

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

Monitor 3 of 2023

8 March 2023

© Commonwealth of Australia 2023

ISSN: 2652-4139 (print)

ISSN: 2652-4147 (online)

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

Membership of the committee

Current members

Senator Linda White (Chair)	Victoria, ALP
Senator David Van (Deputy Chair)	Victoria, LP
Senator Catryna Bilyk	Tasmania, ALP
Senator David Pocock	Australian Capital Territory, IND
Senator Louise Pratt	Western Australia, ALP
Senator Paul Scarr	Queensland, LP

Secretariat

Fattimah Imtoul, Secretary (A/g)
Anika Khwaja, Principal Research Officer
Nicole Maslaris, Principal Research Officer
Anneka Atley, Senior Research Officer
Nidhi Venkatesan, Senior Research Officer
Geoffrey Fricke, Legislative Research Officer

Committee legal adviser

Associate Professor Andrew Edgar

Committee contact details

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: sdlc.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_sdlc

Contents

Membership of the committee	iii
Introduction.....	vii
Part I – Technical legislative scrutiny	1
Chapter 1: New and ongoing matters	5
<i>New matters</i>	5
<i>Ongoing matters</i>	6
Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022	6
Corporations Amendment (Litigation Funding) Regulations 2022	10
Data Availability and Transparency Code 2022	16
Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022	21
Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022	26
Chapter 2: Concluded matters	33
Chapter 3: Agency engagement.....	35
<i>New matters</i>	35
<i>Ongoing matters</i>	35
<i>Concluded matters</i>	36
Chapter 4: Undertakings	37
<i>Implemented undertakings</i>	37
<i>Outstanding undertakings.....</i>	37

Part II – Matters of interest to the Senate.....	39
Chapter 5: Instruments raising significant issues.....	43
Chapter 6: Expenditure and taxation in delegated legislation.....	45
<i>Commonwealth expenditure</i>	45
Instruments specifying expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and <i>Industry Research and Development Act 1986</i>	45
Instruments providing for Commonwealth grants to states and territories under the <i>Federal Financial Relations Act 2009</i>	46
Chapter 7: Exemptions from disallowance and sunseting	49
<i>Exemptions from disallowance</i>	49
<i>Exemptions from sunseting</i>	51

Introduction

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

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

This Monitor details matters relating to the committee's scrutiny of **54** legislative instruments registered on the Federal Register of Legislation between **1 February** and **20 February 2023**. This includes **40** disallowable instruments and **14** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

Committee information

Terms of reference

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

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

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

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

Undertakings

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

Matters of interest to the Senate

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

Disallowance process¹

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

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

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

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

Publications

Delegated Legislation Monitor

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

Scrutiny News

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

Guidelines

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

Other resources

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

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

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

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

Part I—Technical legislative scrutiny

Part I: Introduction

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

Chapter 1: New and ongoing matters

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

Chapter 2: Concluded matters

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

Chapter 3: Agency engagement

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

Chapter 4: Undertakings

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

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

Chapter 1

New and ongoing matters

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

New matters

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

Ongoing matters

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

Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022

FRL No.	F2022L01457 ¹
Purpose	Amends the Aged Care Quality and Safety Commission Rules 2018 to make provision for the Code of Conduct for Aged Care, which establishes minimum standards of conduct for approved providers and their aged care workers and governing persons.
Authorising legislation	<i>Aged Care Quality and Safety Commission Act 2018</i>
Portfolio	Health and Aged Care
Disallowance	15 sitting days after tabling (tabled in the Senate on 21 November 2022) Notice of motion to disallow given on 7 March 2023

Overview

1.3 The *Aged Care Quality and Safety Commission Act 2018* (the Act) establishes the Aged Care Quality and Safety Commission,² and empowers the minister to make the Aged Care Quality and Safety Commission Rules 2018 (the Commission Rules).³ Further, the Act enables the Commission Rules to provide for, or in relation to, both the performance of the Commissioner's functions under the Act,⁴ and the taking of action in relation to compliance with the Code of Conduct.⁵

1.4 The Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 (the instrument) amends the Commission Rules to include a Code of Conduct which establishes minimum standards of conduct for

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

2 *Aged Care Quality and Safety Commission Act 2018*, s 11.

3 *Aged Care Quality and Safety Commission Act 2018*, s 77.

4 *Aged Care Quality and Safety Commission Act 2018*, s 21(1).

5 *Aged Care Quality and Safety Commission Act 2018*, s 21(3A).

approved aged care providers, workers, and governing persons, and to enable the Commissioner to take action relating to compliance with the Code of Conduct.⁶

1.5 The committee's secretariat, on behalf of the committee, engaged with the Department of Health and Aged Care in relation to the instrument in January 2023. The committee retained scrutiny concerns and sought advice from the Minister for Aged Care (the minister) in *Delegated Legislation Monitor 1 of 2023*.⁷ The minister responded on 24 February 2023.⁸

Scrutiny concerns

Conferral of discretionary powers;⁹ adequacy of explanatory materials¹⁰

1.6 Section 23BE of the instrument provides that, if an investigation is undertaken in relation to compliance under section 23BD, the Commissioner may 'take any action' to deal with the outcome of an investigation that they consider appropriate. The explanatory statement provides four examples of actions that the Commissioner may take following an investigation but notes that this list is not exhaustive and indicates that 'it is not intended that the Commissioner be restricted in relation to the types of actions they may take to deal with the outcome of an investigation'.¹¹

1.7 The committee was concerned that the instrument confers a significant broad discretionary power on the Commissioner, and neither the instrument nor the explanatory statement specifically defines the types of actions the Commissioner may take or provides factors which the Commissioner must take into account in exercising this power.

