

The Senate

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Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

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Introduction

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

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

This Monitor details matters relating to the committee's scrutiny of **86** legislative instruments registered on the Federal Register of Legislation between **24 September** and **7 October 2022**. This includes **77** disallowable instruments and **nine** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

Committee information

Terms of reference

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

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

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

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

Undertakings

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

Matters of interest to the Senate

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

Disallowance 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 identified significant technical scrutiny concerns in relation to the instruments listed below.

Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No. 2)

FRL No.	F2022L01321 ¹
Purpose	Specifies certain positions in the Department of Home Affairs and the Attorney-General's Department as 'Communications Access Co-ordinators' under subsection 6R(2) of the <i>Telecommunications (Interception and Access) Act 1979</i> .
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 25 October 2022)

Overview

1.3 The *Telecommunications (Interception and Access) Act 1979* (the Act) establishes the position of 'Communications Access Co-ordinator' as the primary point of liaison for interception agencies and telecommunications and carriage service providers in relation to telecommunications interception and data retention issues. The Act also empowers the Attorney-General to specify, by legislative instrument, a person or body as a Communications Access Co-ordinator.²

1.4 The Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No.2) (the instrument) specifies certain positions in the Department of Home Affairs and the Attorney-General's Department as

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

2 *Telecommunications (Interception and Access) Act 1979*, subsections 6R(1) and 6R(2).

Communications Access Co-ordinators under the Act. It also repeals and remakes the Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (the original 2022 instrument) to take into account a restructure of the Attorney-General's Department.³

1.5 The committee's secretariat, on behalf of the committee, engaged with the Attorney-General's Department in relation to the original 2022 instrument in October and November 2022. As the committee has identified similar scrutiny concerns with the current instrument, it has now resolved to raise those scrutiny concerns with the Attorney-General.

Scrutiny concerns

Delegation of administrative powers and functions;⁴ adequacy of explanatory materials⁵

1.6 Under the Act, the Communications Access Co-ordinator is defined as the Secretary of the Department or a person or body that the Attorney-General specifies in a legislative instrument.⁶ Section 5 of the instrument specifies certain persons as Communications Access Co-ordinators for this purpose. These are persons classified at Executive Level 1, Executive Level 2 or Senior Executive Service (SES) Band 1,⁷ in certain work areas of the Attorney-General's Department and the Department of Home Affairs, as well as SES Band 2 or Group Manager in a specified work area of the Department of Home Affairs. Communications Access Co-ordinators are empowered to perform certain functions under the Act.

1.7 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 administrative powers and functions are delegated under the instrument. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.8 The committee notes that the explanatory statement indicates that, in assigning Communications Access Co-ordinator functions to particular classification

3 Explanatory statement, p. 1.

4 Senate Standing Order 23(3)(c).

5 Senate Standing Order 23(3)(g).

6 *Telecommunications (Interception and Access) Act 1979*, subsections 6R(1), 6R(2).

7 These classification levels are determined by the Australian Public Service Commission and set out the responsibilities and duties expected at each level. More information is available at the [commission's website](#). Information about Senior Executive Service is available on the [APS website](#).

levels, the departments have had regard to the Australian Public Service Commission's APS Work Level standards and Integrated Leadership System.

1.9 However, the committee is concerned that neither the instrument nor its explanatory statement indicates which delegates will exercise the different powers specified in section 5. In addition, while the explanatory statement does explain who will exercise certain powers under the Act, it remains unclear to the committee which delegates will exercise the remaining powers.

1.10 The committee is particularly concerned about the delegation of the following powers under the Act, given their significance:

- Section 187B(2), which enables Communications Access Co-ordinators to declare that data retention obligations provided for in section 187A(1) apply to a service provider,⁸ where they otherwise would not apply on the basis that the relevant service is only provided to a person's immediate circle,⁹ or in the same area;¹⁰
- Section 187K, which enables Communications Access Co-ordinators to exempt or vary obligations imposed on service providers to retain data under Part 5-1A of the Act;
- Section 192 which enables Communications Access Co-ordinators to exempt specified persons from all or any of the obligations under Division 1 which allow them to intercept communications on their network; and
- Section 203, which enables Communications Access Co-ordinators to make determinations relating to delivery of intercepted information and requires those determinations to specify the format of delivery to agencies, the place and manner of delivery and ancillary matters.

