

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

Monitor 12 of 2021

11 August 2021

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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 the Hon Concetta Fierravanti-Wells (Chair)	New South Wales, LP
Senator the Hon Kim Carr (Deputy Chair)	Victoria, ALP
Senator Raff Ciccone	Victoria, ALP
Senator Perin Davey	New South Wales, NATS
Senator Nita Green	Queensland, ALP
Senator Paul Scarr	Queensland, LP

## Secretariat

Mr Glenn Ryall, Secretary  
Ms Hannah Wilkins, Principal Research Officer (A/g)  
Ms Anika Khwaja, Principal Research Officer  
Ms Sarah Batts, Senior Research Officer  
Ms Katie Helme, Senior Research Officer  
Mr Matthew Kowaluk, Senior Research Officer  
Ms Anita Zovak, 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](mailto:sdlc.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)



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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 disallowable legislative instruments, and to decide whether they comply with the committee's non-partisan scrutiny principles.

## Terms of reference

The committee's 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; and
- (k) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

Senate standing order 23(4) also 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.

## Nature of the committee's scrutiny

The committee's work may be broadly described as technical legislative scrutiny. In this regard, the committee does not examine the policy merits of delegated legislation. However, if the committee determines that an instrument raises significant issues, it may write to the relevant legislation committee to alert that

committee to the instrument, or otherwise draw the instrument to the attention of the Senate.

Where an instrument does not appear to comply with the committee's technical scrutiny principles, the committee's usual approach is to correspond with the responsible minister or relevant agency to seek further explanation or clarification of the matter at issue. The committee may also seek an undertaking for specific action to address its scrutiny concerns.

The committee's work is supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.<sup>1</sup>

## **Publications**

The committee's usual practice is to table a report, the *Delegated Legislation Monitor*, each Senate sitting week. The monitor provides an overview of the committee's scrutiny of disallowable legislative instruments for the preceding period. Disallowable legislative instruments detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.<sup>2</sup>

## **Ministerial correspondence**

The committee undertakes formal correspondence with ministers in order to resolve more significant scrutiny concerns. Ministerial correspondence is published on the committee's website.<sup>3</sup>

## **Agency correspondence**

The committee undertakes informal correspondence with agencies via its secretariat to gather information about potential scrutiny concerns. This correspondence 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, a record of the instrument, scrutiny issue and status of the correspondence is included in Appendix A (new matters), Appendix B (ongoing matters) and Appendix C (concluded matters) in the monitor.

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1 For further information on the disallowance process and the work of the committee see *Oggers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

2 *Index of instruments*, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index).

3 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Monitor](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor).

## Guidelines

Guidelines relating to the committee's scrutiny principles are published on the committee's website.<sup>4</sup>

## General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.<sup>5</sup>

The Senate Disallowable Instruments List provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.<sup>6</sup>

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.<sup>7</sup>

## Instruments considered in this monitor

The committee examined 61 disallowable legislative instruments registered on the Federal Register of Legislation between 19 and 25 June 2021.

This monitor identifies the instruments registered in this period about which the committee has or had scrutiny concerns. It also identifies instruments registered before this period in relation to which the committee is continuing to engage with the relevant minister or agency, or has concluded its examination.

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4 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Guidelines](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines).

5 See Australian Government, Federal Register of Legislation, [www.legislation.gov.au](http://www.legislation.gov.au).

6 Parliament of Australia, *Senate Disallowable Instruments List*, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/leginstruments/Senate\\_Disallowable\\_Instruments\\_List](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List).

7 *Disallowance Alert 2021*, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Disallowance\\_Alert\\_2021](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_Alert_2021).



# Chapter 1

## Instruments raising significant scrutiny concerns

1.1 This chapter details the instruments which raise significant scrutiny concerns in relation to which the committee is seeking further information from the relevant minister or of which the committee has concluded its examination.

1.2 Where the committee has significant unresolved scrutiny concerns about an instrument contained in this chapter, the committee may give a notice of motion to disallow it, subject to any further developments between the time that the notice is given and the time the notice is scheduled for debate in the Senate. Accordingly, where appropriate, this chapter also details the committee's reasons for withdrawing notices of motion to disallow such instruments.

## Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]

<b>FRL No.</b>	<a href="#">F2020L00863</a> <sup>1</sup>
<b>Purpose</b>	To amend the governance standards to provide that registered entities must not engage in conduct that may be dealt with as a relevant kind of summary offence, and to require registered entities to maintain reasonable internal control procedures in relation to its resources.
<b>Authorising legislation</b>	<i>Australian Charities and Not-for-profits Commission Act 2012</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 3 August 2021).

### Overview

1.3 The instrument amends the Australian Charities and Not-for-profits Commission Regulation 2013 (the Principal Regulations) to alter certain governance standards relating to charities engagement in, or promotion of, unlawful activities. These amendments include providing that a registered entity must:

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

- not engage in conduct or omit to engage in conduct that may be dealt with as a summary offence under an Australian law relating to certain types of actions; and
- maintain reasonable internal control procedures to ensure its resources are not used to actively promote another entity's acts or omissions that may be dealt with as such an offence.

1.4 Registered entities must comply with these standards in order to qualify for certain exemptions, benefits and concessions under the *Australian Charities and Not-for-profits Commission Act 2021* (ACNC Act). Failure to comply with these governance standards may result in revocation of the entity's registration under section 35-10 of the ACNC Act and the exercise of certain enforcement powers under Part 4-2 of the ACNC Act.

1.5 The explanatory statement explains that the purpose of these amendments is to 'give the public greater confidence that a registered entity is governed in a way that is consistent with its purposes, and that it protects its assets, reputation, and the people it works with', and 'make clear that in all cases, a registered entity may not be entitled to registration under the Act if it engages in any of the relevant summary offences'.<sup>2</sup>

## **Scrutiny concerns**

### ***Conferral of discretionary powers***<sup>3</sup>

1.6 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer discretionary powers on a person.

1.7 As noted above, the instrument amends the Principal Regulations to alter governance standards relating to charities' engagement in, or promotion of, certain unlawful activities. The amendments made by the instrument appear to enable the ACNC Commissioner to exercise a range of discretionary powers in determining whether a registered entity has failed to comply with these governance standards.

1.8 For example, the instrument inserts new paragraph 45.15(2)(aa) into the Principal Regulations. This paragraph provides that registered entities must not engage in conduct, or omit to engage in conduct, if that conduct may be dealt with as a summary offence under Australian law and the offence relates to certain types of actions. While the explanatory statement to the instrument provides some examples as to the type of offences to which this provision may apply, it is unclear what the full scope of the offences may be.

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2 Explanatory statement, p. 4.

3 Scrutiny principle: Senate Standing Order 23(3)(c).

1.9 Additionally, the instrument inserts a note to subsection 45.15(2) to the Principal Regulations. This note states that the ACNC Commissioner may consult with a law enforcement agency or other relevant entity in forming a reasonable belief about compliance with the governance standards under subsection 35-10(1) of ACNC Act. The explanatory statement explains that this is intended to 'address general concerns from stakeholders about the ACNC Commissioner's discretion and enforcement powers'.<sup>4</sup> However, it does not provide guidance as to the scope of this discretion, such as the circumstances in which the ACNC Commissioner may seek such advice, or indicate which entities may be contacted.