1.8 Accordingly, the committee requested the minister's advice as to:

- whether the types of action that the Commissioner may take under section 23BE can be specifically defined and included in the instrument;
- what factors the Commissioner must take into account when exercising their discretion under section 23BE of the instrument;

6 Explanatory statement, p 1.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2023](#) (8 February 2023) pp. 5–7.

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

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

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

11 Explanatory statement, p. 9.

- whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy; and
- how the Commissioner's investigative powers relate to the complaints mechanism under the Act.

*Minister's response*¹²

1.9 In her response of 24 February 2023, the minister advised that the Commissioner requires the discretion to take various appropriate actions to respond to the outcomes of Code of Conduct investigations in a risk-based and proportionate manner. Defining these actions may limit the scope of the Commissioner's discretion and inhibit the Commissioner from taking the most reasonable action allowable to protect the health, safety and wellbeing of aged care recipients. However, any actions taken under section 23BE in relation to an investigation must be taken in accordance with the Commission Rules, the Act, other relevant legislation, and the principles of administrative law.

1.10 The minister also provided advice in relation to factors that must be considered when dealing with the outcomes of an investigation under section 23BE. These factors include the nature and/or seriousness of the non-compliance with the Code, actions that would likely mitigate or remove harm to aged care recipients, the consequence of harm arising, and the likelihood of harm being managed by an approved provider. The minister advised that the explanatory statement can be amended to include these factors.

1.11 The minister advised that various safeguards are applicable, such as the requirement to have due regard to the rules of procedural fairness under section 23BG of the instrument, procedural fairness requirements in the Commission's legislative framework (such as in section 63N of the Act), and banning orders under section 74GE of the Act. Under section 76(1B) of the Act, the Commissioner must not delegate a function or power unless satisfied that the delegate has suitable training or experience to properly perform the function or exercise the power.

1.12 In her response, the minister also advised that there are two avenues through which the Commissioner may exercise investigative powers: first, in relation to the Code of Conduct, under which a complaint may be made; and second, under the *Aged Care Act 1997* (the Aged Care Act) or the Aged Care Principles. In the case of the latter, the Commissioner can exercise investigative powers in accordance with section 65 of the Act.

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

1.13 However, issues with compliance with the Code of Conduct can also be raised outside of section 23BE of the Act. When receiving a complaint or information that raises issues about compliance with the Code of Conduct from a worker, governing person or provider that is high risk and warrants an investigation, the Commission can utilise powers under section 74D(l)(c) of the Act. The Commission can then take action to deal with the outcome of that investigation under section 23BE of the instrument.

Committee view

1.14 The committee thanks the minister for her detailed advice, including the factors that are to be taken into consideration before undertaking any action under section 23BE, the various safeguards applicable to the exercise of the power under section 23BE, and the relationship between the Commissioner's investigative powers and the Act's complaints mechanism. The committee also welcomes the minister's undertaking to prepare a revised explanatory statement containing the relevant factors provided in the advice.

1.15 The committee notes the minister's advice that the Commissioner's powers under section 23BE must remain broad to allow them to take appropriate action in a risk based and proportionate manner. However, the committee remains concerned at the conferral of a broad discretionary power that on its face appears to be unlimited. The explanatory statement to the instrument also does not provide that the investigative powers under section 23BE are limited by sections 63N and 74GE of the Act, noting that these provisions establish detailed limitations on, and requirements of, the Commissioner when imposing sanctions and making banning orders.

1.16 Further, the committee notes the similarity in the nature of the work performed by both the Aged Care Commissioner and the National Disability Insurance Scheme Commissioner, and queries the reasons for the differences between the National Disability Insurance Scheme (Code of Conduct) Rule 2018 and the Aged Care Quality and Safety Commission Rules 2018.

1.17 In light of the above, the committee requests the minister's further advice as to:

- **whether section 23BE of the instrument can be amended to expressly state that it is limited to actions that are available under the *Aged Care Quality and Safety Commission Act 2018* and the *Aged Care Quality and Safety Commission Rules 2018*, noting the minister's advice as to those limits;**
- **whether the explanatory statement to the instrument can be amended to reflect those amendments; and**
- **the reasons for the differences in procedures under the *Aged Care Quality and Safety Commission Rules 2018* and the *National Disability Insurance Scheme (Code of Conduct) Rule 2018*.**

Corporations Amendment (Litigation Funding) Regulations 2022

FRL No.	F2022L01614 ¹³
Purpose	Amends the Corporations Regulations 2001 to provide litigation funding schemes with an explicit exemption from the managed investment scheme (MIS) regime, Australian Financial Services Licence (AFSL) requirements, product disclosure regime and anti-hawking provisions in the <i>Corporations Act 2001</i> .
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 February 2023)

Overview

1.18 This instrument amends the Corporations Regulations 2001 (the Corporations Regulations) to provide litigation funding schemes with an explicit exemption from the managed investment scheme (MIS) regime, Australian Financial Services Licence (AFSL) requirements, product disclosure regime and anti-hawking provisions in the *Corporations Act 2001* (the Corporations Act).

1.19 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 1 of 2022*, on 25 January 2023.¹⁴ The Assistant Treasurer responded on 20 February 2023.¹⁵

Scrutiny issues

Compliance with authorising legislation¹⁶

1.20 Section 3 provides that the instrument is made under the Corporations Act and its explanatory statement indicates that it is made under section 1364.

1.21 This section enables the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient

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

14 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023), p. 5.

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

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

to be prescribed for carrying out or giving effect to the Act. These are general enabling provisions that do not specifically authorise exemptions or modifications from provisions of the Acts.

1.22 Accordingly, the committee requested the Assistant Treasurer's advice as to the relevant specific exemption-making powers.

Assistant Treasurer's response¹⁷

1.23 In his response of 20 February 2023, the Assistant Treasurer advised that the following provisions of the Corporations Act were relied upon to introduce the exemptions in the instrument:

- (a) Paragraph 9(n) of the definition of 'managed investment scheme' regarding the exemption to the MIS regime;
- (b) Paragraph 911A(2)(k) regarding the exemption from AFSL requirements;
- (c) Paragraph 1020G(1)(a) regarding the exemption from the product disclosure regime; and
- (d) Paragraph 992A(2)(c) regarding the exemption from the anti-hawking provisions.