1.11 While the explanatory statement indicates that decisions relating to interception capability plans and variation requests from interception and data retention obligations are appropriate for Executive Level 1 and Executive Level 2 officers, it is unclear to the committee whether these are decisions in relation to the powers in sections 187B(2), 187K and/or 192 of the Act.

1.12 Given the complex and sensitive nature of the powers set out in sections 187B(2), 187K, 192 and 203 of the Act, the committee considers that they are more appropriate to be exercised by officers at SES level. This is because sections 187B(2), 187K and 192 enable Communications Access Co-ordinators to make decisions creating exemptions to provisions of the Act and section 203 enables a delegate to

8 Subsection 187A(1) of the *Telecommunications (Interception and Access) Act 1979*.

9 Section 23 of the *Telecommunications Act 1997*.

10 Section 36 of the *Telecommunications (Interception and Access) Act 1979*.

make a determination which it appears to the committee may be a power that is legislative in character.

1.13 The committee therefore seeks the Attorney-General's advice as to who the powers under sections 187B(2), 187K, 192 and 203 of the Act will be delegated to, and whether the instrument can be amended to require exercise of these powers to be limited to SES level officers.

Ongoing matters

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

Competition and Consumer Amendment (Consumer Data Right) Regulations 2021

FRL No.	F2021L01617 ¹¹
Purpose	Amends the Competition and Consumer Regulations 2010 to exempt the Australian Energy Market Operator (AEMO) from four privacy safeguard obligations, and in circumstances where AEMO provides Consumer Data Right data to a retailer.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ¹² Notice of motion to disallow given on 25 October 2022

Overview

1.15 The Competition and Consumer Amendment (Consumer Data Right) Regulations 2021 (the instrument) amends the Competition and Consumer Regulations 2010 (the principal regulations) to exempt the Australian Energy Market Operator (AEMO) from four privacy safeguard obligations, and in circumstances where AEMO provides Consumer Data Right data to a retailer.

1.16 The committee first wrote to the former Treasurer on 10 February 2022, seeking further information in response to its technical scrutiny concerns. The former Minister for Superannuation, Financial Services and the Digital Economy (the former minister) responded on 28 March 2022.¹³ The committee retained scrutiny concerns

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

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

13 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 28 March 2022, pp. 8–10.

and sought advice from the new Assistant Treasurer in *Delegated Legislation Monitor 5 of 2022*.¹⁴ The Assistant Treasurer responded on 10 October 2022.¹⁵

Scrutiny concerns

Exemption from the operation of primary legislation;¹⁶ exemption from sunseting¹⁷

1.17 The committee initially raised concerns that the instrument exempts AEMO from the operation of four privacy safeguard obligations in the *Competition and Consumer Act 2010* (the Act) on an ongoing basis, due to the exemption of the principal regulations from sunseting.

1.18 The former minister advised that it was appropriate for the exemption to be included in delegated legislation on an ongoing basis. The former minister further advised that consideration could be given to the necessity and appropriateness of including the exemptions in delegated legislation as part of the statutory review of the Consumer Data Right legislation that had recently been initiated under the Act.

1.19 The committee retained its concerns about this matter. Accordingly, it requested the new Assistant Treasurer's advice as to whether the statutory review considered the use of delegated legislation to exempt AEMO from privacy safeguard obligations, the outcomes of the review, and whether the relevant exemptions could be time-limited to facilitate more frequent parliamentary oversight.