1.10 Further, the instrument inserts new subsection 45.15(3) into the Principal Regulations. This provision requires registered entities to maintain reasonable internal control procedures to ensure that its resources are neither used nor continued to be used to actively promote another entity's acts or omissions that may be dealt with under paragraphs 45.15(2)(a), (aa) or (b). While some examples of the matters that internal control procedures could deal with are set out on the face of the instrument, in the absence of further information in the explanatory statement, it is unclear what objective test will be applied in determining whether a registered entity has complied with the requirements in subsection 45.15(3).

1.11 The committee generally considers that instruments that confer discretionary powers on a person should clearly address the purpose and scope the discretion and why it is considered necessary in the explanatory statement. Additionally, the committee expects that the explanatory statement should explain the factors that must be considered in exercising the discretion, and the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

1.12 In this instance, the committee considers that the explanatory statement does not provide sufficient detail as to the scope of these discretionary powers, their necessity, or any relevant limitations. The committee considers that such information is important to enable charities to clearly understand their obligations under the governance standards. The committee's concerns are heightened in this instance noting that the discretionary powers to be exercised by the Commissioner may relate to the determination of whether a criminal law has been breached.

***Implied freedom of political communication<sup>5</sup>***

1.13 Senate standing order 23(3)(b) requires the committee to scrutinise each legislative instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid. This includes whether an instrument may restrict the implied freedom of political communication.

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4 Explanatory statement, p. 4.

5 Scrutiny principle: Senate Standing Order 23(3)(b).

1.14 The instrument has the effect of preventing registered entities from engaging in or actively promoting certain kinds of summary offences as this may affect an entity's entitlement to registration under the ACNC Act. However, it is unclear whether the instrument may limit registered entities' implied freedom of political communication, by preventing them from engaging in, or supporting certain activities. This may include limiting their ability to engage in, or support, certain types of political protest.

1.15 The committee generally expects that instruments which may have the potential to infringe the implied freedom of political communication should include an explanation of how the instrument does not impermissibly restrict the implied freedom in the explanatory statement. In this instance, the explanatory statement does not address the issue.

### **Actions to date**

1.16 Since July 2021, the committee has been corresponding with the Assistant Treasurer to address its technical scrutiny concerns. The committee also considers that this instrument may raise significant policy issues which should be considered by the Senate. Accordingly, the committee drew the instrument to the attention of the Senate in accordance with Senate standing order 23(4) in *Delegated Legislation Monitor 10 of 2021*,<sup>6</sup> and wrote to the Senate Economics Legislation Committee.<sup>7</sup>

1.17 Since raising concerns in relation to the instrument, the committee has also received considerable correspondence from a wide range of charities and non-government organisations in both writing and by telephone. This correspondence has served to heighten the committee's scrutiny concerns about the potential impact the instrument may have on registered charities.

### ***Correspondence with the Assistant Treasurer***

1.18 The committee wrote to the Assistant Treasurer on 15 July 2021 to seek his advice regarding its significant technical scrutiny concerns.<sup>8</sup> In particular, the committee requested more detailed information about:

- why it is considered necessary and appropriate to expand the discretion that the ACNC Commissioner may exercise in determining whether a registered entity complies with the governance standards under section 45.15 of the Principal Regulations, further detail about the scope of these powers, and any limitations or safeguards that may apply; and

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<sup>6</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 10 of 2021*, p. 4.

<sup>7</sup> Copies of the letters are available on the committee's [website](#).

<sup>8</sup> Copies of the letters are available on the committee's [website](#).

- how the instrument is compliant with the implied freedom of political communication, and whether the explanatory statement can be amended to include this analysis.

1.19 The Assistant Treasurer responded to the committee's concerns in a letter dated 28 July 2021.<sup>9</sup> With regard to the committee's concerns about the conferral of discretionary powers, the Assistant Treasurer advised that the instrument does not expand, modify, or alter the ACNC Commissioner's powers which are set out in the ACNC Act and advised that a number of safeguards and limitations on the exercise of the ACNC Commissioner's discretionary powers apply under the Act, including the availability of independent merits review and judicial review.

1.20 The response noted new paragraph 45.15(2)(aa) does not enable the ACNC Commissioner to exercise discretion in determining which summary offences will apply but rather whether a summary offence is covered by this new paragraph depends on whether it is a summary offence under an Australian law and the offence relates to one of the matters prescribed in subparagraphs 45.15(2)(aa)(i) to (iv). In this regard, the Assistant Treasurer stated that it would be neither practical nor appropriate to list all of the specific summary offences as it would obscure the policy outcome intended to be achieved by the standard and would require constant revision. However, the Assistant Treasurer noted that the ACNC will provide guidance and education to registered charities once the instrument comes into effect to help them understand and comply with the governance standards.

1.21 The Assistant Treasurer further explained that whether a charity's internal control procedures meet the requirements of the standard under subsection 45.15(3) is 'a question of fact as assessed against an objective standard having regard to the individual circumstances of the charity'.

1.22 With regard to the committee comments regarding the impact of the instrument on the implied freedom of political communication, the Assistant Treasurer stated that the implied freedom is not absolute and political communication may be subject to valid legislative restrictions in certain circumstances. The Assistant Treasurer therefore advised that this instrument does not interfere with the implied freedom as the instrument relate solely to matters that are unlawful under other Australian laws.

### **Committee comment**

1.23 The committee thanks the Assistant Treasurer for his engagement in relation to this instrument. However, while acknowledging the Assistant Treasurer's advice, the committee retains some significant concerns regarding aspects of this instrument. The committee's comments with regard to each of these issues are outlined below.

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<sup>9</sup> Copies of the letters are available on the committee's [website](#).

### ***Conferral of discretionary powers***

1.24 The committee notes the Assistant Treasurer's advice that the ACNC Commissioner's powers are set out in the ACNC Act and this instrument does not expand these powers. The committee also thanks the Assistant Treasurer for his comprehensive overview the limitations and safeguards on the exercise of these powers, and his advice that the ACNC will provide education and guidance to charities once the instrument comes into effect to help them comply with the governance standard.

1.25 However, the committee remains particularly concerned that subsection 45.15(3) appears to provide for the exercise of a broad discretion by the ACNC Commissioner.

1.26 Although the Assistant Treasurer advised that determining whether a registered entity has reasonable internal control measures is a 'question of fact as assessed against an objective standard', it is unclear how this will not require the ACNC Commissioner to make a subjective judgement, noting that they must have regard to the individual circumstances of each charity. The committee notes that neither the explanatory statement to the instrument nor the Assistant Treasurer's response provides clear guidance as to the factors that the ACNC Commissioner will consider in determining whether a registered entity has complied with the requirement in subsection 45.15(3).

1.27 In the absence of further information in the Assistant Treasurer's response, the committee retains significant concerns that this provision appears to enable the ACNC Commissioner to exercise a broad discretion in determining compliance with the governance standards. The committee's concerns are heightened noting that the lack of clarity on what will constitute 'reasonable internal control procedures' may inhibit charities' ability to understand their obligations under the instrument.

**1.28 In light of the matters outlined above, the committee therefore requests the Assistant Treasurer's more detailed advice as to:**

- **what objective test will be applied to determine whether a registered entity has complied with the requirements of subsection 45.15(3); and**
- **what factors the ACNC Commissioner must consider in making this determination.**

### ***Implied freedom of political communication***

1.29 The committee also thanks the Assistant Treasurer for his advice that the instrument does not interfere with the implied freedom of political communication as it relates solely to matters that are unlawful under other Australian laws. However, while noting this advice, the committee remains concerned that the Assistant Treasurer has not provided a clear explanation as to how the instrument as a whole does not impermissibly restrict the implied freedom.

1.30 In particular, the committee does not consider that the Assistant Treasurer's explanation adequately addresses the effect of the requirements in subsection 45.15(3) relating to internal control procedures on the implied freedom. The committee's concerns centre on the fact that those requirements relate to the promotion of unlawful activities by other entities and not unlawful actions undertaken by the registered entities themselves. Failure to comply with these requirements may result in the application of certain enforcement powers under Part 4-2 of the ACNC Act.

1.31 In this regard, it appears that the instrument may limit a registered entity's ability to support or promote certain types of political protest, without having committed an unlawful act themselves. Accordingly, in the absence of further information from the Assistant Treasurer, it is unclear whether this provision may impermissibly burden the implied freedom of political communication in its terms, operation, or effect.

**1.32 The committee therefore requests the Assistant Treasurer's more detailed advice as to how the instrument as a whole, including subsection 45.15(3), does not impermissibly restrict the implied freedom of political communication.**

# Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]

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

<b>FRL No.</b>	<a href="#">F2021L00590</a> and <a href="#">F2021L01043</a> <sup>1</sup>
<b>Purpose</b>	<p>F2021L00590: To expand the operating remit of the Australian Renewable Energy Agency and permit the agency to invest in a wider range of clean energy technologies to deliver programs announced in the 2020-21 Budget.</p> <p>F2021L01043: To expand the operating remit of the Australian Renewable Energy Agency to permit it to invest in a wider range of technologies for the deployment of initiatives announced in the 2020-21 Budget.</p>
<b>Authorising legislation</b>	<i>Australian Renewable Energy Agency Act 2011</i>
<b>Portfolio</b>	Industry, Science, Energy and Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 3 August 2021).

### Overview

1.1 The Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590] (the first ARENA instrument) sought to amend the Australian Renewable Energy Agency Regulation 2016 to allow the Australian Renewable Energy Agency (the ARENA) to provide financial assistance in relation to the following programs announced in the 2020-21 Budget:

- Freight Energy Productivity Program;
- Future Fuels Fund;
- Industrial Energy Transformation Studies Program;
- Regional Australia Microgrid Pilots Program; and
- Technology Investment Roadmap.

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

1.2 The first ARENA instrument was disallowed in the Senate on 22 June 2021.

1.3 On 29 July 2021 the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] (the second ARENA instrument) was registered on the Federal Register of Legislation. This instrument amends the Australian Renewable Energy Agency Regulation 2016 to allow the Australian Renewable Energy Agency (the ARENA) to provide financial assistance in relation to the following programs announced in the 2020-21 Budget:

- Freight Efficiency Assistance Grants initiative;
- Freight Energy Productivity Trial Program;
- Future Fuels Fund;
- Industrial Energy Transformation Studies Program; and
- Regional Australia Microgrid Pilots Program.

1.4 It also confers functions on the ARENA in relation to priority low emissions technologies.

### **Scrutiny concerns**

#### **Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]**

1.5 The committee wrote to the Minister for Energy and Emissions Reduction on 17 June 2021 to set out the below scrutiny concerns in relation to the first ARENA instrument.

#### ***Compliance with authorising legislation***

1.6 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act.

1.7 The instrument was made under the *Australian Renewable Energy Agency Act 2011* (the Act). Section 74 of the Act provides the Governor-General with the power to make regulations under the Act. Section 8 prescribes the functions of the ARENA. These functions relate to research and development of renewable energy technologies.

1.8 Paragraph 8(f) provides that further functions can be prescribed via regulations made under the Act. The explanatory statement to the instrument noted that the legislated functions of the ARENA are limited to supporting renewable energy technologies and that the instrument 'provides ARENA with the necessary authority to deliver any non-renewable elements of the programs, supporting emissions reductions through broader clean energy technologies such as energy efficiency and non-renewable low-emission technologies.'

1.9 From a scrutiny perspective, the committee was concerned that the instrument was expanding the remit of the ARENA beyond what was envisaged by Parliament when the Act was passed. The committee noted that the object of the Act

is to improve the competitiveness and supply of renewable energy in Australia. The committee further noted that there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that the ARENA would have the ability to foster anything other than renewable energy technologies.

1.10 The committee's view is that statutory provisions must be read in context<sup>2</sup> and that the terminology used in section 8 to provide the ARENA's functions in relation to renewable energy indicates there are limits on the power to prescribe further functions by regulation. In addition, the committee considers that in general, delegated legislation can fill out the detail of an Act but cannot extend it. Where the power to extend the operation of an Act is claimed, it would need to be clear that the enabling provision is a Henry VIII power. In this instance, it did not appear to the committee that this is the case.

### ***Significant matters in delegated legislation***

1.11 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

1.12 The committee raised concerns that the instrument dealt with the significant matter of expanding the jurisdiction of the ARENA from investing in renewable energy technologies to programs relating to energy efficiency and low-emissions technology. Given the scope and impact of the measures, from a scrutiny perspective, it was the committee's view that they are more appropriate for parliamentary enactment.

1.13 In this regard, the explanatory statement did not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation, rather than primary legislation.

### ***Consultation with persons affected***

1.14 Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, including relevant experts, were adequately consulted in relation to the specific instrument.

1.15 Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the instrument had an adequate

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2 As per *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28, para [69].

opportunity to comment on its proposed content, as per paragraph 17(2)(b) of the Legislation Act.

1.16 The committee therefore expects explanatory statements to instruments to provide details of any consultation undertaken with persons likely to be affected by the instrument. If no consultation was undertaken with persons likely to be affected, the committee expects the explanatory statement to explain why no such consultation was undertaken.

1.17 In this instance, the explanatory statement to the instrument stated that exposure drafts of the instrument were circulated for consultation with government stakeholders including the Department of Finance, the Department of Prime Minister and Cabinet, and the ARENA. The explanatory statement further explained that 'public consultation was not necessary, as the Regulations only addresses machinery issues relating to the administration of announced Government programs. ARENA will undertake appropriate consultation on the implementation of the programs consistent with its statutory framework and responsibilities.'

1.18 While noting this explanation, the committee considered that the measures provided for in the instrument are more than machinery in nature, given that they substantially expand the jurisdiction of the ARENA to invest public funds. As such, from a scrutiny perspective, it is the committee's view that stakeholders and experts should have been consulted in relation to the instrument.

### **Actions to date**

1.19 The Senate disallowed the first ARENA instrument on 22 June 2021, and the second ARENA instrument was registered on 29 July 2021.

### ***Minister's response of 3 August 2021***

#### *Compliance with authorising legislation*

1.20 The minister responded to the committee's letter in relation to the first ARENA instrument on 3 August 2021. This response addresses the committee's scrutiny concerns in relation to the first instrument while noting that the advice provided is of relevance to the second ARENA instrument.

1.21 The minister made several arguments in support of both the first and second ARENA instruments' compliance with the Act.

1.22 First, the minister advised that section 3 of the Act sets out the main object of the Act, as opposed to the sole object. This drafting, he advised, provides the flexibility for secondary objects of the Act beyond the purpose of renewable energy.

1.23 Secondly, the minister advised that the object of the Act must be read in conjunction with the Act's constitutional basis, being a measure towards meeting Australia's international obligations under the United Nations Framework Convention on Climate Change and the Paris Agreement. This would permit objects beyond investment in renewable energy.

1.24 Thirdly, the minister advised that the wording of paragraphs 8(f) and (g) do not limit the prescription of additional functions to the ARENA to those concerning renewable energy as they are set out in broad terms to be ‘any other functions that are prescribed’. The minister also noted that if Parliament had intended for regulations conferring additional functions on the ARENA to be limited to renewable energy then this would have been made clear in the Act or the accompanying explanatory memorandum.

1.25 Fourthly, the minister advised that the regulations do not expand the operation of the Act but confer functions under a power to do so and can be seen as ‘filling out the detail’ of the ARENA Act as opposed to extending its operation.

1.26 Finally, the minister advised that regulations expanding the remit of ARENA were made in 2016 and the then-Regulations and Ordinances Committee did not raise any scrutiny concerns at that time and have been in place without challenge for over five years.

#### *Consultation with persons affected*

#### *Significant matters in delegated legislation*

1.27 The minister also provided detailed information in relation to the consultation that was undertaken on the measures. He further advised that the measures are suited to delegated legislation to provide for prompt delivery of government commitments, and as the programs are time limited and will need to be amended over time.

#### **Committee comment**

1.28 The committee thanks the minister for his detailed advice of 3 August 2021. However, the committee remains concerned that the second ARENA instrument is expanding the remit of the ARENA beyond what was envisaged by Parliament.

1.29 The committee considers that the second ARENA instrument, like the first instrument, deals with the significant matter of expanding the jurisdiction of the ARENA to provide it with functions relating to low emissions technologies. Given the scope and impact of the measures, and the committee’s view that they go beyond filling out the detail of the Act, the committee retains its position that the measures in the second ARENA instrument appear more appropriate for parliamentary enactment.

1.30 While noting the minister’s advice about the drafting of section 3 of the Act in relation to the ‘main’ object, it is the committee’s view that the Act has been drafted in such a way as to limit the purpose of the Act to renewable energy objectives. Both paragraphs of section 3 refer to renewable energy, indicating that the Act is intended to be so limited, and it does not appear to refer to any additional or secondary objects. The committee’s view is that no additional objects can be implied from the Act and the objects clause cannot be interpreted in a way as to render the objects of the Act unlimited.

1.31 In addition, while the Act may, in part, rely on the external affairs power, the committee's view is that section 14 of the Act appears to operate as a limitation on the functions of the ARENA, not as an avenue to expand these functions beyond functions relating to renewable energy.

1.32 From a scrutiny perspective, the committee remains of the view that the second ARENA instrument is expanding the remit of the ARENA beyond what was envisaged by Parliament when the Act was passed. The committee reiterates its views that there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that the ARENA would have the ability to foster anything other than renewable energy technologies. The committee notes that the minister's position is that the absence of a clearly drafted legislative limit or an express statement in the explanatory memorandum that the ARENA is limited to renewable energy indicates that Parliament did not intend the ARENA to be so limited. Respectfully, the committee does not accept this, and considers that the express references to renewable energy in the Act and the explanatory memorandum are a clear indication of Parliament's intent.

1.33 The committee also considers that the lack of comment in relation to the 2016 instrument by the then-Regulations and Ordinances Committee has no bearing on this committee's concerns. In this context, the committee notes that its standing orders in relation to scrutiny of delegated legislation have been amended twice by the Senate since 2016.

1.34 Finally, the committee notes that section 48 of the Legislation Act provides that a legislative instrument that is the same in substance as a legislative instrument that has been disallowed must not be made within 6 months after the day of disallowance. It is unclear to the committee whether the second ARENA instrument may be considered to be the 'same in substance' as the first ARENA instrument and therefore invalid. The minister's letter of 3 August 2021 stated that the advice set out in that letter is relevant to both the first and second ARENA instruments, which implies similarity between the instruments.

**1.35 In light of the matters outlined above, the committee remains of the view that the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] expands the scope of the Australian Renewable Energy Agency beyond the scope what was envisaged by the Parliament when it passed the *Australian Renewable Energy Agency Act 2011*. The committee also maintains its view that these measures go beyond filling out the detail of the Act and that they therefore appear more appropriate for parliamentary enactment.**

**1.36 The committee therefore requests the minister's further advice as to whether there is any additional evidence, beyond that already provided to the committee, that Parliament intended that functions not relating to renewable energy could be conferred on the ARENA.**

**1.37 The committee also requests the minister's advice as to why the second ARENA instrument should not be considered to be the 'same in substance' as the first ARENA instrument.**

# Australia's Foreign Relations (State and Territory Arrangements) Rules 2020

<b>FRL No.</b>	<a href="#">F2020L01569</a> <sup>1</sup>
<b>Purpose</b>	To prescribe matters required or permitted by the <i>Australia's Foreign Relations (State and Territory Arrangements) Act 2020</i> including exempt arrangements, additional information to be included in the Public Register and information State/Territory entities must include in a notice to the Minister.
<b>Authorising legislation</b>	<i>Australia's Foreign Relations (State and Territory Arrangements) Act 2020</i>
<b>Portfolio</b>	Foreign Affairs and Trade
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 10 December 2020). Notice of motion to disallow placed on 11 May 2021. <sup>2</sup>

## Overview

1.1 The *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act) established the Foreign Arrangements Scheme (the Scheme) which commenced on 10 December 2020. The purpose of the Scheme is to ensure that arrangements between state or territory governments (and their entities) and foreign entities do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy. The Scheme provides for states and territories and their entities to notify or seek approval from the Minister for Foreign Affairs if they propose to negotiate, or enter, or have entered a foreign arrangement. It creates obligations in respect of both future arrangements and existing arrangements. It also deals with subsidiary arrangements entered into for the purposes of implementing a foreign arrangement.<sup>3</sup>

1.2 This instrument prescribes the following matters for the purposes of the Act:

- exempt arrangements;
- additional information to be included in the Public Register; and

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

2 Notice given by the Chair of the committee. See *Disallowance Alert 2021* at [https://www.apf.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Disallowance\\_Alert\\_2021](https://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/Disallowance_Alert_2021).

3 Department of Foreign Affairs and Trade, *Foreign Arrangements Scheme*, <https://www.foreignarrangements.gov.au/>.

- information State and Territory entities must include in a notice to the minister.

## Scrutiny concerns

### *Matters more appropriate for parliamentary enactment*<sup>4</sup>

#### *Clarity of drafting*<sup>5</sup>

1.3 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. This includes instruments which provide exemptions to primary legislation. In addition, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting is defective or unclear.

1.4 Section 5 of the instrument provides that certain arrangements are exempt from the notification and approval provisions of the Act. Specifically, section 5 establishes a definition of an 'exempt arrangement' for the purposes of section 4 of the Act. Appearing in numerous sections of the Act, the definition of an 'exempt arrangement' appears to be a significant element of the Act.

1.5 The committee is concerned that the instrument deals with significant matters that go to the scope of the Scheme as a whole. This concern is heightened by the fact that a number of concepts within the definition in section 5 appear to have a wide interpretation.

1.6 The committee generally considers that the scope of regulatory schemes should be clearly defined and be set out on the face of the primary legislation. Where significant details as to the scope of a scheme are nevertheless included in delegated legislation, the committee considers that such matters should be subject to regular parliamentary scrutiny. In this instance, the instrument is subject to a regular ten-year sunset period.

## Actions to date

1.7 The committee wrote to the minister in March, April, and June of this year to seek further advice regarding these significant scrutiny concerns.<sup>6</sup> A summary of this correspondence is set out in *Delegated Legislation Monitor 11 of 2021*.<sup>7</sup>

1.8 On 4 August 2021, the committee set out its views in relation to the instrument in *Delegated Legislation Monitor 11 of 2021*. The committee also wrote

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4 Scrutiny principle: Senate Standing Order 23(3)(j).

5 Scrutiny principle: Senate Standing Order 23(3)(e).

6 Copies of the letters are available on the committee's [website](#).

7 *Delegated Legislation Monitor 11 of 2021* may be accessed here: [https://www.aph.gov.au/-/media/Committees/Senate/committee/regord\\_ctte/mon2021/Monitor\\_11\\_of\\_2021.pdf?la=en&hash=331C3C60A76B27B9D3D5E257B7F6431D4C5765ED](https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/mon2021/Monitor_11_of_2021.pdf?la=en&hash=331C3C60A76B27B9D3D5E257B7F6431D4C5765ED)

to the Minister on this date to advise that it retains significant scrutiny concerns in relation to this instrument and to reiterate its request that the instrument be amended so that it repeals five years from commencement. In addition, the committee resolved not to withdraw its notice of motion to disallow the instrument at that time.

### ***Recent correspondence***

1.9 On 10 August 2021, the minister wrote to the committee to advise that she will progress an amendment to the instrument to provide that it repeals within five years from commencement.

### **Committee comment**

1.10 The committee thanks the minister for her ongoing engagement in relation to this instrument and welcomes her undertaking to progress an amendment to the instrument to provide that it repeals within five years from commencement.

1.11 The committee reiterates its view that in the system of representative and responsible government established by the Constitution there are often important scrutiny reasons for providing for shorter sunseting of instruments made by the executive under legislative power delegated by the Parliament; and highlights that in this case a shorter sunseting period is considered justified.

1.12 Finally, the committee notes the minister's previous advice that the statutory review of the Act under section 63A will provide an opportunity to consider whether the measures in the instrument would be more appropriate for primary legislation, and considers that the five-year repeal will allow sufficient time for any recommendations arising from the review to be implemented.

**1.13 In light of the minister's undertaking, the committee has concluded its examination of the instrument and resolved to withdraw the notice of motion to disallow the instrument.**



## Chapter 2

### Matters of interest to the Senate

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

2.2 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), with the exception of instruments which specify significant executive expenditure, which are listed in Chapter 3.<sup>1</sup>

Instrument	Purpose	Portfolio committee
<b>Fuel Tax (Road User Charge—Gaseous Fuels) Determination 2021 [F2021L00794]</b>	<p>Heavy vehicles with a gross vehicle mass of more than 4.5 tonnes and used on public roads for business purposes are charged to recover that part of the road construction and maintenance costs that are attributable to heavy vehicles (cost recovery). A portion of the costs are recovered by states and territories through heavy vehicle registration charges and a portion by the Commonwealth through the fuel-based road user charge.</p> <p>This determination sets the new rate of road user charge at 35.3 cents per kilogram for taxable fuels, which is a 2.5 per cent increase to the previous rate.</p>	Senate Rural and Regional Affairs Legislation Committee
<b>Migration Amendment (Merits Review) Regulations 2021 [F2021L00845]</b>	<p>To increase the fee for certain merits review applications to the Administrative Appeals Tribunal (AAT) from \$1,826 to \$3,000.</p> <p>The fee applies to applications for review of decisions relating to visas other than protection visas, and includes decisions in relation to sponsorships and nominations. The new fee is subject to annual increase, from 1 July 2022, in line with existing legislated indexation arrangements.</p> <p>Prior to introducing this measure, the Department of Home Affairs consulted with the Attorney-General's Department and the AAT, however consultation with external stakeholders such as migration agents and peak bodies was not conducted.</p>	Senate Legal and Constitutional Affairs Legislation Committee

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1 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the committee's website: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Matters\\_of\\_interest\\_to\\_the\\_Senate](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Matters_of_interest_to_the_Senate).



## Chapter 3

### Scrutiny of Commonwealth expenditure

3.1 The *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act) and the *Industry Research and Development Act 1986* (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 moneys on the relevant grant or program. The scrutiny of such instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.<sup>1</sup>

3.2 To facilitate such scrutiny, this chapter draws the Senate's attention to the nature and extent of Commonwealth expenditure that is authorised by the FF(SP) Act and the IRD Act and specified in delegated legislation made under those Acts.<sup>2</sup>

3.3 The tables below outline the expenditure specified in legislative instruments registered between 19 and 25 June 2021.

3.4 The committee has resolved to write to the relevant legislation committees to alert those committees to the expenditure listed below that falls within their area of portfolio responsibility. The committee does so under standing order 23(4) which requires the committee to scrutinise each instrument to determine whether the Senate's attention should be drawn to it on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.

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1 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](#).

2 Details of all instruments which specify Commonwealth expenditure are published on the committee's website: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Scrutiny\\_of\\_Commonwealth\\_expenditure](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure).

<b>Instrument</b>	<b>Grant/ Program</b>	<b>Amount</b>	<b>Description</b>	<b>Portfolio committee</b>
<b>Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2021 [F2021L00826]</b>	Grants to Working Women's Centres	\$0.2 million in 2021-22 (interim funding)	Grants will be provided to working women's centres to support the continued operation of these organisations. Working women's centres are not-for-profit, community organisations that provide free information, advocacy, support and advice to women on work related matters, such as workplace entitlements and rights, gender issues, discrimination and sexual harassment, particularly for women who lack legal representation or are not union members.	Senate Legal and Constitutional Affairs Legislation Committee
<b>Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 2) Regulations 2021 [F2021L00827]</b>	Innovation Fund for Online and Offshore Education Services	\$9.4 million in 2021-22	The Innovation Fund will provide one-off grants of up to \$150,000 to approximately 60 private providers of English Language Intensive Course for Overseas Students (ELICOS) programs and higher education programs to international students. The grant funding will be targeted at private ELICOS and higher education providers that are most affected by Australia's border closures.	Senate Education and Employment Legislation Committee
	Child care services website	\$9.2 million over four years from 2021-22, with subsequent ongoing funding of \$0.6 million per year	Funding will be provided for the development, establishment and maintenance of a child care services website that will assist families by publishing the fees, vacancies and operating hours of child care services, and offering a service-by-service comparison of Child Care Subsidy providers.	Senate Education and Employment Legislation Committee
<b>Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 3) Regulations 2021 [F2021L00828]</b>	Regional Arts Fund	\$19.7 million over four years from 2021-22	The Regional Arts Fund provides funding for two main grant opportunities: <ul style="list-style-type: none"> <li>• Project Grants and Quick Response Grants, which provide funding for arts projects, professional development for artists and arts workers, and community capacity building projects; and</li> <li>• Strategic Partnership Grants, which provide funding for strategic projects that contribute to the furtherance of regional arts nationally.</li> </ul>	Senate Environment and Communications Legislation Committee

Instrument	Grant/ Program	Amount	Description	Portfolio committee
<b>Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 2) Regulations 2021 [F2021L00825]</b>	Boosting the Local Care Workforce Program	\$16.8 million over two years from 2021-22	The Program is intended to facilitate an adequate and appropriate supply of disability, aged care and veterans' care service providers, including for the purposes of the National Disability Insurance Scheme, the <i>Aged Care Act 1997</i> and the <i>Veterans' Entitlements Act 1986</i> . Additional funding is being provided until 30 June 2023 to strengthen the focus on connecting employment service and training providers with care and support providers, and support the development of a care and support work sector across disability, aged care and veterans' care.	Senate Community Affairs Legislation Committee
	Volunteer Management Activity	Up to \$43.5 million over six years from 2020-21	The redesigned Volunteer Management Activity includes an online platform to provide volunteer management tools, training and resources to volunteer support services, volunteer involving organisations and volunteers, and grants to volunteering peak bodies to develop and implement strategies to build the capacity of volunteer support services, volunteer involving organisations and volunteers, and remove barriers to volunteering for certain priority groups such as people with disability, newly arrived migrants, and First Nations people.	Senate Community Affairs Legislation Committee
	Stronger Places, Stronger People	\$24 million over three years from 2021-22	The Stronger Places, Stronger People initiative is intended to improve outcomes for children in disadvantaged communities through: <ul style="list-style-type: none"> <li>• supporting families, and assisting communities to support families, to prepare for parenthood and caregiving responsibilities and further the development of the children in their care; and</li> <li>• discouraging use of harmful substances such as tobacco, alcohol and drugs amongst prospective parents; and</li> </ul>	Senate Community Affairs Legislation Committee

Instrument	Grant/ Program	Amount	Description	Portfolio committee
			<ul style="list-style-type: none"> <li>• encouraging young people to seek employment; and</li> <li>• preparing young people for employment; and</li> <li>• ensuring women have access to appropriate pre-natal and post-natal services; and</li> <li>• undertaking measures to help children to live safely and outside the youth justice system.</li> </ul>	
<b>Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 2) Regulations 2021 [F2021L00824]</b>	Wellbeing and Support Program	\$23.3 million over four years from 2021-22	The Program will provide case management services to highly vulnerable veterans who are transitioning into civilian life after their service in the Australian Defence Force, or have complex care needs.	Senate Foreign Affairs, Defence and Trade Legislation Committee
<b>Industry Research and Development (Ahead for Business Program) Instrument 2021 [F2021L00851]</b>	Ahead for Business Program	\$0.9 million	<p>The Program will support small business owners to take proactive, preventative and early steps to improve their mental wellbeing by continuing to develop and maintain the Ahead for Business digital hub for a further three years from 2021–22.</p> <p>This will include adding new content and promotional activities in various modes including in-person and online engagement with small business stakeholders, business related newsletters, newspapers and social media channels to ensure that the Program provides relevant support information and is reaching small business owners across Australia.</p>	Senate Education and Employment Legislation Committee

<b>Instrument</b>	<b>Grant/ Program</b>	<b>Amount</b>	<b>Description</b>	<b>Portfolio committee</b>
<b>Industry Research and Development (Natural Hazards and Disaster Resilience Research Centre Program) Instrument 2021 [F2021L00817]</b>	Natural Hazards and Disaster Resilience Research Centre Program	\$85 million	The Program will provide grant funding to support the establishment of a new research centre that will focus on natural hazards resilience and disaster risk reduction to support the needs of emergency service agencies and communities in preparing for, responding to and recovering from future natural disasters.	Senate Economics Legislation Committee

**Senator the Hon Concetta Fierravanti-Wells**

**Chair**

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



# Appendix A

## New matters

4.1 The committee engages with relevant ministers and agencies to attempt to resolve its concerns about scrutiny issues raised by disallowable legislative instruments. This appendix documents the committee's new scrutiny concerns in relation to disallowable legislative instruments registered on the Federal Register of Legislation between 19 and 25 June 2021.

### Ministerial engagement

4.2 The committee is writing to the relevant minister about the scrutiny issues raised by the instruments listed below for the first time. Copies of the ministerial correspondence are available on the committee's website.<sup>1</sup>

Instrument	Issue	Status
<b>Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043]<sup>2</sup></b>	Principle (a) compliance with authorising legislation  Principle (a) compliance with <i>Legislation Act 2003</i> - same in substance  Principle (j) significant matters in delegated legislation	Seeking advice from the minister.

### Agency engagement

4.3 The committee is engaging with the relevant agencies via its secretariat to seek further information about potential scrutiny concerns raised by the instruments listed below.

Instrument	Issue	Status
<b>Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 [F2021L00843]</b>	Principle (k) parliamentary oversight	Seeking advice from the agency.
<b>Health Insurance (Section 3C General Medical Services—Transcatheter Mitral Valve Repair) Determination 2021 [F2021L00800]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Seeking advice from the agency.

1 See [www.aph.gov.au/senate\\_sd/c](http://www.aph.gov.au/senate_sd/c).

2 Note this instrument was registered on 29 July 2021.

Instrument	Issue	Status
<b>National Health (Medication Program for Homeless People) Special Arrangement 2021 [F2021L00844]</b>	Principle (i) availability of independent merits review	Seeking advice from the agency.
<b>Road Vehicle Standards (Limit of Acceptable Damage or Corrosion) Determination 2021 [F2021L00823]</b> <b>Road Vehicle Standards (Verification of Road Vehicles) Determination 2021 [F2021L00850]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> - incorporation	Seeking advice from the agency.
<b>Road Vehicle Standards (Model Reports— Compliance with Standards) Determination 2021 [F2021L00838]</b>	Principle (f) incorporated materials freely accessible	Seeking advice from the agency.
<b>Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2021 [F2021L00848]</b>	Principle (d) consultation with persons affected	Seeking advice from the agency.
<b>Veterans' Entitlements (Counselling) Extended Eligibility Determination 2021 [F2021L00804]</b>	Principle (c) conferral of discretionary powers Principle (e) drafting error Principle (h) retrospective commencement	Seeking advice from the agency.

## Appendix B

### Ongoing matters

5.1 This appendix documents the committee's ongoing scrutiny concerns in relation to matters previously raised in earlier *Delegated Legislation Monitors*.

#### Ministerial engagement

5.2 The committee is continuing to engage with the relevant minister about the scrutiny issues raised by the instruments listed below. Copies of the ministerial correspondence are available on the committee's website.<sup>1</sup>

Instrument	Issue	Status
<b>Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]</b>	Principle (j) significant matters in delegated legislation Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 04/08/2021.
<b>Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]</b>	Principle (b) implied freedom of political communication Principle (c) conferral of discretionary powers Principle (e) clarity of drafting	Seeking further advice from the Assistant Treasurer.
<b>Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]</b>	Principle (a) compliance with authorising legislation Principle (d) consultation with persons affected Principle (j) significant matters in delegated legislation	Seeking further advice from the minister.
<b>Aviation Transport Security Amendment (Screening Information) Regulations 2021 [F2021L00736]</b>	Principle (c) conferral of discretionary powers Principle (h) strict liability Principle (j) significant penalties in delegated legislation	Seeking advice from the minister.

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<sup>1</sup> See [www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc).

Instrument	Issue	Status
<b>Bankruptcy Regulations 2021 [F2021L00261]</b>	Principle (j) modifications to primary legislation Principle (k) parliamentary oversight	Seeking further advice from the Assistant Minister to the Attorney-General. Notice of motion to disallow placed on 11/08/2021.
<b>Charter of the United Nations Lists [F2021L00626] [F2021L00627] [F2021L00628] [F2021L00631] [F2021L00632] [F2021L00633] [F2021L00634] [F2021L00635] [F2021L00636] [F2021L00637] [F2021L00638] [F2021L00639] [F2021L00640] [F2021L00641] [F2021L00642] [F2021L00643] [F2021L00644] [F2021L00645] [F2021L00647] [F2021L00648] [F2021L00649]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> - registration of instruments	Seeking advice from the minister.
<b>Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021 [F2021L00290]</b>	Principle (j) matters more appropriate for parliamentary enactment Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 11/08/2021.
<b>High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021 [F2021L00391]</b>	Principle (c) conferral of discretionary powers Principle (e) clarity of drafting Principle (g) adequacy of explanatory materials	Seeking further advice from the Chief Executive and Principal Registrar of the High Court of Australia. Notice of motion to disallow placed on 11/08/2021.
<b>Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021 [F2021L00567]</b>	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking advice from the minister.
<b>Industry Research and Development (Boosting Australia's Diesel Storage Program) Instrument 2021 [F2021L00610]</b>	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking advice from the minister.
<b>Industry Research and Development (Carbon Capture, Use and Storage Development Program) Instrument 2021 [F2021L00547]</b>	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking advice from the minister. Notice of motion to disallow placed on 11/08/2021.

Instrument	Issue	Status
<b>Industry Research and Development (Growing Australia’s Cyber Skills Program) Instrument 2021 [F2021L00536]</b>	Principle (g) adequacy of explanatory materials	Seeking advice from the minister.
	Principle (k) parliamentary oversight	Notice of motion to disallow placed on 11/08/2021.
<b>Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021 [F2021L00539]</b>	Principle (g) adequacy of explanatory materials	Seeking advice from the minister.
	Principle (j) matters more appropriate for parliamentary enactment	Notice of motion to disallow placed on 11/08/2021.
	Principle (k) parliamentary oversight	
<b>Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 [F2021L00277]</b>	Principle (d) adequacy of consultation	Seeking further advice from the Assistant Minister to the Attorney-General.
	Principle (k) parliamentary oversight - sunseting	Notice of motion to disallow placed on 11/08/2021.
<b>Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021 [F2021L00651]</b>	Principle (j) exemptions from primary legislation	Seeking advice from the minister.
	Principle (k) parliamentary oversight	

## Agency engagement

5.3 The committee is continuing to engage with the relevant agencies via its secretariat to seek further information about potential scrutiny concerns raised by the instruments listed below.

Instrument	Issue	Status
<b>Aged Care Legislation Amendment (Service Staff Vaccination Recording and Reporting) Principles 2021 [F2021L00697]</b>	Principle (h) privacy	Seeking further advice from the agency.
<b>Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 1) [F2021L00759]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> - incorporation	Seeking further advice from the agency.
	Principle (e) clarity of drafting	
	Principle (g) adequacy of explanatory materials	

Instrument	Issue	Status
<b>Aviation Transport Security (Screening Officer Requirements) Determination 2021 [F2021L00738]</b> <b>Maritime Transport Security (Screening Officer Requirements) Determination 2021 [F2021L00740]</b>	Principle (c) conferral of discretionary powers	Seeking further advice from the agency.
<b>Higher Education Provider Approval No 1 of 2021 [F2021L00747]</b>	Principle (g) adequacy of explanatory materials	Seeking further advice from the agency.
<b>Inspector-General of the Australian Defence Force Amendment Regulations 2021 [F2021L00591]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> - retrospective application  Principle (h) privacy	Seeking further advice from the agency.
<b>Recycling and Waste Reduction (Product Stewardship—Televisions and Computers) Rules 2021 [F2021L00624]</b>	Principle (f) incorporation of copyrighted material	Seeking further advice from the agency.

## Appendix C

### Concluded matters

6.1 This appendix records the instruments in relation to which the committee has concluded its inquiries, following correspondence with the relevant minister or agency.

#### Ministerial engagement

6.2 The committee has concluded its examination of the instruments listed below following correspondence with the relevant minister. Copies of the ministerial correspondence are available on the committee's website.<sup>1</sup>

Instrument	Issue	Status
<b>Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 [F2020L01569]</b>	Principle (e) clarity of drafting	Concluded following response from the minister on 10/08/2021.
	Principle (j) matters more appropriate for parliamentary enactment	The Minister for Foreign Affairs undertook to amend the instrument in response to the committee's scrutiny concerns.
<b>Paid Parental Leave Rules 2021 [F2021L00384]</b>	Principle (e) clarity of drafting	Concluded following response from the minister on 30/07/2021.
	Principle (g) adequacy of explanatory materials	The Minister for Families and Social Services undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
	Principle (h) privacy	
	Principle (j) modifications to primary legislation	
Principle (k) parliamentary oversight	The Minister for Families and Social Services advised that the Office of Parliamentary Counsel would make minor changes to the instrument in response to the committee's scrutiny concerns.	

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<sup>1</sup> See [www.aph.gov.au/senate\\_sd/c](http://www.aph.gov.au/senate_sd/c).

## Agency engagement

6.3 The committee has concluded its examination of the instruments listed below following informal correspondence with the relevant agencies via its secretariat.

Instrument	Issue	Status
<b>Aged Care Legislation Amendment (Requirements for Staff Members and Volunteers) Instrument 2021 [F2021L00758]</b>	Principle (e) clarity of drafting	Concluded following response from the agency on 26/07/2021.  The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
<b>ASIC Market Integrity Rules (Capital) 2021 [F2021L00765]</b>	Principle (c) conferral of discretionary powers  Principle (i) availability of independent merits review	Concluded following response from the agency on 04/08/2021.  The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.  The Department of the Treasury undertook to amend the instrument in response to the committee's scrutiny concerns.
<b>Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681]</b>	Principle (a) compliance with the <i>Legislation Act 2003</i> - incorporation	Concluded following response from the agency on 26/07/2021.  The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
<b>Higher Education Standards Framework (Threshold Standards) 2021 [F2021L00488]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> - incorporation	Concluded following response from the agency on 09/08/2021.  The Department of Education, Skills and Employment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
<b>National Greenhouse and Energy Reporting (Measurement) Amendment (2021 Update) Determination 2021 [F2021L00771]</b>	Principle (f) access and use	Concluded following response from the agency on 23/07/2021.
<b>Radiocommunications (Class Licence) Amendment Instrument 2021 (No.1) [F2021L00734]</b>	Principle (e) clarity of drafting	Concluded following response from the agency on 28/07/2021.  The Australian Communications and Media Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.

Instrument	Issue	Status
<b>Radiocommunications (Conditions of Frequency Assignment Certificates - Apparatus Licences) Determination 2021 [F2021L00755]</b>	Principle (a) compliance with <i>Legislation Act 2003</i> - incorporation  Principle (k) legal certainty	Concluded following response from the agency on 28/07/2021.  The Australian Communications and Media Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
<b>Radiocommunications Accreditation (General) Rules 2021 [F2021L00748]</b>	Principle (i) availability of independent merits review	Concluded following response from the agency on 28/07/2021.
<b>Therapeutic Goods Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00450]</b>	Principle (f) incorporated materials freely accessible	Concluded following response from the agency on 30/07/2021.  The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
<b>Vehicle Standard (Australian Design Rule) Amendment Instrument 2021 (No.1) [F2021L00570]</b>	Principle (a) compliance with authorising legislation  Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation  Principle (f) incorporated materials freely accessible	Concluded following response from the agency on 04/08/2021.  The Department of Infrastructure, Transport, Regional Development and Communications undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.



# Appendix D

## Undertakings

7.1 From time to time, a minister or agency may make an undertaking to address the committee's scrutiny concerns. These may include, for example, an undertaking to amend a legislative instrument or an explanatory statement, or to review an Act or a departmental practice. The committee expects that, when a minister or agency has made an undertaking, it will be implemented in a timely manner. Accordingly, this appendix records outstanding ministerial and agency undertakings, and the undertakings implemented since the committee's last *Delegated Legislation Monitor*.

### Outstanding undertakings

7.2 The following table records undertakings that remain outstanding, from oldest to newest. The committee draws these undertakings to the attention of the Senate.

Instrument	Undertaking	Date of Undertaking
<b>Competition and Consumer (Industry Codes—Dairy) Regulations 2019 [F2019L01610]</b>	The Attorney-General undertook to commence an inquiry into good faith obligations in Commonwealth legislation in response to the committee's scrutiny concerns.	31/08/2020
<b>Reserve Bank of Australia Head Office, 65 Martin Place, Sydney Heritage Management Plan 2020 [F2020L01031]</b>	The Minister for the Environment advised that the Reserve Bank of Australia undertook to amend the instrument in response to the committee's scrutiny concerns.	01/12/2020
<b>Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245]</b>	The Assistant Minister to the Attorney-General undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	11/02/2021
<b>Amendment of List of Exempt Native Specimens – Commission for the Conservation of Antarctic Marine Living Resources Exploratory Fisheries in Statistical Divisions 58.4.1 and 58.4.2 (the East Antarctica Fishery) and Statistical Subareas 88.1 and 88.2 (the Ross Sea Fishery), November 2020 [F2020L01484]</b>	The Department of Agriculture, Water and the Environment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	15/02/2021
<b>Treasury portfolio – various instruments</b>	The Treasurer undertook to continue to engage with the committee in good faith to seek a resolution to the committee's systemic concerns regarding the duration of instruments which provide for exemptions or modifications to primary legislation.	18/02/2021

<b>Instrument</b>	<b>Undertaking</b>	<b>Date of Undertaking</b>
<b>Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations (No. 2) 2020 [F2020L01620]</b>	The Department of Agriculture, Water Resources and the Environment undertook to revoke the instrument in response to the committee's scrutiny concerns.	16/03/2021
<b>Industry Research and Development (Digital Directors Program) Instrument 2020 [F2020L01554]</b>	The Department of Industry, Science, Energy and Resources undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	06/04/2021
<b>Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 [F2020L01654]</b>	The Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	09/04/2021
<b>Part 133 (Australian Air Transport Operations—Rotorcraft) Manual of Standards 2020 [F2020L01614]</b>	The Civil Aviation Safety Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	20/04/2021
<b>Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 2) 2021 [F2021L00178]</b>	The Greenhouse and Energy Minimum Standards Regulator undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	07/05/2021
<b>CASA EX16/21 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2021 [F2021L00149]</b>	The Civil Aviation Safety Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	10/05/2021
<b>Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021 [F2021L00200]</b>	The Civil Aviation Safety Authority undertook to amend the instrument in response to the committee's scrutiny concerns.	21/05/2021
<b>Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 10) 2021 [F2021L00305]</b>	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	04/06/2021
<b>Export Control (Tariff Rate Quotas) Amendment (Brexit) Order 2021 [F2021L00243]</b>	The Department of Agriculture, Water and the Environment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	04/06/2021
<b>Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021 [F2021L00200]</b>	The Civil Aviation Safety Authority undertook to amend the instrument in response to the committee's scrutiny concerns.	08/06/2021
<b>Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020 [F2020L01506]</b>	The Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	16/06/2021

<b>Instrument</b>	<b>Undertaking</b>	<b>Date of Undertaking</b>
<b>Income Tax Assessment (1997 Act) Regulations 2021 [F2021L00206]</b>	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	18/06/2021
<b>Treasury Laws Amendment (Reuniting More Superannuation) Regulations 2021 [F2021L00412]</b>	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	24/06/2021
<b>Road Vehicle Standards Amendment (2021 Measures No. 1) Rules 2021 [F2021L00376]</b>	The Department of Infrastructure, Transport, Regional Development and Communications undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	25/06/2021
<b>Radiocommunications (Spectrum Access Charges – 20 GHz and 30 GHz Bands) Determination 2021 [F2021L00230]</b>	The Minister for Communications, Urban Infrastructure, Cities and the Arts advised that the Australian Communications and Media Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	30/06/2021
<b>Export Control Rules 2021 - various instruments [F2021L00312] [F2021L00317] [F2021L00334] [F2021L00304] [F2021L00315] [F2021L00310] [F2021L00308] [F2021L00313]</b>	The Department of Agriculture, Water and the Environment undertook to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.	02/07/2021
<b>Student Assistance Regulations 2021 [F2021L00201]</b>	The Minister for Families and Social Services undertook to amend the instrument in response to the committee's scrutiny concerns.  The Minister for Families and Social Services undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	06/07/2021
<b>CASA 30/21 – Required Communication Performance and Required Surveillance Performance (RCP 240 and RSP 180) Capability Declarations – Direction 2021 [F2021L00504]</b>	The Civil Aviation Safety Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	09/07/2021
<b>Export Control (Wood and Woodchips) Rules 2021 [F2021L00318]</b>	The Minister for Agriculture and Northern Australia undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	13/07/2021

<b>Instrument</b>	<b>Undertaking</b>	<b>Date of Undertaking</b>
<b>Broadcasting Services (Parental Lock) Amendment Technical Standard 2021 (No.1) [F2021L00543]</b>	The Australian Communications and Media Authority undertook to amend the instrument in response to the committee's scrutiny concerns.	14/07/2021
<b>Inspector-General of the Australian Defence Force Amendment Regulations 2021 [F2021L00591]</b>	The Department of Defence undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	16/07/2021
<b>Radiocommunications Equipment (General) Rules 2021 [F2021L00661]</b>	The Australian Communications and Media Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	21/07/2021
<b>Bankruptcy Regulations 2021 [F2021L00261]</b>	The Assistant Minister to the Attorney-General undertook to advise the committee of the outcome of the government's targeted review of the appropriateness of modifying provisions currently prescribed in the instrument.	26/07/2021
<b>Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681]</b>	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26/07/2021
<b>Aged Care Legislation Amendment (Requirements for Staff Members and Volunteers) Instrument 2021 [F2021L00758]</b>	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26/07/2021
<b>Radiocommunications (Class Licence) Amendment Instrument 2021 (No.1) [F2021L00734]</b>	The Australian Communications and Media Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	28/07/2021
<b>Radiocommunications (Conditions of Frequency Assignment Certificates - Apparatus Licences) Determination 2021 [F2021L00755]</b>	The Australian Communications and Media Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	28/07/2021
<b>Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 1) [F2021L00759]</b>	The Australian Transaction Reports and Analysis Centre undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29/07/2021

Instrument	Undertaking	Date of Undertaking
<b>Paid Parental Leave Rules 2021 [F2021L00384]</b>	<p>The Minister for Families and Social Services undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p> <p>The Minister for Families and Social Services advised that the Office of Parliamentary Counsel would make minor changes to the instrument in response to the committee's scrutiny concerns.</p>	30/07/2021
<b>Therapeutic Goods Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00450]</b>	<p>The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	30/07/2021
<b>ASIC Market Integrity Rules (Capital) 2021 [F2021L00765]</b>	<p>The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p> <p>The Department of the Treasury undertook to amend the instrument in response to the committee's scrutiny concerns.</p>	04/08/2021
<b>Vehicle Standard (Australian Design Rule) Amendment Instrument 2021 (No.1) [F2021L00570]</b>	<p>The Department of Infrastructure, Transport, Regional Development and Communications undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	04/08/2021
<b>Higher Education Standards Framework (Threshold Standards) 2021 [F2021L00488]</b>	<p>The Department of Education, Skills and Employment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	09/08/2021
<b>Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 [F2020L01569]</b>	<p>The Minister for Foreign Affairs undertook to amend the instrument in response to the committee's scrutiny concerns.</p>	10/08/2021

## Implemented undertakings

7.3 The following table records undertakings that have been implemented since the committee's last *Delegated Legislation Monitor*.

Instrument	Undertaking	Date implemented
<b>Aged Care Legislation Amendment (Aged Care Recipient Classification) Principles 2021 [F2021L00357]</b>	The Department of Health amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	06/08/2021