Committee view

1.24 The committee welcomes the Assistant Treasurer's further advice about the legal authority for exemptions from primary legislation contained in the regulations and considers this would be important information to be included in the instrument's explanatory statement.

1.25 The committee therefore requests the Assistant Treasurer's advice as to whether the explanatory statement can be amended to include this further information provided regarding the legal authority to make this instrument.

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

Exemption from the operation of primary legislation;¹⁸ parliamentary oversight¹⁹

1.26 The instrument provides litigation funding schemes with explicit exemptions from the Corporation Act's MIS regime, AFSL requirements, product disclosure regime and anti-hawking provisions.²⁰

1.27 The committee's longstanding view is that provisions which amend or create exemptions to primary legislation should be included in primary, rather than delegated, legislation. However, if the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary, which in most cases should be no more than three years after commencement. Further, under Senate standing order 23(3)(l), the Senate requires the committee to examine such instruments as to whether they are only in force as long as strictly necessary. This is to ensure a minimum degree of regular parliamentary oversight. In addition, the committee expects the explanatory statement to comprehensively justify the nature and scope of the exemptions, including whether they are appropriate for inclusion in delegated legislation.

1.28 It was unclear to the committee why it was necessary and appropriate to introduce these explicit exemptions and to do so in delegated legislation, given the recent Full Court of the Federal Court decision in *LCM Funding v Stanwell Corporation Limited* [2022] FCAFC 103 (the LCM case).²¹

1.29 Accordingly, the committee requested the Assistant Treasurer's advice as to why it was necessary and appropriate to introduce these explicit exemptions and to use delegated legislation to do so, given the LCM case. The committee further requested his advice as to whether there is any intention to include the exemptions in the Corporations Act and, if not, whether the instrument can be amended so that the measures cease within three years. Finally, the committee sought advice as to whether there was any intention to conduct a review of the provisions to determine whether they remain necessary and appropriate, including a review of whether it is appropriate to include them in delegated legislation.

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

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

20 For example, Schedule 1, item 1 of the instrument provides for litigation funding schemes to be exempt from the definition of an MIS in section 9 of the Act. Item 13 provides an explicit exemption for litigation funding schemes from the Act's requirement to hold an AFSL, while item 20 creates an exemption from the Act's anti-hawking provisions. Further, item 22 exempts litigation funding schemes from the Act's Part 7.9 disclosure obligations.

21 *LCM Funding v Stanwell Corporation Limited* [2022] FCAFC 103.

*Assistant Treasurer's response*²²

1.30 In his response, the Assistant Treasurer advised that the relevant amendments 'reinforce the outcome' in the LCM case, that litigation funding schemes are not regulated under the MIS regime.²³

1.31 The Assistant Treasurer further advised that delegated legislation was the most appropriate place for the exemptions, due to its important role in removing prescriptive detail from the primary law, and because changes should fit within existing legal hierarchies. Moreover, as modification to the operation of the law is not undertaken in a 'vacuum', new changes should fit within 'existing legal hierarchies'. He added that wide application provisions in the primary legislation are supplemented by regulations to address issues not contemplated at the time of drafting, including exemptions for specific circumstances or a small number of industry participants.

1.32 The Assistant Treasurer further advised that including the exemptions in the instrument would also ensure that they are co-located alongside existing exemptions in the Corporations Regulations, relating to litigation funding schemes in the insolvency context and litigation funding arrangements. He added that placing the exemptions in regulations assists stakeholders in finding and understanding their obligations. Placing them in the primary legislation instead would create complexity and inconsistency with similar longstanding exemptions.

1.33 Finally, the Assistant Treasurer indicated that time limiting only the new exemptions (and not the existing exemptions in the Corporations Regulations) would introduce uncertainty and confusion.

1.34 For these reasons, there was no intention to introduce the exemptions in primary law or time limit them. The Assistant Treasurer also indicated that, as the regulations reinstate longstanding exemptions and reflect the current status of case law in this area, a review of the location of the provisions was not necessary.

Committee view

1.35 The committee thanks the Assistant Treasurer for his detailed response; however, it retains significant scrutiny concerns with this instrument.

1.36 It remains unclear to the committee why the exemptions are required, and in delegated rather than primary legislation, to 'reinforce the outcome' of the LCM case, if the LCM case reflects the current status of the law. Further, in this regard, the

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

23 [2022] FCAFC 103.

committee reiterates its longstanding view that provisions which amend or create exemptions to primary legislation should be included in primary, rather than delegated, legislation. However, in cases where the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary.

1.37 Finally, while the Assistant Treasurer advised that time-limiting only the new exemptions inserted by the instrument would introduce uncertainty and confusion, the committee notes that the Treasurer undertook on 29 November 2023 to time-limit the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 to a period of three years 'as a show of good faith and respect for the work of the Committee, and to settle this longstanding matter'.²⁴ As both instruments create exemptions to the Corporations Act's anti-hawking provisions, the committee is unclear as to how these two instruments differ, such that time-limiting one and not the other would not create uncertainty.

1.38 The committee also notes that in response to its scrutiny concerns, the Attorney-General agreed to limit the operation of the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No.1) to a period of five years.²⁵ That instrument similarly created exemptions for litigation funding schemes from the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* after the LCM case.

1.39 Additionally, noting the Assistant Treasurer's advice that modifications to the operation of the law are not undertaken in a vacuum, and as such new changes should fit within existing legal hierarchies, the committee would appreciate further detail about the existing hierarchy and how this impacts the decisions about where exemptions to primary law are located.

1.40 The committee therefore reiterates its longstanding concerns as to the use of delegated legislation to create ongoing exemptions to primary legislation, and requests the Assistant Treasurer's advice as to:

- **why the exemptions are required noting that the LCM case already reflects the current status of the law;**
- **noting the committee's longstanding views, whether the Corporations Act can be amended to include the relevant exemptions;**
- **how the instrument differs from the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021,**

24 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 29 November 2023, p. 28.

25 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 18 November 2022, p. 3.

which the Assistant Treasurer undertook to amend to be time-limited to three years; and

- **further detail about the 'existing legal hierarchies' referred to in his response and how this concept is applied in practice when determining where to place exemptions from primary legislation.**

Data Availability and Transparency Code 2022

FRL No.	F2022L01719 ²⁶
Purpose	Supports the operation of the <i>Data Availability and Transparency Act 2022</i> .
Authorising legislation	<i>Data Availability and Transparency Act 2022</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 February 2023)

Overview

1.41 The *Data Availability and Transparency Act 2022* (the Act) commenced on 1 April 2022 and established a new data sharing scheme (the scheme) for safely sharing Australian Government data with entities accredited under the scheme. The Act authorises the National Data Commissioner to make codes of practice about the scheme.

1.42 The Data Availability and Transparency Code 2022 (the Code) provides guidance for scheme participants on best practice regarding data sharing, including the data sharing principles that scheme participants must apply when entering into a data sharing agreement, as well as privacy protections.

1.43 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 1 of 2023*.²⁷ The Minister for Finance (the minister) responded on 9 February 2023, attaching information provided by the National Data Commissioner (the Commissioner) regarding these concerns.²⁸

Scrutiny concerns

Significant matters in delegated legislation²⁹

1.44 The data sharing principles included in the Code are significant, and the committee raised concerns that the Code was included in delegated rather than

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

27 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2022) pp. 9–11.

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

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

primary legislation, and therefore not subject to the same level of parliamentary oversight and scrutiny. Further, the explanatory statement does not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation. The committee was also concerned as the Senate Standing Committee for the Scrutiny of Bills had previously reported on the Data Availability and Transparency Bill 2020 (which became the Act), stating that significant matters such as privacy safeguards for data sharing should be included in primary legislation unless a sound justification is provided.

1.45 For these reasons, the committee requested the minister's advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for the data sharing principles set out in the Code.

Commissioner's response³⁰

1.46 In her response of 9 February 2023, the Commissioner advised that in response to comments previously made by the Senate Standing Committee for Scrutiny of Bills, extensive amendments were made to the Bill to include additional privacy protections in the primary legislation. Further, the Code provides more detail about the data sharing principles and clarity to entities using the scheme.

1.47 The Commissioner also advised that Section 126 of the Act specifically provides for the Code to be in delegated legislation to allow the Code to be easily amended as the scheme matures and new types of data sharing arrangements are negotiated.

1.48 The Commissioner noted that while the Code sets out details for entities, it cannot be inconsistent with the privacy protections in the Act and likened this approach to that taken in the Privacy (Australian Government Agencies — Governance) APP Code 2017, which assisted agencies to apply and comply with one of the Australian Privacy Principles in the *Privacy Act 1988* (the Privacy Act).

Committee view

1.49 The committee welcomes the Commissioner's detailed response, particularly the confirmation that, in response to comments previously made by the Senate Standing Committee for Scrutiny of Bills, amendments were made to the Bill to include additional privacy protections in the primary legislation. The committee further welcomes the advice that the Code cannot be inconsistent with the privacy protections in the Act.

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

1.50 However, the committee retains concerns where significant matters pertaining to privacy protections of individuals are set out in delegated legislation, as this involves more limited parliamentary oversight compared with the additional level of scrutiny attached to the legislative process for primary legislation.

1.51 In light of the information provided by the Commissioner, the committee concludes its examination of the instrument in relation to this issue. However, the committee remains concerned about the inclusion of significant matters relating to privacy protections in delegated legislation and has therefore resolved to draw its concerns about the inclusion of significant matters in delegated rather than primary legislation to the attention of the Senate.

Conferral of discretionary power;³¹ clarity of drafting³²

1.52 The Code appears to provide high levels of discretion to entities when making decisions under the data sharing scheme, with several relevant terms remaining undefined in either the Code or the explanatory statement.

Consent to share personal information

1.53 This includes subsection 21(1) which provides for the consideration that the data custodian must make when deciding whether it is 'unreasonable or impractical to seek consent' for the sharing of data, including personal information. Subsection 21(2) states that it may be unreasonable or impracticable to seek consent if doing so would be 'excessively burdensome' in all the circumstances. However, it was unclear to the committee what 'excessively burdensome' means in this context.

1.54 Additionally, subsection 20(8) provides that consent to use personal information by a new data custodian under the Act must be 'current'. However, 'current consent' is not defined in the Code or the explanatory statement.

Dealing with conflicts of interest

1.55 Similarly, section 9 of the Code provides that data custodians may assume that any conflicts of interest in relation to the collection or use of data by the accredited user are appropriately managed if the accredited user represents that they have 'a system in place to identify and manage such conflicts' and 'the system operates effectively'. However, there are no further details or guidance in the Code or the explanatory statement about what an 'effective operating system' means in this context.

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

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

1.56 Therefore, the committee sought the minister's advice as to the meaning of the above terms.

*Commissioner's response*³³

1.57 In her response of 9 February 2023, the Commissioner advised that the test of 'unreasonable or impractical to seek consent' is intended to align with the test of 'unreasonable or impractical to obtain the individual's consent' in section 16A of the Privacy Act. Further, the meaning of 'excessively burdensome' in this context broadly aligns with guidance published by the Australian Information Commissioner on the operation of the words 'unreasonable or impractical to obtain the individual's consent' in section 16A of the Privacy Act.

1.58 The Commissioner explained that 'excessively burdensome' is an objective test that sets a high bar and requires consideration of all the relevant facts. The Code also expressly provides that the 'excessively burdensome' test is not likely to be satisfied just because seeking consent is inconvenient, time consuming or costly, or because consent would need to be sought from a very large number of individuals.

1.59 The Commissioner advised that the meaning of 'current consent' is intended to align with the Australian Information Commissioner's guidance on the operation of consent in the Privacy Act.

1.60 The Commissioner highlighted that the Code clarifies that consent cannot be current at a particular time if it has been withdrawn prior to that time. The requirement that consent be 'current' at a particular time reflects the position that consent, once given, does not remain in effect indefinitely. The drafting of the Code recognises that where consent should be regarded as having ongoing effect is dependent on context and may, for example, be affected by the period of time that has passed since giving that consent. The Commissioner also advised that they may issue non-binding guidance to assist entities applying the scheme to understand the requirements in the Act and the Code relating to consent.

1.61 Regarding what constitutes an 'effective' system to identify and manage conflicts of interest, the Commissioner clarified that, in this context, the accredited user will be a Commonwealth or a State or Territory government body. As such, it would be impractical for a Commonwealth data custodian to assess the operation of the internal conflict of interest processes of another Commonwealth agency or a State or Territory government agency. Therefore, the Code enables a data custodian or an accredited data service provider (ADSP) to rely upon written representations in a data sharing agreement by the accredited user that the accredited user has a system in

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

place within the entity to identify and manage conflicts of interest in relation to the collection and use of data and that that internal system operates effectively.

Committee view

1.62 The committee welcomes the Commissioner's more detailed advice about the terms queried and considers this would be useful information to include in the instrument's explanatory statement.

1.63 In light of the information provided by the Commissioner, the committee requests that the explanatory statement to the instrument be updated to include the additional detail provided.

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

FRL No.	F2022L01333 ³⁴
Purpose	Amends the Telecommunications Regulations 2021 to allow for the disclosure of certain customer data to financial services entities and the Commonwealth for limited purposes.
Authorising legislation	<i>Telecommunications Act 1997</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 25 October 2022) Notice of motion to disallow placed on 8 February 2023

Overview

1.64 The Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022 (the instrument) amends the Telecommunications Regulations 2021 to prescribe two new circumstances for the purposes of section 292 of the *Telecommunications Act 1997* (the Act). This has the effect of permitting carriers and carriage service providers to securely disclose government identifiers to financial services entities and government agencies and of enabling the minister to expand by notifiable instrument the class of personal information that can be disclosed.

1.65 The committee's secretariat, on behalf of the committee, engaged with the Department of Infrastructure, Transport, Regional Development, Communications and The Arts about this instrument in December 2022. Following this engagement, the committee retained scrutiny concerns and sought advice from the Minister for Communications (the minister) in *Delegated Legislation Monitor 1 of 2023*.³⁵ The minister responded on 28 February 2023.³⁶

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

35 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023) pp.12–13.

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

Scrutiny concerns

Adequacy of explanatory materials;³⁷ parliamentary oversight³⁸

1.66 Sections 15A and 15B of the instrument prescribe the circumstances for section 292(1) of the Act, which has the effect of permitting carriers and carriage service providers to securely disclose government identifiers such as drivers licences and passport numbers to financial services entities and government agencies. Prescribing those circumstances in sections 15A and 15B also allows the minister, by notifiable instrument, to specify and expand the classes of information that can be disclosed, including personal information.

1.67 The explanatory statement to the instrument sets out safeguards applying to the disclosure of personal information and explains that the purpose of these disclosures is to help protect customers. However, the committee was concerned that the classes of personal information that can be disclosed can be extended by the minister via notifiable instruments, which are not legislative instruments and therefore not subject to scrutiny by the committee or other parliamentary processes. Further, the explanatory statement does not provide a justification for this.

1.68 Accordingly, the committee asked the minister for further detail about information or documents that can be specified or disclosed by notifiable instrument and advice as to why it is considered necessary and appropriate to include such matters in notifiable, rather than legislative, instruments.

Minister's response³⁹

1.69 In her response of 28 February 2023, the minister advised that the information specified by the minister in a notifiable instrument must be 'personal information' within the meaning of the *Privacy Act 1988* about individuals who are or were customers of the relevant carrier or carriage service provider. Further, as the ministerial power provided by the instrument goes to a matter of detail relating to 'the scope of information that may be disclosed' by a telecommunications provider in response to a specific data breach, it is within the usual purposes for which notifiable instruments may be used.

1.70 The minister further advised that, while the instrument aims to constrain the classes of information that can be disclosed, it also provides a degree of flexibility so that the minister can quickly respond to emerging data breaches where new classes

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

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

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

of data have been compromised. Additionally, the minister's power is intended to be used in compelling circumstances and has not yet been needed.

1.71 The minister added that notifiable instruments are inherently more certain than legislative instruments because they do not face the prospect of disallowance. In this regard, the minister stated that, while parliamentary scrutiny is 'normally desirable', it can create delay and uncertainty when swift and decisive action is needed. Further, if a legislative (rather than notifiable) instrument were used in this case, it could create doubt in the minds of providers about the risks of acting immediately, including in the event of disallowance. The minister also advised that if an instrument were subject to a notice of disallowance or disallowed, it could lead to a gap because an instrument the same in substance could generally not be made within seven days of tabling, while subject to a notice of disallowance or within six months of disallowance, except in some cases with the approval of both Houses of Parliament.

1.72 The minister also advised that a range of other safeguards apply to information or data provided to financial services and government entities. These include that: there must be a clear and justifiable reason for collecting the relevant information or data and it can only be used for preventing or responding to cyber security incidents, fraud, scam activity or identity theft; financial services entities that wish to receive the information or data must provide written commitments that they will comply with privacy and security requirements; and that government entities requesting data and approved recipients are subject to comprehensive laws and protocols broadly relating to confidentiality and use.

1.73 The minister further noted that consultation with the telecommunications sector and government stakeholders confirmed that the instrument strikes the right balance between protecting personal information and providing confidence that the information could quickly be shared if necessary to protect consumers. Finally, she advised that the Government will consider whether the relevant provisions should continue in their current form before the instrument's first anniversary.

Committee view

1.74 The committee thanks the minister for her detailed advice about the safeguards that apply to disclosure of the relevant information or data, and considers this would be useful information to be included in the explanatory statement. However, the committee retains scrutiny concerns about the minister's power to expand the class of disclosable information via notifiable instrument, as this limits parliamentary oversight over a significant matter.

1.75 The committee considered this issue in its *Inquiry into the exemption of delegated legislation from parliamentary oversight*. It is the committee's view that classifying instruments as notifiable, rather than legislative, instruments significantly

limits Parliament's scrutiny function, as they are not subject to the usual tabling, disallowance or sunseting processes.⁴⁰ This concern is heightened when the subject matter of the notifiable instrument is significant.

1.76 In relation to this instrument, it is unclear to the committee how the minister's power to expand the class of disclosable information via notifiable instrument goes to a mere matter of detail, as it appears to enable an *expansion* of the type of information that can be disclosed. It therefore appears to the committee to be a significant matter that would justify parliamentary oversight and scrutiny.

1.77 In addition, the committee notes the minister's advice that notifiable instruments are inherently more certain than legislative instruments because they do not face the prospect of disallowance. In this regard, the committee notes that legislative instruments may in fact be exempted from disallowance, and that such instruments are at least subject to some oversight, including through the tabling process, and subject to the committee's scrutiny.⁴¹ It should be noted the committee has expressed strong views against creating exemptions against disallowance.⁴²

1.78 The committee has not previously accepted justifications such as the need for certainty, flexibility, and the need to act urgently on their own to be an adequate justification for an exemption from parliamentary oversight. The committee also notes that the potential for disallowance does not prevent the government from acting quickly and decisively, as the disallowance process does not inhibit the immediate commencement and enforceability of instruments, nor does it invalidate any actions taken under the instrument prior to disallowance. Even where urgent action is required, the committee's view is that Parliament must have effective oversight and retain the ability to scrutinise the actions of governments.

1.79 While the committee acknowledges the minister's concerns regarding a possible gap on the basis that an instrument, the same in substance, could generally not be made if the instrument were subject to a disallowance motion or disallowed, the committee observes that the instances of the disallowance procedure resulting in disallowance by the Parliament are rare. Nevertheless, it is a crucial check on executive power, and the committee notes that senators would consider, as part of their deliberations, any impact that disallowance would have.

40 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: [Interim report](#)* (December 2020) and *[Final report](#)* (March 2021).

41 Senate standing order 23(4A).

42 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: [Interim report](#)* (December 2020) and *[Final report](#)* (March 2021).

- 1.80** The committee therefore requests the minister's further advice as to:
- whether sections 15A and 15B of the instrument can be amended to enable the minister to specify and expand the class of disclosable information by legislative instrument, rather than notifiable instrument; and
 - whether the explanatory statement can be amended to add the additional information the minister provided about other safeguards applying to the disclosure of relevant information.

Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022

FRL No.	F2022L01629 ⁴³
Purpose	Amends the Corporations Regulations 2001 and the National Consumer Credit Regulations 2010 to incorporate longstanding and accepted matters currently contained in ASIC legislative instruments into the regulations.
Authorising legislation	<i>Corporations Act 2001; National Consumer Credit Protection Act 2009</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 February 2023)

Overview

1.81 The Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 (the instrument) amends the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010 (together, the 'principal regulations') to add a number of exemptions from primary legislation which are currently contained in Australian Securities and Investments Commission (ASIC) legislative instruments into the principal regulations.

1.82 These are exemptions, in specified circumstances, from the requirements to hold an Australian financial services licence under section 911A of the *Corporations Act 2001* (the Corporations Act) and to hold a credit licence under section 29 of the *National Consumer Credit Protection Act 2009* (the Consumer Credit Protection Act).⁴⁴

1.83 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 1 of 2023*, on 25 January 2023.⁴⁵ The Assistant Treasurer responded on 20 February 2023.⁴⁶

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

44 Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022, Schedules 1 and 2.

45 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2022) pp. 9–11.

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

Compliance with authorising legislation⁴⁷

1.84 Section 3 of the instrument provides that the instrument is made under the Corporations Act and the Consumer Credit Protection Act. The explanatory statement indicates the instrument is made under sections 1364 and 329 of those Acts, respectively.

1.85 Those sections provide that the Governor-General may make regulations prescribing matters required or permitted by those Acts, or necessary or convenient to be prescribed for carrying out or giving effect to those Acts.⁴⁸ These are general enabling provisions that do not specifically authorise exemptions or modifications from provisions of the Acts.

1.86 Accordingly, the committee requested the Assistant-Treasurer's advice as to the relevant specific exemption-making powers.

Assistant Treasurer's response⁴⁹

1.87 In his response of 20 February 2023, the Assistant Treasurer advised that:

Paragraph 911A(l) of the Corporations Act creates a broad obligation that a person who carries on a financial services business must hold an Australian financial services licence. Paragraph 911A(2) exempts a person from this requirement if they meet any of the circumstances listed in the subparagraphs to 911A(2). Subparagraph 911A(2)(k) indicates that the provision of a service is exempt if it is covered by an exemption prescribed in regulations made for the purposes of this paragraph. The exemptions to the Corporations Act introduced in these regulations are made for the purpose of this subparagraph.

Section 29 of the [Consumer Credit Protection Act] provides that a person must not engage in a credit activity if the person does not hold a licence. Paragraph 110(1)(a) of the [Consumer Credit Protection Act] provides that the regulations may exempt a person or class of persons from all or specific provisions to which this Part applies, which includes section 29. Item 5 of Schedule 1 relies on this paragraph to introduce an exemption for rural financial counselling services from the licensing obligation within the regulations.

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

48 Explanatory statement, p. 1.

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

Committee view

1.88 The committee welcomes the Assistant Treasurer's further advice about the legal authority for exemptions from primary legislation contained in the regulations and considers this would be important information to be included in the instrument's explanatory statement.

1.89 The committee therefore requests the Assistant Treasurer's advice as to whether the explanatory statement can be amended to include this further information provided regarding the legal authority to make this instrument.

Exemption from the operation of primary legislation⁵⁰; parliamentary oversight⁵¹

1.90 The instrument inserts ongoing exemptions to requirements of the Corporations Act and the Consumer Credit Protection Act via the principal regulations.⁵²

1.91 The explanatory statement indicates that the relevant amendments 'form part of a program of legislative amendments intended to simplify and improve the navigability of Treasury legislation' and 'incorporate longstanding and accepted matters currently contained in [ASIC] legislative instruments' into the principal regulations.⁵³

1.92 However, the explanatory statement does not explain why it was considered appropriate to include the relevant provisions in delegated legislation, particularly as they are not time-limited as the principal regulations, being the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010, are not subject to sunseting.

1.93 The committee's longstanding view is that provisions that amend or create exemptions to primary legislation should be included in primary, rather than delegated, legislation. However, if the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary, which in most cases should be no more than three years after commencement. Under Senate standing order 23(3)(l), the Senate requires the committee to examine such instruments to confirm that they are only in force as long as strictly necessary. This is to ensure a minimum degree of regular parliamentary oversight. The committee also expects the explanatory statement to comprehensively justify the nature and scope of the

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

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

52 Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022, Schedules 1 and 2.

53 Explanatory statement, p. 1.

exemptions including whether they are appropriate for inclusion in delegated legislation.

1.94 For these reasons, the committee sought the Assistant Treasurer's advice as to why it was considered necessary and appropriate to include the exemptions to the Corporations Act and Consumer Credit Protection Act in delegated legislation, rather than primary legislation. Further, the committee asked whether there is any intention to include these exemptions in the primary legislation and, if not, whether the instrument can be amended to provide that the measures cease within three years after commencement.

*Assistant Treasurer's response*⁵⁴

1.95 The Assistant Treasurer advised that it remains his view that delegated legislation has an important role to play in removing prescriptive detail from the primary law. Further, modifications to the operation of the law are not undertaken in a vacuum, and as such new changes should fit within existing legal hierarchies. As such, he does not intend to include these exemptions in the primary law.

1.96 Regarding the exemptions to the Corporations Act, the Assistant Treasurer advised that adding the large number of specific exemptions to the Corporations Act would 'clutter' the Act, which is already complex and contains a great volume of operative provisions. Further, noting the specificity of some of the exemptions, it would be inappropriate to include them in the primary law. For example, if the name of a specific organisation subject to the exemption changes, this would require the Act to be amended.

1.97 The Assistant Treasurer further advised that including the exemptions via the principal regulations ensures they are in proximity with each other, which simplifies and improves the navigability of the legislation. He advised that this would assist stakeholders to find and understand their obligations, noting that 'placing the exemptions in the Acts would unnecessarily increase the complexity of the primary law and would create inconsistency with similar longstanding regulations'.

1.98 Finally, the Assistant Treasurer advised that he does not intend to time-limit the exemptions as this would introduce uncertainty and confusion, noting that exemptions which already exist in the respective principal regulations are not time-limited.

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

Committee view

1.99 The committee thanks the Assistant Treasurer for his detailed response. However, it retains significant scrutiny concerns with this instrument.

1.100 The committee reiterates its longstanding view that provisions which amend or create exemptions to primary legislation should be included in primary, rather than delegated, legislation. However, in cases where the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary.

1.101 The committee also notes the Assistant Treasurer's advice that, as some exemptions which already exist in the respective principal regulations are not time-limited, time-limiting only the new exemptions would introduce uncertainty and confusion. However, it is the committee's view that all exemptions to the primary law should be only in place as long as *strictly necessary*, as required by the Senate under Senate standing order 23(3)(I) and as detailed in the committee's guidelines.

1.102 It is unclear to the committee why the principal regulations, being the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010, are not subject to sunseting, particularly as they appear to contain a large number of exemptions to the primary law which should only be in force as long as strictly necessary.

1.103 This issue is particularly concerning to the committee as this instrument is moving exemptions to the primary law, which were previously contained in individual instruments that were usually time-limited to three to five years, into the principal regulations which are not subject to sunseting. These exemptions now appear to be in place indefinitely in delegated legislation.

1.104 Further, noting the Assistant Treasurer's advice that modifications to the operation of the law are not undertaken in a vacuum, and as such new changes should fit within existing legal hierarchies, the committee would appreciate further detail about the existing hierarchy and how this impacts the decisions about where exemptions to primary law are located.

1.105 The committee therefore reiterates its longstanding concerns as to the use of delegated legislation to create ongoing exemptions to primary legislation, and requests the Assistant Treasurer's advice as to:

- **with reference to standing order 23(3)(I), why it is considered appropriate to move the ASIC exemptions from time limited individual instruments into principal regulations that are exempt from sunseting and therefore operate indefinitely;**
- **noting the committee's longstanding views, whether the Corporations Act can be amended to include the relevant exemptions;**

- **why the principal regulations, being the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010, are exempt from sunset, and if they could be amended to sunset to ensure a minimum level of parliamentary oversight; and**
- **further detail about what is meant by 'existing legal hierarchies' referred to in his response and how this concept is applied in practice when determining where to place exemptions from primary legislation.**

Chapter 2

Concluded matters

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

2.2 In this Monitor, the committee is not concluding its examination of any instruments raising significant technical scrutiny concerns.

Chapter 3

Agency engagement

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

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

New matters

3.3 Of the instruments registered on the Federal Register of Legislation between 1 February and 20 February 2023, the committee commenced engaging with the relevant agency via its secretariat about the following **six** instruments.¹

Instrument

Competition and Consumer Amendment (State/Territory Coal Market Price Emergency Law) Regulations 2023 [F2023L00095]

Emergency Response Fund Investment Mandate Amendment (Disaster Ready Fund) Direction 2023 [F2023L00128]

Industry Research and Development (Community Batteries for Household Solar Program) Instrument 2023 [F2023L00094]

Norfolk Island Applied Laws and Service Delivery (Queensland) Amendment (Education) Ordinance 2023 [F2023L00081]

Norfolk Island Continued Laws Amendment (Fire Control) Ordinance 2023 [F2023L00091]

Public Governance, Performance and Accountability Amendment (2023 Measures No. 1) Rules 2023 [F2023L00124]

Ongoing matters

3.4 Since the last Monitor was tabled, the committee has concluded all outstanding matters involving agencies that were listed as new or ongoing in *Delegated Legislation Monitor 2 of 2023*. These instruments are listed below as concluded agency matters.

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

Concluded matters

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

Instrument

Competition and Consumer Amendment (State/Territory Coal Market Price Emergency Law) Regulations 2023 [F2023L00095]

Industry Research and Development (Small Business Programs) Amendment Instrument 2022 [F2022L01521]

Statement of Principles concerning epicondylitis (Reasonable Hypothesis) (No. 5 of 2023) [F2023L00019]

Telecommunications (Infringement Notice Penalties) Determination 2022 [F2022L01741]

Telecommunications (Interception and Access) (Staff Members of Victoria Police) Declaration 2023 [F2023L00061]

Therapeutic Goods (Poisons Standard—February 2023) Instrument 2023 [F2023L00067]

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

Chapter 4

Undertakings

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

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

Implemented undertakings

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

Outstanding undertakings

4.4 During this period, two new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. No new undertakings were made to amend an Act or legislative instrument or to conduct a review in the relevant period.

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

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

Part II—Matters of interest to the Senate

Part II: Introduction

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

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

Chapter 5: Instruments raising significant issues

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

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

Chapter 6: Expenditure and taxation in delegated legislation

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

Chapter 7: Exemptions from disallowance and sunseting

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

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

Chapter 5

Instruments raising significant issues

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

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

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

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

Chapter 6

Expenditure and taxation in delegated legislation

6.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) in the interests of promoting appropriate parliamentary scrutiny and control of Commonwealth expenditure in delegated legislation.¹

Commonwealth expenditure

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

- instruments specifying Commonwealth expenditure under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986*; and
- instruments providing grants to the states and territories under the *Federal Financial Relations Act 2009*.

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

6.3 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified in instruments made under those Acts. Consequently, the specification of expenditure in an instrument made under these Acts effectively authorises the Commonwealth to spend public monies on the relevant grant or program. The scrutiny of these instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.² Accordingly, the committee has resolved to draw the Senate's attention to Commonwealth expenditure authorised by delegated legislation made under the FF(SP) Act and IRD Act under Senate standing order 23(4).³

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

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

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

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

Instrument	Amount	Grant/Program
Industry Research and Development (Supporting Australia's Textiles, Clothing and Footwear Industry Program) Instrument 2023 [F2023L00117]	\$6.1 million over 2022-26	Supporting Australia's Textiles, Clothing and Footwear Industry Program

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

6.5 The *Federal Financial Relations Act 2009* (the Federal Financial Relations Act) is a key source of legislative authority for funding provided by the Commonwealth to the states and territories. It empowers the relevant minister to make determinations providing for payments of general revenue assistance to the states and territories (under section 9) and specific purposes agreed with a state or territory (under section 16). Such instruments are not subject to disallowance by Parliament.⁴

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

6.7 The following tables list instruments providing for Commonwealth grants pursuant to the Federal Financial Relations Act framework registered in the relevant period.

General revenue assistance – section 9, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 8) Determination 2023 [F2023L00109]	\$160 396 820.31	Determines amounts of general purpose financial assistance to be paid to Western Australia and the Australian Capital Territory.

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

Specific purpose payments – section 16, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 8) Determination 2023 [F2023L00088]	\$569 051 207.15	Determines amounts of financial assistance to be paid to the states, the Australian Capital Territory or the Northern Territory to: support the delivery of agreed outputs or projects; facilitate state and territory reforms; and reward states and territories for nationally significant reforms.

Chapter 7

Exemptions from disallowance and sunseting

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

Exemptions from disallowance

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

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

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

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

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

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

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

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

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

Instruments which do not meet the committee's expectations

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

Instrument

Australia New Zealand Food Standards Code — Schedule 20 - Maximum residue limits Variation Instrument No. APVMA 1, 2023 [F2023L00107]

Competition and Consumer (Price Inquiry—Retail Deposit Products) Direction 2023 [F2023L00106]

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 8) Determination 2023 [F2023L00109]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 8) Determination 2023 [F2023L00088]

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

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

Exemptions from sunseting

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

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

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

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

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

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

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

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

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

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

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

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

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

Instruments which do not meet the committee's expectations

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

Instrument

Australia New Zealand Food Standards Code — Schedule 20 - Maximum residue limits Variation Instrument No. APVMA 1, 2023 [F2023L00107]

Competition and Consumer (Price Inquiry—Retail Deposit Products) Direction 2023 [F2023L00106]

Emergency Response Fund Investment Mandate Amendment (Disaster Ready Fund) Direction 2023 [F2023L00128]

Marine Order 98 (Harmful anti-fouling systems) 2023 [F2023L00103]

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation