resolved to publish this letter and a copy is **attached** for the information of your committee.

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

3 March 2022

Committee Secretary
Senate Scrutiny of Delegated Legislation Committee
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Parliament House
Canberra ACT 2600

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ABN 90 061 969 284
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Dear Senator Fierravanti-Wells

The Australia Institute writes to you in your capacity as Chair of the Senate Committee for the Scrutiny of Delegated Legislation concerning a recent determination.

On 8 September 2021, the Minister for Energy and Emissions Reduction made the *Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021* (ERF landfill gas generation method) under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act). The Australia Institute is concerned that the ERF landfill gas generation method was made to subvert a statutory prohibition contained in the CFI Act.

Emissions Reduction Fund (ERF) methods are delegated legislation that set out the rules for the development and issuance of Australian carbon credit units (ACCUs). ACCUs are a financial product intended to reflect 1 tonne of greenhouse gas abatement. ACCUs are purchased in biannual auctions held by the Clean Energy Regulator on behalf of the Australian Government and sold to private entities in the voluntary market.

To date, the abatement of methane (CH₄) emissions from solid waste landfills has been one of the most significant offset activities under the ERF. Landfill gas projects abate emissions by capturing landfill gas emitted from landfill sites and combusting the CH₄ using either a flare or an electricity generator. Reflecting this, there are two types of landfill gas projects: flaring-only projects, which capture landfill gas and combust it using a flare only (they do not generate electricity); and generation projects, which capture and combust landfill gas for electricity generation. Both are eligible to receive ACCUs under the ERF's landfill gas methods.

In 2018, the Emissions Reduction Assurance Committee (ERAC) – the body responsible for ensuring the integrity of ERF methods –undertook a review to determine whether the crediting period for both flaring-only and generation projects should be extended (a 'crediting period extension review'). The review

concluded that the crediting period for flaring-only projects should be extended because, in the absence of ACCUs, there would be insufficient incentive for these projects to continue to capture and combust the gas. In contrast, the ERAC concluded that the crediting period should not be extended for generation projects because:

Extending the crediting period for electricity generation projects is likely to result in the issuance of ACCUs for emissions reductions that would occur in the ordinary course of events. For existing electricity generation projects, in most cases, the revenues from the sale of electricity and LGCs are likely to cover the ongoing capital, operational and maintenance costs of the projects, including engine refurbishment costs. Due to this, it is likely that, in most instances, existing electricity generation projects will continue in the absence of the incentive provided by the Emissions Reduction Fund (ERF). Similarly, the available evidence indicates the extension of the crediting period is unlikely to promote new electricity generation projects that would not have otherwise occurred.

On this basis, the ERAC recommended that:

... the crediting period for electricity generation projects should not be extended. Extending the crediting period for electricity generation projects carries too great a risk of crediting abatement that is likely to occur in the ordinary course of events.

Acting on these recommendations, the original ERF method (formally the *Carbon Credits (Carbon Farming Initiative—Landfill Gas) Methodology Determination 2015*) was amended to provide flaring-only projects with a 5 year extension to their original 7-year crediting period (i.e. a total of 12 years). The crediting period for generation projects was left at 7 years, consistent with the ERAC's recommendation.

The ERAC's recommendation that generation projects not receive an crediting period extension should have ensured that generation projects that were registered under the original ERF method received one 7-year crediting period only. This is a product of section 114(7A) of the CFI Act, which provides that:

The Minister must not vary a methodology determination so as to extend the crediting periods for the eligible offsets projects covered by the determination unless:

- a) *the Emissions Reduction Assurance Committee has advised the Minister under subsection 123A(2) or paragraph 255(hc) that the variation should be made; and*
- b) *the Emissions Reduction Assurance Committee **has not previously advised the Minister under subsection 123A(2) or paragraph 255(hc) that the variation should not be made; and***

c) *the determination has not previously been varied so as to extend the crediting periods.* [Emphasis added]

The effect of section 114(7A) is to make the ERAC's determination final. Once the ERAC has recommended that the crediting period of a method should not be extended, the Minister *cannot* vary the method to extend the crediting period, even if the ERAC subsequently changes its mind.

However, a decision appears to have been made to provide generation projects with a crediting period extension, contrary to the ERAC's 2018 recommendation and section 114(7A) of the CFI Act. Because the original method could not be amended to include this extension, an entirely new method was made (the ERF landfill gas generation method). The ERF landfill gas generation method is almost the same as the original ERF landfill gas method. The only material difference between the two methods is that the ERF landfill gas generation method grants generation projects 12-year credit periods, while generation projects only receive 7-year crediting periods under the original ERF landfill gas method.

If the ERF landfill gas generation method is allowed to stand, the generation projects currently registered under the original ERF landfill gas method will be able to transition across to the new ERF landfill gas generation method, thereby allowing them to receive the 5-year extension to their crediting period that the ERAC advised should not be granted.

The Senate should not allow delegated legislation to be made in circumstances where the sole aim of the instrument is to subvert a prohibition contained in the enabling legislation.

The Australia Institute asks the Committee to consider *Carbon Credits (Carbon Farming Initiative—Electricity Generation from Landfill Gas) Methodology Determination 2021* in this light.

Yours sincerely

Richie Merzian
Climate & Energy Program Director
The Australia Institute



21 March 2022

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

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

Dear Chair,

Matters of interest to the Senate—Electronic Transactions Amendment Regulations 2021

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 policy matters relating to the use of electronic communications by business and individuals in their dealings with government, 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
Electronic Transactions Amendment Regulations 2021 [F2022L00021]	To remove 33 exemptions to the operation of the <i>Electronic Transactions Act 1999</i> . Removing the exemptions from the operation of the Act for particular provisions of Commonwealth law enables, but does not compel or mandate, the use of electronic communications by business and individuals in their dealings with government.	9 June 2022

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



21 March 2022

Senator Wendy Askew
Chair
Senate Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: community.affairs.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
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 8) Regulations 2021 [F2021L01834]	Grant to the Australian Olympic Committee Inc.	\$2.1 million in 2021-22	Funding will be provided for the costs associated with the completion of mandatory quarantine by the Australian Olympic Team (including athletes and officials) on their return to Australia following their participation in the Tokyo 2020 Olympic Games.
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations	mRNA vaccines and treatments	Not specified	Funding will be provided to support the development and maintenance of Australia’s onshore capability to manufacture mRNA (Messenger Ribonucleic

Instrument	Grant/Program	Amount	Description
2021 [F2021L01823]			Acid) products. The capability will be initially founded through a partnership with one or more suppliers. The partnership is expected to be underpinned by agreements commencing in 2021-22 that would establish a population-scale mRNA manufacturing capability and guarantee the supply of locally manufactured mRNA vaccines, including COVID-19 vaccines, as well as provide future pandemic readiness.
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 5) Regulations 2021 [F2021L01826]	Market Information for Care and Support Providers	\$2.4 million over two years from 2021-22	Funding will be provided for the establishment and maintenance of a website to make market demand and supply information available to the care and support sector, including providers of one or more of the following services: <ul style="list-style-type: none"> • disability care and support services; • care and support services for veterans; and • aged care and support services.

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 expires on 9 June 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



21 March 2022

Senator Katy Gallagher
Chair
Senate Select Committee on COVID-19
Parliament House
CANBERRA ACT 2600

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

Dear Chair,

Legislative instruments specifying Commonwealth expenditure—mRNA vaccines and treatments

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 mRNA vaccines and treatments 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
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 [F2021L01823]	mRNA vaccines and treatments	Not specified	Funding will be provided to support the development and maintenance of Australia's onshore capability to manufacture mRNA (Messenger Ribonucleic Acid) products. The capability will be initially founded through a partnership with one or more suppliers. The partnership is expected to be underpinned by agreements commencing in 2021-22 that would establish a population-scale mRNA

Instrument	Grant/Program	Amount	Description
			manufacturing capability and guarantee the supply of locally manufactured mRNA vaccines, including COVID-19 vaccines, as well as provide future pandemic readiness.

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 9 June 2022. The committee has also drawn this instrument to the attention of the Senate Community Affairs Legislation Committee.

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



21 March 2022

Senator the Hon Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: legcon.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 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 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
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021 [F2021L01824]	Community Refugee Integration and Settlement Pilot	\$8.6 million over four years from 2021-22	To fund providers to implement a pilot which tests whether Australia can achieve strong integration outcomes through a community-supported settlement model that provides a dedicated settlement pathway to refugees and humanitarian entrants to Australia.
	Economic Pathways to Refugee Integration	\$24.6 million over three years from 2021-22	Funding will be provided to support organisations to implement initiatives that lift the rate of refugee and humanitarian entrants' economic

Instrument	Grant/Program	Amount	Description
			<p>participation, including initiatives which help refugees and humanitarian entrants to:</p> <ul style="list-style-type: none"> • concurrently build English language abilities and vocational skills in areas of workforce shortage; or • start their own businesses; or • relocate to areas of workforce shortage in regional Australia; or • directly access a role with a large employer.
	Assisted Passage Program	\$132.7 million over four years from 2021-22	Funding will be provided for health screening, assisted passage and related pre-departure costs of people approved for entry to Australia under the refugee component of the offshore Humanitarian Program.
	National Cybercrime Capability Fund	\$30.9 million over three years from 2021-22 (initial funding)	<p>Funding will be provided to Commonwealth, State and Territory agencies to improve Australia's cybercrime law enforcement capabilities, including for:</p> <ul style="list-style-type: none"> • training to enhance cybercrime investigative skills; and • measures to support the sharing of cybercrime intelligence between the Commonwealth and the States and Territories; and • improved support for victims of cybercrime.

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 9 June 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



22 March 2022

Senator Claire Chandler
Chair
Senate Finance and Public Administration
Parliament House
CANBERRA ACT 2600

via email: fpa.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 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 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
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021 [F2021L01825]	Preparing Australian Communities Program—Projects of Local Significance	\$150 million over four years from 2021-22	Funding will be provided for grants to support eligible entities to deliver eligible projects of local significance to help reduce the risks and impacts of natural disasters under the Preparing Australian Communities Program.
	Territories Stolen Generations Redress Scheme	\$378.6 million over five years from 2021-22	Funding will be provided for the establishment and maintenance of the Territories Stolen Generations Redress Scheme to provide benefits and promote healing in relation to removals that took place in the Northern Territory prior to self-government, the

Instrument	Grant/Program	Amount	Description
			<p>Australian Capital Territory prior to self-government or the Jervis Bay Territory, including by:</p> <ul style="list-style-type: none"> • making payments to recognise the harm caused by removals and facilitate healing; • providing direct personal responses; • providing legal, financial, counselling and other advisory and support services in relation to the scheme; and • engaging independent persons to assess applications or perform other roles under the scheme.

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 9 June 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



22 March 2022

Senator the Hon Eric Abetz
Chair
Senate Foreign Affairs Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

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

Dear Chair,

Legislative instruments specifying Commonwealth expenditure—Schools Pathways Program

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 Schools Pathways 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
Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 3) Regulations 2021 [F2021L01798]	Schools Pathways Program	\$2.8 million over two years from 2020-21	Funding will be provided to: <ul style="list-style-type: none">• provide linkages, and enhance work and career pathways, for students into the Australian defence industry and address specific skills gaps in defence industry capability; and• expand the pool of skilled workers from which the Australian defence industry can recruit (including by supporting studies,

Instrument	Grant/Program	Amount	Description
			experiences and educational endeavours in science, technology, engineering and mathematics for students).

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 9 June 2021.

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



22 March 2022

Senator the Hon Matthew Canavan
Chair
Senate Education and Employment Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: eec.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 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 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
Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 5) Regulations 2021 [F2021L01799]	Grants to improve apprenticeships	\$10.5 million over three years from 2021-22 (for a pilot to be conducted by South Australia and New South Wales)	Funding will be provided for grants to the States and Territories to enable them to develop, test and implement measures directed at allowing apprenticeships to be completed more quickly.
	Tertiary Access Payment for Regional and Remote School Leavers	\$175 million over four years from 2021-22 (including administration costs)	Funding will be provided for the Tertiary Access Payment to eligible school leavers from regional and remote areas of Australia who need to relocate to

Instrument	Grant/Program	Amount	Description
			access tertiary study, with eligibility for the payment extended to include students from inner regional areas in addition to outer regional areas and remote areas, and payment rates differentiated based on remoteness from major cities.
	School Leavers Information Service	\$10.5 million over two years from 2021-22	Funding will be provided for: <ul style="list-style-type: none"> • information, advice and referral services to support young people to make informed decisions about their career or to transition to further learning or employment; and • trial supporting job seekers aged 25 years and over through telephone and online services to make informed decisions about their career or to transition to further learning or employment.

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 9 June 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



22 March 2022

Senator Susan McDonald
Chair
Senate Rural and Regional Affairs and Transport Legislation Committee
Parliament House
CANBERRA ACT 2600

via email: rrat.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 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 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
Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 5) Regulations 2021 [F2021L01822]	Online measures to improve price transparency in perishable goods industries	\$5.4 million over four years from 2021-22	Funding will be provided for research and development corporations and industry representative bodies to support the development and implementation of online measures to improve price transparency in perishable goods industries.
	Agricultural innovation hubs program	\$21.7 million over two years from 2021-22	Funding will be provided for the establishment, development and operation of agricultural innovation hubs that support

Instrument	Grant/Program	Amount	Description
			innovation in the agricultural, aquaculture, fishery and forestry industries.

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 9 June 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



22 March 2022

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

Via email: 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.

The committee expects explanatory statements to exempt instruments to identify the source of the instrument's exemption from disallowance. This includes identifying the specific provision of the Act or instrument which provides for the exemption (including the relevant table item, where applicable). The committee does not consider general statements identifying that an exemption is provided under the *Legislation Act 2003* or under the *Legislation (Exemptions and Other Matters) Regulation 2015* to be sufficient. In addition, the explanatory statement should set out a substantive justification as to why the exemption from disallowance is considered appropriate.

The committee considers that the inclusion of this information helps to improve parliamentary oversight over delegated legislation made by the executive.

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instrument in your portfolio which does not meet these expectations:

- Australian National University (Residential Colleges Affiliation) Statute 2021 [F2021L01835].

This instrument is therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 3 of 2022*, 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 both details as to the source of the exemption and a substantive justification for why the exemption is

considered 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**



22 March 2022

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

Via email: minister.sukkar@treasury.gov.au

CC: dlosukkar@treasury.gov.au; committeescrutiny@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.

The committee considers that exemptions from disallowance are only justified in exceptional circumstances. This is in recognition of the important role that the disallowance process plays in maintaining parliamentary oversight of delegated legislation made by the executive and accords with the view of the Senate 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 (see Senate resolution 53B: *Delegated legislation—disallowance and sunseting*, agreed to on 16 June 2021).

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instruments in your portfolio which do not meet these expectations:

- Consumer Goods (Portable Non-aerosol Fire Extinguishers) Safety Standard 2021 [F2021L01844]
- Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 6) Determination 2021 [F2021L01818]

- Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 8) Determination 2021 [F2021L01898]
- Federal Financial Relations (National Specific Purpose Payments for 2020-21) Determination 2021 [F2021L01785].

The committee acknowledges that substantive explanations as to why these instruments are exempt from disallowance have been provided, however the committee does not consider that the instruments meet the very high threshold for when an exemption from disallowance is appropriate. These instruments are therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 3 of 2022*, 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



22 March 2022

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.

The committee expects explanatory statements to exempt instruments to identify the specific source of the instrument's exemption from disallowance *and* to set out a substantive justification as to why the exemption from disallowance is considered appropriate.

The committee considers that the inclusion of this information helps to improve parliamentary oversight over delegated legislation made by the executive.

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instrument in your portfolio which does not meet these expectations:

- Income Tax: Alternative method for calculating the tax free component and taxable component of a superannuation benefit paid during the 2021–22 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 [F2022L00004].

The committee acknowledges that the explanatory statement to the instrument identifies the specific source of the instrument's exemption from disallowance, however no justification as to why the exemption from disallowance is considered appropriate has been provided. This instrument is therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 3 of 2022*, 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 both details as to the source of the exemption *and* a substantive justification for why the exemption is considered 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



22 March 2022

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

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

CC: RegOrds@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.

The committee expects explanatory statements to exempt instruments to identify the specific source of the instrument's exemption from disallowance *and* to set out a substantive justification as to why the exemption from disallowance is considered appropriate.

The committee considers that the inclusion of this information helps to improve parliamentary oversight over delegated legislation made by the executive.

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instrument in your portfolio which does not meet these expectations:

- Food Standards (Application A1178 – Method AOAC 2017.16 as a new method of analysis for total dietary fibre) Variation [F2022L00027].

The committee acknowledges that the explanatory statement to the instrument identifies the specific source of the instrument's exemption from disallowance, however no justification as to why the exemption from disallowance is considered appropriate has been provided. This instrument is therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 3 of 2022*, 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 both details as to the source of the exemption *and* a substantive justification for why the exemption is considered 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**



22 March 2022

The Hon Jason Wood MP
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

Via email: amo.dlo@homeaffairs.gov.au
CC: legislation@homeaffairs.gov.au

Dear Assistant 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.

The committee expects explanatory statements to exempt instruments to identify the source of the instrument's exemption from disallowance. This includes identifying the specific provision of the Act or instrument which provides for the exemption (including the relevant table item, where applicable). The committee does not consider general statements identifying that an exemption is provided under the *Legislation Act 2003* or under the *Legislation (Exemptions and Other Matters) Regulation 2015* to be sufficient. In addition, the explanatory statement should set out a substantive justification as to why the exemption from disallowance is considered appropriate.

The committee considers that the inclusion of this information helps to improve parliamentary oversight over delegated legislation made by the executive.

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instrument in your portfolio which does not meet these expectations:

- Customs By-law No. 2100221 [F2021L01781].

This instrument is therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 3 of 2022*, 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 both details as to the source of the exemption and a substantive justification for why the exemption is considered 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



22 March 2022

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

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.

The committee expects explanatory statements to exempt instruments to identify the specific source of the instrument's exemption from disallowance *and* to set out a substantive justification as to why the exemption from disallowance is considered appropriate.

The committee considers that the inclusion of this information helps to improve parliamentary oversight over delegated legislation made by the executive.

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instruments in your portfolio which do not meet these expectations:

- Migration (Arrangements for Work and Holiday (Subclass 462) Visa Applications) Amendment Instrument (LIN 21/085) 2021 [F2021L01830]
- Migration (Class of persons for Visitor (Class FA) visa nil VAC) Amendment Instrument (LIN 21/097) 2021 (No. 2) [F2021L01773]
- Migration (Payment of visa application charges and fees in foreign currencies) Instrument (LIN 22/001) 2022 [F2021L01829]
- Migration (Places and currencies for paying of fees) Instrument (LIN 22/002) 2022 [F2021L01819].

The committee acknowledges that the explanatory statements to the instruments identify the specific source of the instruments' exemption from disallowance, however no justification as to why the exemption from disallowance is considered appropriate has been provided. These instruments are therefore being drawn to the attention of the Senate by the committee in Chapter

4 of *Delegated Legislation Monitor 3 of 2022*, 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 the instruments should be amended as a matter of best practice.

In addition, all future explanatory statements to exempt instruments should include both details as to the source of the exemption *and* a substantive justification for why the exemption is considered 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.

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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**



22 March 2022

Senator the Hon Bridget McKenzie
Minister for Emergency Management and National Recovery and Resilience
Parliament House
CANBERRA ACT 2600

Via email: minister.mckenzie@infrastructure.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.

The committee expects explanatory statements to exempt instruments to identify the specific source of the instrument's exemption from disallowance *and* to set out a substantive justification as to why the exemption from disallowance is considered appropriate.

The committee considers that the inclusion of this information helps to improve parliamentary oversight over delegated legislation made by the executive.

Please find **attached** a copy of the committee's recently published guideline regarding instruments that are exempt from disallowance. This guideline sets out further details in relation to the committee's expectations under Senate standing order 23(4A).

The committee has identified the following instrument in your portfolio which does not meet these expectations:

- Social Security (Australian Government Disaster Recovery Payment—Queensland floods) Determination 2022 (No. 1) [F2022L00023]

The committee acknowledges that the explanatory statement to the instrument identifies the specific source of the instrument's exemption from disallowance, however no justification as to why the exemption from disallowance is considered appropriate has been provided. This instrument is therefore being drawn to the attention of the Senate by the committee in Chapter 4 of *Delegated Legislation Monitor 3 of 2022*, 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 both details as to the source of the exemption *and* a substantive justification for why the exemption is considered 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