Assistant Treasurer's response¹⁸

1.20 In his response of 10 October 2022, the Assistant Treasurer advised that the statutory review 'did not consider this specific issue', and re-iterated previous advice that the preference was to maintain the permanency of the exemption in delegated legislation. Specifically, he advised that the regulations exist within a broader framework, structured around a hierarchy of legislative instruments that enable or engage with the fundamental principles of application of the Consumer Data Right regime. Further, in isolation, the Act does not impose privacy safeguards onto any individual or entity but rather empowers the minister to designate new sectors of the economy and classes of people as being data holders. Parallel to these instruments, the regulation-making powers allow for modifications and exceptions to the Act to

14 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp.46–49.

15 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 October 2022, pp. 32–33.

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

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

18 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 October 2022, pp. 32–33.

ensure the regime operates as intended. In this regard, the explanatory material notes that such regulations 'will only seek to declare that provisions of the [Consumer Data Right] are modified or varied in exceptional circumstances'.

1.21 In addition, as AEMO holding consumer data without being able to independently fulfil the privacy safeguards in the Act is exceptional compared with any other designated data holder, the Assistant Treasurer advised that the exemption falls within the expected use of the regulation-making power. Therefore, as the regulations ensure consumer privacy by applying safeguard obligations to the energy retailers who can meet the privacy safeguard requirements, he considered that this is the appropriate place in the legislative hierarchy for such a modification to be contained.

1.22 Finally, as AEMO's function as a data holder and its inability to independently meet the privacy safeguards is unlikely to change at any point in the future, the Assistant Treasurer advised that time limiting the exemption will subject AEMO and relevant retailers to the uncertainties inherent in the subordinate legislation-making process and add an administrative burden to the relevant government agencies in tracking and remaking the provisions.

Committee view

1.23 While the committee thanks the Assistant Treasurer for his advice as to why it is appropriate to include the exemptions in delegated legislation on an ongoing basis, it re-iterates its longstanding view that, if provisions which exempt persons or entities from the operation of primary legislation are to be included in delegated legislation, the relevant instrument should operate no longer than strictly necessary. At the very least, in this case, the committee would consider that the exemption should be subject to the usual sunseting process to allow a minimum level of parliamentary oversight. The committee does not consider this would impose an unreasonable administrative burden on government and notes the importance of sunseting regime to ensure measures, particularly those which create exemptions to primary law, are reviewed to ensure they remain relevant and necessary.

1.24 In light of the further information provided by the Assistant Treasurer, the committee requests that the instrument be amended to allow, at a minimum, the usual sunseting regime to apply in relation to these measures, to allow a minimum level of parliamentary oversight.

Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022

FRL No.	F2022L00471 ¹⁹
Purpose	Amends the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 to increase transparency of the operation and structure of franchise systems, before prospective franchisees enter into franchise agreements.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022) Notice of motion to disallow given on 25 October 2022

Overview

1.25 The Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022 (the instrument) amends the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the Franchising Code) to introduce a public Franchise Disclosure Register and increase transparency regarding the operation and structure of franchise systems.

1.26 The committee sought advice from the Treasurer in *Delegated Legislation Monitor 5 of 2022*.²⁰ The Minister for Small Business (the minister) responded on 5 October 2022.²¹ The committee retained scrutiny concerns and sought the minister's further advice in *Delegated Legislation Monitor 7 of 2022*.²² The minister responded on 15 November 2022.²³

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

20 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 29–30.

21 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 5 October 2022, pp. 4–7.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 7 of 2022](#) (26 October 2022) pp. 10–12.

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

Scrutiny concerns

*Parliamentary oversight – tabling documents*²⁴

1.27 New section 53J of the Franchising Code, as inserted by item 4 of schedule 1 to the instrument, requires a written report of a review into the operation of Part 5A of the industry code regulation to be provided to the minister before 30 June 2024. However, the instrument does not require that report to be tabled in Parliament. The explanatory statement indicates that the report will be published online to promote transparency and accountability, and that 'it is not necessary for the report to be tabled; since the Regulations have broad support, executive oversight of the review process is sufficient'.²⁵

1.28 In *Delegated Legislation Monitor 5 of 2022*,²⁶ the committee raised its concern that instruments providing for the review of significant matters should require the report relating to that review to be tabled in Parliament to enable parliamentary oversight. In her response of 5 October 2022, the minister explained that in this case, there is no tabling requirement because the review has an operational focus, Parliament will have an opportunity to scrutinise the new provisions of the instrument when the code sunsets on 1 April 2025, and for reasons of consistency with other industry codes.

1.29 However, due to the need to facilitate parliamentary oversight of instruments providing for the review of significant matters, and noting this instrument followed recommendations by another parliamentary committee, the Parliamentary Joint Committee on Corporations and Financial Services, the committee reiterated its request to the minister that the instrument be amended to include a tabling requirement for the review report.

*Minister's response*²⁷

1.30 In her response of 15 November 2022,²⁸ the minister reiterated her earlier advice that the report would be presented to the minister but there would be no tabling requirement because:

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

25 Explanatory instrument, p 11.

26 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 29–30.

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

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

- (a) the review and report have an operational focus on the relevant part of the Franchising Code, therefore are not significant such as to require Parliamentary scrutiny;
- (b) there will be an opportunity for Parliamentary scrutiny within a year of the review through the sunseting of the Franchising Code on 1 April 2025; and
- (c) the current review arrangements for the code are consistent with the broader legislative framework for industry codes.

1.31 The minister reiterated she would arrange for publication of the report online, to 'further the objectives of transparency and accountability noted by the Committee and...[ensure] availability of the report to all interested persons.'

Committee view

1.32 While the committee thanks the minister for her response and her confirmation that the report will be published online so that it will be available to interested persons, including members of Parliament and industry stakeholders, it remains concerned that instruments which provide for review of significant matters are not required to be tabled in Parliament, to enable appropriate Parliamentary oversight.

1.33 While the minister indicated that the review and report have an operational focus and are therefore not significant, the committee reiterates that as the measures follow recommendations of another Parliamentary Committee, this indicates the significance of the review and Parliament's continued interest in this matter. Further, the fact that other industry codes do not include a tabling requirement is not of itself a sufficient justification for failure to include such a requirement for this report, noting the committee's general expectation that all review reports relating to significant matters should be tabled, as a matter of best practice.

1.34 The committee notes the minister's advice that the Franchising Code will sunset next year to provide the committee with an opportunity to scrutinise any new instruments made following the review. Further, the committee is not persuaded by the argument that there should be no tabling requirement on the basis that this would create inconsistencies with other industry codes, noting that the tabling of all such review reports would support parliamentary oversight. However, despite this, it is still unclear to the committee as to why the report may be published online and made available to the public but cannot be tabled in Parliament, as tabling the report would enable appropriate parliamentary oversight.

1.35 While the committee thanks the minister for her advice and undertaking to make the report of the review available online, it retains its concerns regarding this approach and again reiterates its request that the instrument be amended to include

a requirement that the report of the review conducted under section 53J be tabled in the Parliament.

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).

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2)

FRL No.	F2021L01658 ¹
Purpose	Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) to specify the conditions that must be met so an issue of an interest in a litigation funding scheme is exempt from the operation of the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> and to define the term litigation funding scheme.
Authorising legislation	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022) Notice of motion to disallow given on 7 September 2022

Overview

2.2 The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2) (the instrument) specifies the conditions that must be met for the issue of an interest in a litigation funding scheme to be exempt from the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act).

2.3 The committee first sought advice about potential scrutiny concerns in the instrument in correspondence to the former Minister for Home Affairs (the former minister) on 10 February 2022.² The former minister responded on 25 February

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

2 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 9 February 2022, pp. 9–11.

2022.³ The committee sought the former minister's further advice on 31 March 2022.⁴ The former minister responded on 22 April 2022.⁵ The committee sought the Attorney-General's advice in *Delegated Legislation Monitor 5 of 2022*.⁶ The Attorney-General responded to the committee's request for further information on 4 October 2022.⁷ The committee retained scrutiny concerns about the instrument and again requested the Attorney-General's advice in *Delegated Legislation Monitor 7 of 2022*.⁸

Scrutiny issues

Exemption from the operation of primary legislation⁹

2.4 Section 248 of the Act empowers the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to make a written instrument which exempts individuals from provisions of the Act, either unconditionally or subject to specified conditions, the breach of which is subject to a civil penalty.

2.5 The committee noted the Attorney-General's advice that it is necessary to include the exemptions in delegated legislation due to the need for flexibility and urgency in the context of money laundering and counter-terrorism financing. However, the committee's longstanding view is that executive-made law should not ordinarily amend primary legislation, and where such provisions are included in delegated legislation, they should operate no longer than strictly necessary. These concerns are heightened where an instrument is exempt from sunseting without a justification in its explanatory statement.

2.6 The committee therefore requested the Attorney-General's further advice as to whether the instrument can be amended to provide that the exemption to primary legislation inserted by the instrument cease within five years of their commencement.

3 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 25 February 2022, pp. 1-4.

4 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 31 March 2022, pp. 12-13.

5 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 April 2022, pp. 6-7.

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp.43–45.

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

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 7 of 2022](#) (26 October 2022) pp. 6-9.

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

*Attorney-General's response*¹⁰

2.7 In his response of 18 November 2022, the Attorney-General agreed that, in light of the changing legal and regulatory position regarding litigation funders, the instrument could be amended to provide that the exemptions it inserts to primary legislation cease within five years of commencement.

2.8 The Attorney-General also reiterated his advice of 4 October 2022 that AUSTRAC would revisit the exemptions after Parliament's consideration of amendments to the Corporations Regulations 2001 to reflect a recent Federal Court decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited*.¹¹ The proposed amendments to the instrument would not be necessary if, in the course of such review, the AUSTRAC CEO determines it is instead appropriate to repeal the instrument.

Committee view

2.9 The committee welcomes the additional advice provided by the Attorney-General and his undertaking to amend the instrument to provide that the exemptions from primary legislation cease within five years of their commencement. The committee also notes the Attorney-General's advice that this amendment may not be necessary if the AUSTRAC CEO determines that it is appropriate to repeal the instrument, in light of Corporations Regulations amendments and the recent Federal Court decision noted above.

2.10 In light of the Attorney-General's further advice and undertaking to amend the instrument such that the exemptions to primary legislation cease within five years of their commencement, the committee concludes its examination of the instrument.

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

11 *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103. This decision overturned an earlier finding that litigation funding schemes are subject to the Managed Investment Schemes regime.

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022

FRL No.	F2022L00357 ¹²
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on a certain activity administered by the Attorney-General's Department.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance; Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 29 March 2022) Notice of motion to disallow given on 26 September 2022

Overview

2.11 The *Financial Framework (Supplementary Powers) Act 1997* (the Act) authorises the Commonwealth to spend public money on grants and programs specified in legislative instruments made under it. The Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022 (the instrument) amends the Financial Framework (Supplementary Powers) Regulations 1997 (the FF(SP) Regulations) to establish legislative authority for government spending on additional activities under the Justice Services—Community Legal Services Program (CLSP).

2.12 Item 2 of Schedule 1 to the instrument enables the CLSP to develop and implement a training package. Specifically, the amendments enable funding under the CLSP to support the development and implementation of the Mental Health Training Package for the Legal Assistance Sector (the training package).

2.13 The committee raised initial scrutiny concerns about this instrument in *Delegated Legislation Monitor 5 of 2022*.¹³ The Finance Minister responded on 26 September 2022, attaching information provided by the Attorney-General.¹⁴

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

13 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 31–33.

14 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 26 September 2022, pp. 34–36.

Scrutiny concerns

Supported by a constitutional head of legislative power¹⁵

2.14 The instrument's explanatory statement indicates that the constitutional basis for the training package comes from paragraph 51(v) of the Constitution, which empowers Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services'.¹⁶ The explanatory statement further notes that the reason for this is because the training package will be 'delivered exclusively online'.¹⁷

2.15 Based on this information, it was unclear to the committee how the activity authorised by the instrument might properly be characterised as a law with respect to 'postal, telegraphic, telephonic and other like services',¹⁸ particularly as the instrument itself does not prescribe the manner in which the program is to be delivered. It was also unclear to the committee whether any other constitutional heads of power could support the objectives of the training package, including in relation to mental health training and services.

2.16 Accordingly, the committee requested the minister's advice as to how the instrument might properly be characterised as a law falling under section 51(v) of the Constitution and whether any additional heads of power provide authority for the implementation and delivery of the training package.

Minister's response¹⁹

2.17 In his response of 26 September 2022, the Attorney-General advised, in summary, that the spending was to be wholly supported by the 'communications power' in paragraph 51(v).

2.18 The Attorney-General advised that the objective of the activity is to improve service delivery by the legal assistance sector to people experiencing mental health issues or at risk of suicide. This would be achieved through development of a compassion-based, trauma-informed mental health training package for the legal assistance sector, which is required to be delivered online so that it is accessible nationally to the Commonwealth-funded legal assistance providers and their employees across Australia. The Attorney-General also noted the reading down provision in item 87(c), that the objective of the activity 'also has the effect it would

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

16 Explanatory statement, p. 8.

17 Explanatory statement, p. 8.

18 Commonwealth of Australia Constitution Act, s 51(v).

19 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 26 September 2022, pp. 34–36.

have if it were limited to providing support for activities...with respect to telegraphic, telephonic, and other like services'.

2.19 The Attorney-General further advised that, as the training package is to be delivered exclusively online, expenditure on this program is supported wholly by the 'communications power'. For this reason, no other heads of power are specifically referenced; however, they may provide support for the activity, such as the 'territories power' (section 122) where funding is provided for the legal assistance sector in a territory.

Committee view

2.20 The committee thanks the Attorney-General for his advice about this matter. In noting this advice, the committee reiterates its general expectation that the relevant constitutional heads of power relied on to support government expenditure are clearly identified in the instrument's explanatory statement with an explanation of how the identified head of power supports the expenditure, drawing on relevant jurisprudence where appropriate.

2.21 In light of the information provided by the Attorney-General, the committee concludes its examination of the instrument in relation to this issue.

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 24 September and 7 October 2022, the committee commenced engaging with the relevant agency via its secretariat about the following **13** instruments.¹

Instrument

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

Banking (prudential standard) determination No. 2 of 2022 [F2022L01254]

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

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

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

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

Insurance (prudential standard) determination No. 6 of 2022 [F2022L01248]

Legislation (Deferral of Sunsetting—Life Insurance (Prudential Standard) Instruments) Certificate 2022 [F2022L01268]

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

In *Delegated Legislation Monitor 7 of 2022*, the Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Amendment (Review) Regulations 2022 [F2022L01232] was listed as a new matter. This instrument was listed in error, and the secretariat has not engaged with the relevant agency regarding this instrument.

Instrument

National Health (Eligible Midwives) Determination 2022 [F2022L01262]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Regional First Home Buyer Guarantee) Direction 2022 [F2022L01290]

Telecommunications (Charges) Determination 2022 [F2022L01253]

Telecommunications Carrier Licence Charges (Annual Charges) Determination (No. 1) 2022 [F2022L01326]

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

Ongoing matters

3.4 The committee is continuing to engage with relevant agencies via its secretariat about potential scrutiny concerns raised by **one** instrument.²

Instrument

Industry Fellowships Program (IFP) Grants Guidelines [F2022L01187]

Concluded matters

3.5 The committee has concluded its consideration of the following **ten** instruments after engagement with relevant agencies via its secretariat.³

Instrument

ASIC Corporations (Product Intervention Order Extension—Binary Options) Instrument 2022/779 [F2022L01169]

Banking (prudential standard) determination No. 2 of 2022 [F2022L01254]

Insurance (prudential standard) determination No. 6 of 2022 [F2022L01248]

Legislation (Deferral of Sunsetting—Life Insurance (Prudential Standard) Instruments) Certificate 2022 [F2022L01268]

Military Superannuation and Benefits (Eligible Members) Declaration 2022 [F2022L01141]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Regional First Home Buyer Guarantee) Direction 2022 [F2022L01290]

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

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

Instrument

Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2022-2023 (No. 1) [F2022L01151]

Telecommunications (Charges) Determination 2022 [F2022L01253]

Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 [F2022L01097]

Telecommunications Carrier Licence Charges (Annual Charges) Determination (No. 1) 2022 [F2022L01326]

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 **seven** explanatory statements in response to the committee's scrutiny concerns. The following table records undertakings to amend an Act, legislative instrument or conduct a review that the committee is aware have been implemented since the tabling of the committee's last Monitor.

Instrument	Undertaking	Date implemented
Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021 [F2021L01812]	The Department of Health undertook to amend the instrument in response to the committee's scrutiny concerns.	21/07/2022
Higher Education Provider Approval No 1 of 2021 [F2021L00747]	The Department of Education, Skills and Employment undertook to amend the instrument in response to the committee's scrutiny concerns.	09/09/2022
Higher Education Provider Approval No. 2 of 2021 [F2021L00965]	The Department of Education, Skills and Employment undertook to amend the instrument in response to the committee's scrutiny concerns.	09/09/2022
Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021 [F2021L01708]	The Minister for Climate Change and Energy undertook to engage with the Minister for Industry and Science to repeal the instrument.	24/10/2022

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

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

Outstanding undertakings

4.4 During this period, no new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. The following table records new undertakings to amend an Act, legislative instrument or conduct a review in the relevant period that remain outstanding. The committee draws these undertakings to the attention of the Senate.

Instrument	Undertaking	Date of Undertaking
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2) [F2021L01658]	The Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	18/11/2022

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 raises significant issues under standing order 23(4). In practice, this may include instruments which:

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

Chapter 6: Expenditure and taxation in delegated legislation

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

Chapter 7: Exemptions from disallowance and sunseting

This Chapter identifies the instruments registered in the relevant period which are exempt from disallowance and sunseting, and which do not satisfy the committee's expectations in relation to the source and appropriateness of those exemptions under standing order 23(4A) and 23(3)(k).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 This Chapter is divided into two sections, covering expenditure-related matters and the levying of taxation in delegated legislation.

Commonwealth expenditure

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

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

Advance to the Finance Minister determinations

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

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

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

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

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

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

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

6.6 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified in instruments made under those Acts. Consequently, the specification of expenditure in an instrument made under these Acts effectively authorises the Commonwealth to spend public monies on the relevant grant or program. The scrutiny of these instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.⁵ 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).⁶

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

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

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

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

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

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 2) Regulations 2022 [F2022L01284]	Up to \$2.5 million in 2022-23	Grant to Fortem Australia Limited

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

6.8 The *Federal Financial Relations Act 2009* (the Federal Financial Relations Act) is a key source of legislative authority for funding provided by the Commonwealth to 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.⁷

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

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

7 *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. 4) Determination 2022 [F2022L01280]	\$529 690 207.82	Determines amounts of financial assistance to be paid to the States, the Australian Capital Territory and 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.

Instruments providing for expenditure pursuant to special accounts

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

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

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

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

Levying of taxation in delegated legislation

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

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

Chapter 7

Exemptions from disallowance and sunseting

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

Exemptions from disallowance

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

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 4) Determination 2022 [F2022L01280]

Industrial Chemicals Environmental Management (Register) Rules 2022 [F2022L01329]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Regional First Home Buyer Guarantee) Direction 2022 [F2022L01290]

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

Industrial Chemicals Environmental Management (Register) Rules 2022 [F2022L01329]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Regional First Home Buyer Guarantee) Direction 2022 [F2022L01290]

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation