

The Senate

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Standing Committee for the  
Scrutiny of Delegated Legislation

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Annual Report 2022

November 2023

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# Membership of the committee

## Current Members

Senator Linda White (Chair) ALP, VIC  
(28.07.2022 - present)

Senator the Hon Linda Reynolds CSC (Deputy Chair) LP, WA  
(20.06.2023 - present)

Senator David Pocock IND, ACT  
(27.07.2022 - present)

Senator Catryna Bilyk ALP, TAS  
(28.07.2022 - present)

Senator Louise Pratt ALP, WA  
(28.07.2022 - present)

Senator Paul Scarr LP, QLD  
(1.08.2022 - present)

## Former Member

Senator David Van (Deputy Chair) IND, VIC  
(1.08.2022 - 20.06.2023)

## Members in 46<sup>th</sup> Parliament (January-April 2022)

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 Nita Green Queensland, ALP

Senator Perin Davey New South Wales, NAT

Senator Karen Grogan South Australia, ALP

Senator Paul Scarr Queensland, LP

**Current Secretariat**

Fattimah Imtoul, A/g Secretary  
Anika Khwaja, Principal Research Officer  
Nicole Maslaris, Principal Research Officer  
Aneka Atley, Senior Research Officer  
Parabhjot Saini, Legislative Research Officer

**Secretariat in 2022**

Glenn Ryall, Secretary  
Laura Sweeny, Secretary (A/g)  
Anika Khwaja, Principal Research Officer  
Hannah Wilkins, Principal Research Officer  
Nicole Maslaris, Principal Research Officer  
Anthony Todd, Senior Research Officer  
Stephanie Lum, Senior Research Officer  
Anita Zovak, Legislative Research Officer  
Geoffrey Fricke, Legislative Research Officer

**Committee Legal Adviser**

Associate Professor Andrew Edgar

**Committee contacts**

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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# Chapter 1

## Introduction

### Overview

- 1.1 The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), 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 set out in Senate standing order 23.
- 1.2 The executive branch of government makes over a thousand legislative instruments each year, known as 'delegated legislation'. Delegated legislation has the same force in law as Acts made by the Parliament and may form as much as half of the statutory law of the Commonwealth of Australia.<sup>1</sup>
- 1.3 The committee's work may be broadly described as technical legislative scrutiny. The committee does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny.
- 1.4 The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3) which requires the committee to scrutinise each legislative 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;

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<sup>1</sup> [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 432.

- (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.
- 1.5 In addition, standing order 23(4) empowers the committee to scrutinise instruments 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.
- 1.6 Further, standing order 23(4A) empowers the committee to consider instruments that are not subject to disallowance, including whether it is appropriate for them to be exempt from disallowance.
- 1.7 This Annual Report provides a summary of the committee's work for the period from 1 January to 31 December 2022. The annual report is divided into two chapters:
- Chapter 2 sets out statistics relating to the work of the committee in 2022; and
  - Chapter 3 highlights the most significant scrutiny issues that the committee identified in 2022 and provides a number of case-studies.

### **Committee membership**

- 1.8 Senate standing order 23 provides for the committee to be appointed at the commencement of each Parliament. The committee shall comprise six members: three government senators and three non-government senators. The committee is to be chaired by a government senator.
- 1.9 A list of current committee members can be found at the beginning of this report.<sup>2</sup>

### **The committee processes**

- 1.10 In undertaking its work during the reporting period, the committee was supported by a secretariat comprising a secretary, two principal research officers, two senior research officers and a legislative research officer.
- 1.11 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Associate Professor Andrew Edgar served as the committee's legal adviser during the reporting period.

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<sup>2</sup> This list is also available on the [Committee Membership](#) page on the committee's website.

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- 1.12 The committee's work is also supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.

### **Scrutiny of instruments**

- 1.13 Each instrument is scrutinised against the committee's scrutiny principles. The committee meets regularly, including during sitting weeks, to consider instruments that give rise to potential scrutiny issues.
- 1.14 Where an instrument raises a scrutiny concern, the committee's usual approach is to include the instrument in its *Delegated Legislation Monitor* (the Monitor) and write to the responsible minister or agency seeking further explanation or requesting specific action to address the relevant issue.

### **The committee's use of the disallowance process**

- 1.15 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns.<sup>3</sup>
- 1.16 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice in order to protect the Senate's ability to subsequently disallow the instrument in question.<sup>4</sup> This can have the effect of extending the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.
- 1.17 The committee may otherwise give a notice of motion to disallow an instrument where it considers that the instrument raises serious unresolved scrutiny concerns, and which should be drawn to the Senate's attention or disallowed.
- 1.18 In the vast majority of cases, these notices are withdrawn when the committee receives a satisfactory response from the relevant minister or agency which addresses the committee's concerns. For example, this includes if the minister or agency provides information that addresses the committee's concerns or includes an undertaking to progress amendments to the instrument or its explanatory statement. Where a satisfactory response is received, the Chair will withdraw the notice of motion on behalf of the committee.
- 1.19 The committee stresses the importance of the disallowance process to its scrutiny role, and in facilitating a minimum level of parliamentary oversight. Accordingly, the committee maintains the view that exemptions from

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<sup>3</sup> [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 437.

<sup>4</sup> [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 438.

disallowance should generally be set out in primary legislation, and only apply to instruments in exceptional circumstances.

### **Undertakings**

1.20 Ministers or agencies may provide an undertaking to address the committee's concerns. Typically, they will undertake to progress amendments to the instrument or its explanatory statement, or to propose amendments to an instrument's enabling legislation. The acceptance of such undertakings by the committee has the benefit of securing a satisfactory outcome in relation to the committee's scrutiny concerns, without interrupting the administration of government by disallowing the instrument in question.

### **Interaction with other legislative scrutiny committees**

1.21 The committee is one of three legislative scrutiny committees. The other two committees are the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee).<sup>5</sup>

1.22 The work of the three committees is complementary in many respects and where appropriate, the committee considers relevant matters raised by these committees or refers matters to them.

### **Committee publications**

1.23 Committee publications may be accessed on the committee's website. A brief overview of these publications is provided below.

#### *Delegated Legislation Monitor*<sup>6</sup>

1.24 The Monitor is the regular scrutiny report on the work of the committee. It is generally published in each Senate sitting week. It identifies instruments in relation to which the committee is engaging with the relevant minister or agency, or has concluded its examination. The Monitor also lists all the instruments registered during the reporting period, which:

- specify Commonwealth government expenditure;
- the committee is otherwise raising under standing order 23(4) as a matter of interest to the Senate because they raise significant issues, or otherwise give rise to issues that are likely to be of interest to the Senate; and
- instruments are exempt from disallowance and sunseting and whether they meet the committee's expectations under standing order 23(4A).

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<sup>5</sup> More information about these committees can be found at the web pages for the [Parliamentary Joint Committee on Human Rights](#) and the [Senate Standing Committee for the Scrutiny of Bills](#).

<sup>6</sup> Monitors for 2022 and for previous years may be accessed via the [committee's webpage](#).

- 1.25 It also records undertakings that have been made or implemented to address the committee's scrutiny concerns.

### ***Scrutiny News***<sup>7</sup>

- 1.26 The committee secretariat prepares *Scrutiny News* each sitting week. This is a brief publication which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list. *Scrutiny News* highlights recent comments drawn from material in the committee's Monitor and the Scrutiny of Bills Committee's *Scrutiny Digest*, with a particular focus on complex issues. *Scrutiny News* is also used to raise awareness of the committees and its functions.

### ***Guidelines***<sup>8</sup>

- 1.27 The committee's guidelines provide detail on the committee's work practices and its technical scrutiny principles, as well as its scrutiny of Commonwealth expenditure and matters of interest of the Senate.

### ***Index of Instruments***<sup>9</sup>

- 1.28 The *Index of Instruments* is an alphabetical list of all instruments about which the committee has raised a scrutiny concern in a particular year.

### ***Index of Undertakings***<sup>10</sup>

- 1.29 The *Index of Undertakings* is an alphabetical list of all instruments in a particular year regarding which the committee has accepted an undertaking from a minister or agency to address its scrutiny concerns.

### **Other resources**

- 1.30 A number of other resources relevant to the committee can be accessed on the Senate website. A brief overview of these resources is provided below.

### ***Disallowance Alert***<sup>11</sup>

- 1.31 The *Disallowance Alert* is a webpage listing all instruments for which a notice of motion for disallowance has been given in either House (whether by the committee or by an individual senator or member). The progress and outcome of all disallowance notices is also recorded here.

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<sup>7</sup> Past editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's [website](#).

<sup>8</sup> [Guidelines](#) relating to the committee's scrutiny principles are published on the committee's website.

<sup>9</sup> The [Index of Instruments](#) can be accessed on the committee's website.

<sup>10</sup> The [Index of Undertakings](#) can be accessed on the committee's website.

<sup>11</sup> The [Disallowance Alert](#) can be accessed via Parliament's website.

### *Senate Disallowable Instruments List*<sup>12</sup>

1.32 The Senate Disallowable Instruments List is a list of all disallowable instruments tabled in the Senate.<sup>13</sup> This online resource may be used to ascertain whether and, if so, when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

### *Guides to Senate Procedure*<sup>14</sup>

1.33 The *Guides to Senate Procedure* are a series of guidance notes designed to provide a practical understanding of the procedures governing the work of the Senate. Of particular relevance to the work of the committee is Brief No. 19 on disallowance.

### *Odgers' Australian Senate Practice*<sup>15</sup>

1.34 *Odgers' Australian Senate Practice* is an authoritative reference work on all aspects of the Senate's powers, procedures and practices.

## **Acknowledgements**

1.35 The committee greatly appreciated the assistance of its legal adviser, Associate Professor Andrew Edgar, and the committee secretariat during the reporting period.

1.36 The committee also wishes to acknowledge the assistance of ministers and agencies during the reporting period. The responsiveness of ministers and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

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<sup>12</sup> The [Senate Disallowable Instruments List](#) can be accessed via Parliament's website.

<sup>13</sup> As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a [House of Representatives Disallowable Instruments List](#).

<sup>14</sup> The [Guides to Senate Procedure](#) can be accessed via Parliament's website.

<sup>15</sup> [Odgers' Australian Senate Practice](#) can be accessed via Parliament's website.

# Chapter 2

## Scrutiny work of the committee in 2022

### Overview

2.1 This chapter provides information about the work of the committee in 2022, including relevant statistics relating to the instruments it considered during this reporting period.

### Meetings and Delegated Legislation Monitors

2.2 In 2022, the committee held 12 private meetings. Of these, nine private meetings related to the regular scrutiny of instruments included in the committee's nine *Delegated Legislation Monitors* tabled in 2022.

2.3 The remaining three meetings were private briefings held by the committee. Such briefings are informal meetings with ministers or senior departmental officials, which enable the committee to obtain further information about certain legislative instruments that raise scrutiny concerns or to discuss and seek to resolve ongoing systemic scrutiny concerns.

2.4 Specifically, the committee met with officials from the Department of Agriculture, Fisheries and Forestry and the Department of Health and Aged Care on 23 November 2022 to discuss the committee's ongoing concerns around exemptions from disallowance under the *Biosecurity Act 2015*. On 24 November 2022, the committee met with the Assistant Treasurer and officials from the Department of the Treasury to discuss the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021. Finally, on 1 December 2022, the committee met with Ms Angelene Falk, the Australian Information Commissioner and Privacy Commissioner, to receive an update on the work of the Office of the Australian Information Commissioner, and the role of privacy in delegated legislation.

2.5 Across the nine Monitors tabled in 2022, the committee considered 1811 legislative instruments, registered between 23 October 2021 and 21 October 2022. The Chair gave six tabling statements in tabling the *Monitors*, to draw the Senate's attention to particular instruments or systemic issues raising significant scrutiny concerns.<sup>1</sup>

2.6 The statistics in this chapter relate to the scrutiny of these 1811 legislative instruments. This includes the scrutiny of 1487 disallowable instruments and 324 instruments exempt from disallowance. This is a slightly greater number of

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<sup>1</sup> The Chair made tabling statements for Monitors 2, 5, 6, 7, 8 and 9 of 2022. These can be viewed on the [committee's website](#).

instruments scrutinised compared to the 1712 disallowable legislative instruments scrutinised in 2021.

### Scrutiny of instruments

2.7 Of the 1811 legislative instruments that the committee examined in the 2022 reporting period, it identified 453 instruments raising one or more scrutiny concerns which required a response from the relevant agency or minister, or which were drawn to the attention of the Senate or relevant minister.<sup>2</sup> This is a very similar ratio to instruments raising concerns in 2021.<sup>3</sup>

2.8 The 453 instruments raising scrutiny concerns during the 2022 reporting period included:<sup>4</sup>

- 294 instruments which raised substantive technical scrutiny concerns under the committee's technical scrutiny principles against which the committee is empowered to examine instruments under standing order 23(3);
- 153 instruments exempt from disallowance that did not meet the committee's expectations as set out in its guidelines;<sup>5</sup>
- 40 instruments exempt from sunseting that did not meet the committee's expectations as set out in its guidelines;<sup>6</sup>
- 80 instruments drawn to the attention of the Senate because they raised significant issues or were otherwise likely to be of interest to the Senate.<sup>7</sup> Of these:
  - seven instruments related to matters of interest to the Senate; and
  - 73 instruments related to Commonwealth expenditure.

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<sup>2</sup> Details of these instruments may be found on the [Index of Instruments](#) page on the committee's website.

<sup>3</sup> In 2021, of the instruments the committee scrutinised, 24.5 per cent were identified as raising one or more scrutiny concerns or were drawn to the attention of the Senate. In 2022 this percentage was 25 per cent.

<sup>4</sup> This breakdown of numbers at [2.7] shows a total of 567 instruments raised. However, some instruments were raised simultaneously due to scrutiny concerns under both standing order 23(4) and standing order 23(4A), and other scrutiny concerns. In the 2021 reporting period, 114 instruments were raised under two or more of the categories. 453 is therefore the total number of unique instruments raised by the committee.

<sup>5</sup> The committee's expectations with respect to exemptions from disallowance are contained in Senate standing order 23(4A); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 47. See also Chapter 2 for further discussion of the scrutiny of instruments exempt from disallowance.

<sup>6</sup> The committee's expectations with respect to exemptions from sunseting are contained in Senate standing order 23(3)(k); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 34.

<sup>7</sup> Senate standing order 23(4).

2.9 The committee also concluded its examination of 297 instruments in the 2022 reporting period.<sup>8</sup>

### *Scrutiny principles engaged*

2.10 The following table provides an analysis of the instruments raising scrutiny issues in the 2022 reporting period.

**Table 2.1 Issues identified by the committee in 2022**

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) <sup>9</sup>												Total	
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)		(m)
<b>Ministerial</b>	5	1	5	1	5	0	3	9	2	15	2	6	11	<b>65</b>
<b>Agency</b>	49	0	22	30	17	15	55	17	21	2	65	1	16	<b>310</b>
<b>Total</b>	<b>54</b>	<b>1</b>	<b>27</b>	<b>31</b>	<b>22</b>	<b>15</b>	<b>58</b>	<b>26</b>	<b>23</b>	<b>17</b>	<b>67</b>	<b>7</b>	<b>27</b>	<b>375</b>

2.11 As shown in the Table 2.1, the committee raised almost three times as many scrutiny issues at agency rather than at ministerial level in 2022. This is a substantially higher number than was apparent in 2021.

### *Scrutiny concerns raised at the ministerial level*

2.12 Where the committee is unable to resolve its scrutiny concerns by informal engagement with agencies via its secretariat, it will engage directly with the responsible minister.

2.13 In 2022, the committee raised 65 matters at ministerial level. This is significantly fewer than the 214 issues raised at ministerial level in 2021.

2.14 As indicated by Table 2.1, the committee most frequently raised scrutiny concerns at the ministerial level in 2022 related to the inclusion in delegated legislation of matters more appropriate for parliamentary enactment.<sup>10</sup> This principle accounted for 23 per cent of concerns raised by the committee, as compared to 24 per cent in 2021.<sup>11</sup>

<sup>8</sup> The discrepancy between the number of responses and the number of concluded entries arises partly because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period. This discrepancy also arises due to the committee's dialogue nature of communication, which mostly results in back and forth correspondence with a minister or agency to resolve an issue.

<sup>9</sup> As individual instruments often raise more than one scrutiny principle, the number of issues raised is greater than the 294 instruments raising concerns in this period.

<sup>10</sup> Senate standing order 23(3)(j).

<sup>11</sup> This 2021 figure is slightly inflated as Senate standing order 23(3)(l), requiring the committee to scrutinise instruments where they modify primary legislation, was subsumed within this principle until July 2021.

- 2.15 This principle is underpinned by the committee's concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight, rather than in delegated legislation. An instrument may include significant matters, for example, where it:
- establishes significant elements of a regulatory scheme;
  - imposes significant penalties;
  - imposes taxes or levies; or
  - has a serious impact on personal rights and liberties.<sup>12</sup>
- 2.16 Concerns raised under principle (m) relating to other technical scrutiny grounds accounted for approximately 17 per cent of concerns raised by the committee at ministerial level in the 2022 reporting period, compared to 18 per cent in 2021.
- 2.17 The scope of specific concerns that the committee may raise under the principle of other technical scrutiny grounds is broad. However, each is underpinned by the protection and promotion of fundamental rule of law principles, including:
- access to justice;
  - equality before the law;
  - legal certainty;
  - parliamentary sovereignty;
  - procedural fairness;
  - protection of personal rights and liberties;
  - separation of powers; and
  - transparency and accountability.
- 2.18 Nine out of the eleven times the committee raised questions under principle (m) in 2022, the committee was concerned about the limitation of parliamentary oversight. The committee often raised this principle together with concerns that a particular instrument included matters more appropriate for parliamentary enactment.<sup>13</sup>
- 2.19 The number of times the committee raised the principles concerning compliance of instruments with legislative requirements,<sup>14</sup> and the adequacy of explanatory materials,<sup>15</sup> at ministerial level appears to have significantly decreased in 2022. However, this figure was particularly high in the 2021 reporting period, due to the delayed registration of 21 Charter of the United Nations Lists instruments

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<sup>12</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022), p. 31.

<sup>13</sup> Senate standing order 23(3)(j).

<sup>14</sup> Senate standing order 23(3)(a).

<sup>15</sup> Senate standing order 23(3)(g).

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under the Foreign Affairs and Trade portfolio, some of which were made almost 20 years ago.<sup>16</sup>

- 2.20 Principle (h), under which the committee considers instruments which may unduly trespass on personal rights and liberties, was the third most frequent issue raised by the committee in 2022, accounting for 14 per cent of issues raised. More than half of these issues were raised by a single instrument, the Australian Capital Territory Land (Lakes) Ordinance 2022.<sup>17</sup>
- 2.21 In 2021, the committee raised scrutiny concerns at the ministerial level regarding the constitutional validity of one instrument, the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022.<sup>18</sup> The committee raised concerns regarding this issue twice in 2021.
- 2.22 This principle requires the committee to scrutinise each instrument as to whether it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid. Accordingly, under this principle, the committee may also consider whether an instrument raises issues in relation to the separation of powers doctrine or the implied right to freedom of political communication under the Constitution.<sup>19</sup> As the committee's view is that questions of legal validity are ultimately questions for the courts to determine, it generally only raises this matter in exceptional circumstances.
- 2.23 The remaining scrutiny principles made up approximately 32 per cent of all scrutiny concerns raised at the ministerial level. The committee raised concerns about the scope of administrative powers,<sup>20</sup> and adequacy of drafting,<sup>21</sup> at a slightly higher rate in 2022 than in 2021, while it raised concerns about the adequacy of consultation,<sup>22</sup> and access and use,<sup>23</sup> relatively less frequently. The issue of availability of independent review was raised at a similar rate in 2022

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<sup>16</sup> Further information on these instruments and links to the relevant correspondence with the minister can be accessed on the [Index of Instruments](#) page on the committee's website.

<sup>17</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 3.

<sup>18</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 31.

<sup>19</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 11.

<sup>20</sup> Senate standing order 23(3)(c).

<sup>21</sup> Senate standing order 23(3)(e).

<sup>22</sup> Senate standing order 23(3)(d).

<sup>23</sup> Senate standing order 23(3)(f).

compared to 2021.<sup>24</sup> 2022 was the first full year in which the committee had dedicated scrutiny principles dealing with exemptions from sunseting and modification of primary legislation.<sup>25</sup> More information on each of the committee's scrutiny principles is available in the committee's Guidelines.<sup>26</sup>

### *Scrutiny concerns raised at the agency level*

- 2.24 Table 2.1 shows that the committee raised a total of 310 issues at agency level in 2022. This is a significant increase when compared to 2021, but can be explained largely by the committee's usage of the new principles added to its remit in July 2021, especially in relation to exemptions from sunseting.<sup>27</sup>
- 2.25 The committee raised concerns around exemptions from sunseting a total of 65 times in 2022, but did not raise the issue at agency level in 2021. This represented 21 per cent of all issues raised, making the issue the most frequently raised of the committee's scrutiny principles in 2022. The committee often raised this issue in conjunction with principle (g), concerning the adequacy of explanatory materials,<sup>28</sup> which was raised 55 times in 2022, a significant increase on the 15 times it was raised in 2021.
- 2.26 Further information about the committee's engagement with agencies regarding exemptions from sunseting can be found in Chapter 2.
- 2.27 Principle (a), regarding compliance with legislative requirements, was raised a total of 49 times in 2022, a decrease from 65 times in 2021. This was the most raised principle at both the agency and ministerial levels in 2021, but fell to third in 2022. This principle requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements, including those set out in the *Legislation Act 2003* (the Legislation Act).<sup>29</sup>
- 2.28 In the 2022 reporting period, the committee raised concerns under principle (d) regarding the adequacy of consultation 30 times, slightly more often than in 2021.<sup>30</sup> This principle requires the committee to consider:

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<sup>24</sup> Senate standing order 23(3)(i).

<sup>25</sup> Senate standing orders 23(3)(k) and 23(3)(l).

<sup>26</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022).

<sup>27</sup> Senate standing order 23(3)(k).

<sup>28</sup> Senate standing order 23(3)(g).

<sup>29</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022), p. 10.

<sup>30</sup> Senate standing order 23(3)(d).

- whether consultation occurred in relation to the specific instrument;
  - whether persons likely to be affected by the instrument were consulted; and
  - whether persons with expertise were consulted.<sup>31</sup>
- 2.29 As with the incorporation principle, scrutiny concerns about this principle are typically resolved via agency correspondence. In corresponding with agencies regarding this principle, the most common outcome is that the agency advises the secretariat that consultation was undertaken. In these instances, the secretariat then requests the inclusion of further information in an updated explanatory statement.
- 2.30 As noted previously, the secretariat's ability to seek information directly from agencies in the first instance has enabled the committee to focus its attention on raising only the most significant scrutiny issues at this level. For example, the committee was able to raise significant scrutiny issues in relation to constitutional validity and matters more appropriate for parliamentary enactment in this reporting period at the ministerial rather than agency level via its secretariat.

### *Ministerial and agency responses*

- 2.31 In the 2022 reporting period, the committee received 51 responses from ministers (compared to 92 in 2021). Ministerial correspondence is published alongside the relevant Monitor on the committee's website.<sup>32</sup>
- 2.32 In addition, the committee received 236 responses from agencies (compared to 208 in 2020). The committee does not publish the content of any correspondence with agencies. However, it does publish a concise record of the instruments in relation to which it is engaging at agency level in the Monitor.

### **Disallowance notices**

- 2.33 The Chair, on behalf of the committee, gave 23 'protective' notices of motion to disallow an instrument in the 2022 reporting period. This is significantly fewer than the 71 notices given in 2021, but similar to the 20 notices given in 2020.
- 2.34 The committee generally gives a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of a disallowable instrument before the original 15 sitting day disallowance period expires. This protects the Senate's ability to subsequently disallow the instrument in question.<sup>33</sup>

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<sup>31</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022), p. 16.

<sup>32</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitors](#).

<sup>33</sup> [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 438.

- 2.35 The committee may otherwise give notice of a motion to disallow an instrument where it considers that the instrument raises serious and/or unresolved scrutiny concerns and should be drawn to the Senate's attention or disallowed.
- 2.36 All but three of the notices given by the Chair in 2022 were withdrawn that year, generally following the receipt of a satisfactory ministerial or agency response or an undertaking that addressed the committee's concerns. The three remaining unresolved notices were subsequently withdrawn in 2023.
- 2.37 Details of all disallowance motions given during the reporting period are available on the Disallowance Alert webpage for 2022.<sup>34</sup>

## Undertakings

- 2.38 The committee generally requests three types of undertakings from ministers and agencies. These include undertakings to make amendments to an explanatory statement, amend or revoke an instrument; or amend an Act. Occasionally the committee may accept an undertaking in relation to an additional matter, for example, to undertake a review into the legislation or to table a report.
- 2.39 The committee expects that such undertakings will be implemented in a timely manner. Accordingly, the committee records all ministerial and agency undertakings in an index available on the committee's web page.<sup>35</sup>
- 2.40 Table 2.2 below outlines the number of undertakings that were implemented in 2022, as well as those that remained outstanding at the end of this reporting period. There were 192 undertakings made and/or implemented in the 2022 reporting period (compared to 199 in 2021).

**Table 2.2 Undertakings addressing the committee's concerns**

Status	Type of undertaking				Total
	Amend ES	Amend/revoke instrument	Amend Act or enabling legislation	Other	
<b>Implemented</b>	115	13	4	1	<b>133</b>
<b>Outstanding</b>	42	11	3	3	<b>59</b>
<b>TOTAL</b>	<b>157</b>	<b>24</b>	<b>7</b>	<b>4</b>	<b>192</b>

- 2.41 A total of 115 replacement explanatory statements were tabled in response to the committee's scrutiny concerns, which is a similar number to the number of explanatory statements tabled in 2021 (122).

<sup>34</sup> Parliament of Australia, [Disallowance Alert 2022](#).

<sup>35</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Index of undertakings](#).

2.42 In 2022, 13 undertakings to amend or revoke instruments were implemented, which is a decrease by four from the previous year.

2.43 Examples of significant undertakings made and implemented in 2022 are discussed in Chapter 3 of this report.

### **Instruments exempt from disallowance**

2.44 Senate standing order 23(4A) empowers the committee to consider instruments that are exempt from disallowance and determine whether such exemptions appropriate. As part of this scrutiny, the committee tracks the total number of instruments exempt from disallowance in each calendar year.

2.45 Table 2.3 below sets out the total number of instruments registered in 2021 and 2022, including the proportion of instruments exempt from disallowance. The committee notes with concern the significant increase in the percentage of instruments exempt from disallowance in 2022.

**Table 2.3 Instruments exempt from disallowance 2021-2022**

<b>Year</b>	<b>Exempt</b>	<b>Disallowable</b>	<b>Total</b>	<b>Percentage exempt</b>
<b>2022</b>	340	1425	1765	<b>19.3%</b>
<b>2021</b>	246	1667	1913	<b>12.9%</b>



# Chapter 3

## Significant scrutiny issues

### Overview

- 3.1 This chapter outlines the most significant scrutiny issues that the committee identified in 2022. It includes:
- case studies related to the committee's role in promoting compliance with its scrutiny principles; and
  - significant ongoing scrutiny concerns that the committee will continue to monitor in the future, including the use of delegated legislation to create exemptions to, or modify the operation of, primary legislation.
- 3.2 Due to the prorogation of the 46th Parliament for the federal election in April 2022, the committee notes that a number of issues raised by the previous committee were re-referred by the new committee to new ministers appointed in the 47th Parliament.

### Case studies and undertakings

- 3.3 The following section outlines the most significant undertakings made and implemented during 2022 to address the committee's scrutiny concerns. The examples below illustrate the committee's approach to its scrutiny role and identify significant issues as assessed against the scrutiny principles outlined in Senate standing order 23(3).
- 3.4 The relevant scrutiny principle is identified in relation to each case study.

#### **Australian Renewable Energy Agency Regulations 2021-2022<sup>1</sup>**

*Principle (a) compliance with authorising legislation*

*Principle (j) significant matters in delegated legislation*

*Principle (d) consultation with persons affected*

- 3.5 In 2021, the committee had engaged in ongoing correspondence with the former Minister for Climate Change and Energy on two Australian Renewable Energy Agency (ARENA) instruments:
- the Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 (the 2020-2021 Budget Regulations); and

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<sup>1</sup> Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590].

- the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 (the Technology Investment Roadmap Regulations).
- 3.6 The 2020-2021 Budget Regulations were ultimately disallowed on 22 June 2021 on the motion of senators outside of the committee. The Technology Investment Roadmap Regulations were similarly disallowed following a motion of the committee lapsing on 28 March 2022.
- 3.7 Subsequently, in 2022, two further ARENA instruments were registered:
- the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 (the Clean Energy Technologies Regulations); and
  - the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022 (the Powering Australia Regulations).
- 3.8 The committee generally considers that delegated legislation can provide additional detail relevant to an Act but cannot extend it. Its principal concern regarding the ARENA instruments was that they introduced measures that expanded the remit of ARENA beyond what was envisaged by Parliament when the *Australian Renewable Energy Act 2011* (ARENA Act) was passed.
- 3.9 Specifically, prior to September 2022, the main objects in section 3 of the ARENA Act were to 'improve the competitiveness of renewable energy technologies and increase the supply of renewable energy in Australia'. Section 8 of that Act sets out ARENA's functions, including paragraph (f) which enables regulations to prescribe further functions, and paragraph (h) permits ARENA to do anything 'incidental or conducive to' the performance of these functions.
- 3.10 Of particular note, the Powering Australia Regulations prescribe 'energy efficient technologies' and 'electrification technologies' as functions which appeared to the committee to expand the remit of ARENA beyond renewable energy technologies.
- 3.11 The committee's interpretation that the ARENA regulations went beyond the remit of the ARENA Act was supported by the fact that nothing in the explanatory memorandum to the bill preceding that Act indicates it was contemplated that ARENA would have the ability to foster anything other than renewable energy technologies. For this reason, it was the committee's view that the measures should have been introduced in primary, rather than delegated, legislation. The committee's concerns were also heightened as stakeholders and experts were not consulted in the making of the instruments.
- 3.12 After the committee raised its concerns regarding the Powering Australia Regulations in 2022, Parliament passed the *Climate Change (Consequential Amendments) Act 2022* (the Climate Change Consequential Amendments Act). This Act expands the objects of the ARENA Act to facilitate the achievement of

Australia's greenhouse gas emissions reduction targets. Further, Senator David Pocock successfully moved an amendment to the Climate Change Consequential Amendments Act that directly addressed the legislative basis of regulations which prescribe energy efficiency technologies as a function of ARENA. This occurred through the addition of a note that section 8(f) allows additional functions to be prescribed related to renewable energy technologies as well as electrification or energy efficiency technologies.

- 3.13 Subsequently, the minister advised that the Climate Change Consequential Amendments Act 'addresses the committee's concerns' and authorises the functions conferred by the Powering Australia Regulations. The minister also provided further information on the links between energy efficiency and electrification technologies and the scope of ARENA Act. Additionally, correspondence from the minister illustrated that consultation with stakeholders in relation to the Clean Energy Technologies Regulations and this consultation was also applicable to the Powering Australia Regulations.
- 3.14 Following this engagement with the minister, the committee was able to conclude its examination of this longstanding matter.

### **Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2) [F2021L01658]**

*Principle (j) exemption from primary legislation*

*Principle (m) parliamentary oversight*

- 3.15 The committee raised concerns in relation to the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2), on the basis it created ongoing exemptions to primary legislation. Specifically, the instrument provided 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). This exemption also appeared to operate on an ongoing basis, as the measures introduced by the instrument were exempt from sunseting.
- 3.16 The former committee initially raised concerns with the former Minister for Home Affairs (the former minister) as to why the instrument sets out ongoing exemptions to primary legislation, noting the committee's longstanding view that executive-made law should not ordinarily amend the operation of parliamentary enactments. In 2022, the new committee raised the same concerns with the new Attorney-General. The former minister and the new Attorney-General both indicated that that the longer timeframes for progressing the changes via primary legislation could compromise the flexibility and urgency required in the context of money laundering and counter-terrorism financing, and effectively cause litigation funders to cease their activities pending the

change. Despite this advice, it remained unclear why the exemptions could not be time-limited and so the committee sought further advice regarding this issue.

- 3.17 In further correspondence with the committee, the new Attorney-General agreed to amend the instrument to cease within five years, in light of the changing legal and regulatory position regarding litigation funders. The Attorney-General also indicated that the Australian Transaction Reports and Analysis Centre would revisit whether the relevant exemptions in the instrument were in fact necessary, after Parliament had considered amendments to the Corporations Regulations to reflect a recent Federal Court decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited*.
- 3.18 The committee welcomed the Attorney-General's engagement and, in light of the undertaking to amend the instrument so that the exemptions cease within five years, was able to conclude its examination of the instrument.

### **Significant ongoing scrutiny concerns**

- 3.19 In 2022, the committee raised concerns about several ongoing and significant scrutiny issues which it will continue to monitor in the future. This section will outline these ongoing issues.

### **Exemptions or modifications to primary legislation in Treasury portfolio legislation**

*Principle (j) exemption from primary legislation*

*Principle (k) parliamentary oversight*

- 3.20 In 2022, the committee continued to raise its systemic scrutiny concerns about the modification or exemption of persons or entities from the operation of primary legislation, in relation to instruments made under the Treasury portfolio.
- 3.21 The committee was particularly concerned about the duration of the exemptions and modifications, as some of the instruments were exempt from the standard sunseting regime under the *Legislation Act 2003* (Legislation Act), such that they would remain in force on an ongoing basis. The committee engaged with the Assistant Treasurer and his department in relation to these instruments. It also held a private briefing in November 2022 to discuss its concerns as they arose in relation to the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021.

### **Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]**

- 3.22 The Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 (the Hawking Regulations) amend the Corporations Regulations 2001 (the regulations) to create exemptions to the prohibition on hawking in the *Corporations Act 2001* (the Corporations Act).

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These operate on an ongoing basis, as the relevant provisions are not expressly time limited, and the regulations are not subject to sunseting.

- 3.23 Prior to the 2022 election, the previous committee engaged extensively with the then Treasurer regarding the use of delegated legislation to create ongoing exemptions from the Act. The committee's longstanding expectation is that instruments which modify or create exemptions to the operation of primary legislation should be time limited and operate no longer than strictly necessary. The committee considers that in most cases, this means no more than three years. This is informed by the committee's view that delegated legislation should not continue in force for such a period as to act as a de facto amendment to primary legislation.
- 3.24 Further, Senate standing order 23(3)(l) requires the committee to scrutinise such instruments as to whether they are in force only for as long as strictly necessary. The committee's detailed views in this regard are set out in its *Inquiry into the exemption of delegated legislation from parliamentary oversight*, which was tabled in March 2021.
- 3.25 The committee sought the former Treasurer's advice regarding the inclusion of the exemptions in delegated legislation and whether they could be time limited in accordance with the committee's guidelines. The former Treasurer advised that inclusion of the exemptions in delegated legislation was necessary and appropriate due to their specific nature and the fact that they do not apply to all persons who are offering to sell or issue financial products. He further advised that a three-year time limit would not be appropriate as the exemptions are made under a specifically delegated power rather than a general exemption or modification power. As these concerns remained unresolved, the former committee placed a notice of motion to disallow the instrument. That motion lapsed at the prorogation of the 46th Parliament. However the fifteen-day period for giving a notice of motion to disallow restarted upon commencement of the new Parliament.
- 3.26 The new committee raised similar concerns with the new Assistant Treasurer in *Delegated Legislation Monitor 5 of 2022* and held a private briefing in November 2022 to discuss this ongoing issue. Following that private briefing, the Assistant Treasurer made an undertaking to amend the Hawking Regulations to provide that the exemptions would cease after three years. In light of this undertaking, the committee was able to conclude its examination of the instrument.
- 3.27 However, the Assistant Treasurer also indicated that, when considering future legislation amendments, he would have regard to the respective legal hierarchies, existing frameworks and stakeholder needs. As such, he advised he would appreciate meeting with the committee in future to discuss the role of delegated legislation within the Treasury portfolio and the approach going forward.

### **Competition and Consumer Amendment (Consumer Data Right) Regulations 2021 [F2021L01617]**

- 3.28 The Competition and Consumer Amendment (Consumer Data Right) Regulations 2021 amend the Competition and Consumer Regulations 2010 (the Consumer Data Right Regulations), to exempt the Australian Energy Market Operator (AEMO) from privacy safeguard obligations contained in the *Competition and Consumer Act 2010* (the Act).
- 3.29 The committee engaged in ongoing correspondence with the former Minister for Superannuation, Financial Services and the Digital Economy and with the former Assistant Treasurer, raising concerns that the instrument contained amendments to the Act, which appeared to operate on an ongoing basis, as the principal regulations are exempt from sunseting. In response to the committee's concerns, the former minister and former Assistant Treasurer both advised that the exemptions were necessary on an ongoing basis because:
- 3.1 the circumstances requiring them were unlikely to change;
  - 3.2 it would cause uncertainty if they were repealed in a shorter timeframe; and
  - 3.3 and inclusion in delegated legislation was appropriate due to the legislative hierarchy.
- 3.4 Following ongoing correspondence with the committee and, in acknowledgment of the committee's concerns, the former Assistant Treasurer undertook to amend the instrument to require a review in a timeframe consistent with the usual ten-year sunseting period. Although the committee welcomed this undertaking and concluded its examination of the instrument on this basis, it noted that Assistant Treasurer's undertaking would provide for executive rather than parliamentary oversight and, accordingly, drew this matter to the attention of the Senate.
- 3.5 The committee thanks the former Assistant Treasurer for his constructive engagement during 2022 in relation to the above instruments. The committee will continue to monitor this issue in 2023 and beyond, in recognition of its longstanding expectation, as reflected in Senate standing order 23(3)(l), that instruments that modify or create exemptions to primary legislation should not continue any longer than strictly necessary.

### **Instruments exempt from disallowance**

- 3.6 Standing order 23(4A) provides that the committee may scrutinise instruments that are not subject to disallowance, including and whether it is appropriate for these instruments to be exempt from disallowance.
- 3.7 2022 was the first full year in which the committee scrutinised the issue of exemptions from disallowance. Of the 1765 instruments registered in 2022, 340 were exempt from disallowance. This equates to 19.3 per cent of exempt

instruments, considerably higher than the 12.9 per cent of exempt instruments in 2021.

- 3.8 The committee considers that delegated legislation should be subject to disallowance unless there are exceptional circumstances. In 2022, the committee focused on scrutinising the justifications provided for the exemption, noting the important role that the disallowance process plays in maintaining parliamentary oversight of delegated legislation made by the executive.
- 3.9 In this reporting period, the committee's focused on raising this issue directly with relevant departments and agencies, via its secretariat, to ensure that where an instrument is exempt from disallowance, its explanatory statement identifies the legislative source and a justification for the exemption.
- 3.10 The committee also added an additional section to its *Delegated Legislation Monitor* regarding instruments that are exempt from disallowance. In this section, the committee includes a comprehensive list of all the instruments registered in the reporting period which did not meet its expectations in relation to an exemption from sunseting. This includes instruments that:
- are exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;
  - are 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*;
  - override or modify primary legislation;
  - trigger, or are a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
  - restrict 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.
- 3.11 The committee will continue to monitor and report on this scrutiny issue going forward.

#### ***Instruments exempt from disallowance under the Biosecurity Act 2015***

- 3.12 As noted above, the committee's longstanding view is that legislative instruments should only be exempt from disallowance in exceptional circumstances.
- 3.13 The committee's broader concerns about the exemption from disallowance of emergency legislative instruments are set out in detail in the interim report of the committee's inquiry into the *Exemption of delegated legislation from*

*parliamentary oversight*.<sup>2</sup> Additionally, the committee continued to identify and draw the Senate's attention to this issue throughout 2022.

- 3.14 It has remained the committee's view that emergency delegated legislation should be subject to appropriate parliamentary oversight, with limited exemptions from disallowance. Where an instrument is exempt from disallowance, the committee expects that a detailed justification will be included in the explanatory statement. This approach upholds the Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.
- 3.15 Therefore, in addition to raising this issue in its *Delegated Legislation Monitors*, on 27 October 2022, the committee wrote to the Minister for Agriculture, Forestry and Fisheries and the Minister for Health and Aged Care to request that they progress amendments to the *Biosecurity Act 2015* (Biosecurity Act) to remove the exemptions from disallowance. Both ministers advised that they would not progress the requested amendments.
- 3.16 While the ministers acknowledged the important role of disallowance in maintaining parliamentary oversight, they advised that the exemptions from disallowance are a long-standing feature of the biosecurity framework and are necessary to protect Australia from biosecurity risks.
- 3.17 The ministers further advised that 'exceptional circumstances' apply to biosecurity exemptions as they are scientific and technical in nature, critical to the effective management of human biosecurity and other biosecurity risks, and necessary to ensure fast and urgent action to manage biosecurity risks.
- 3.18 The committee has not previously accepted these justifications for exemptions from disallowance. This is because the disallowance process does not inhibit the immediate commencement of instruments and does not invalidate actions taken under instruments prior to disallowance. Potential disallowance would therefore not prevent the government from taking critical or emergency action to respond to biosecurity risks and threats.
- 3.19 Further, the committee has not accepted the argument that measures in delegated legislation are so scientific or technical that Parliament should not have oversight over the measures being introduced. In particular, it is not clear why parliamentarians would not be able to take into account scientific or technical evidence in their deliberations over an instrument. Lastly, the instances where an instrument has been disallowed by the Senate are rare, but nevertheless remain a crucial check on executive power.

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<sup>2</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of delegated legislation from parliamentary oversight: Interim Report*, 2 December 2020. Accessible at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Exemptfromoversight/Interim\\_report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Interim_report).

- 3.20 The committee is also of the view that instruments which impact on personal rights and liberties, should be enacted by Parliament, rather than by the executive in delegated legislation, let alone in delegated legislation that is exempt from basic parliamentary oversight. In this regard, many of the determinations such as the COVID-19 travel bans have such an impact.
- 3.21 The committee also considers that the disallowance process is an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to instruments which impose significant requirements on the Australian public, as many of the instruments made under the Biosecurity Act do, the committee considers that the disallowance process is necessary to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.
- 3.22 The committee held a private briefing with officials from the Department of Agriculture, Fisheries and Forestry and Health and Aged Care on Wednesday 23 November 2022, and intends to continue pursuing its scrutiny concerns regarding this matter.

### **Instruments exempt from sunseting**

#### *Principle (k) exemption from sunseting*

- 3.23 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. This process is called 'sunseting'.
- 3.24 The committee considers that the sunseting framework provides an important opportunity for the executive to ensure that delegated legislation remains current and appropriate and allows Parliament to maintain effective and regular oversight over delegated legislation.
- 3.25 2022 was the first full year in which the committee scrutinised the issue of exemptions from sunseting since it became its own scrutiny principle. Of the 453 instruments the committee raised scrutiny concerns about in 2022, 40 were exempt from sunseting and did not meet the committee's expectations set out in its guidelines.
- 3.26 The committee considers that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances. It is the committee's view that where an instrument is exempt from sunseting, or contain measures that will remain in force within another instrument that is exempt from sunseting, the explanatory statement should, at a minimum, provide a thorough justification for the exemption, noting the effect of exemptions from sunseting on parliamentary oversight.

- 3.27 In 2022, the committee focused on raising this issue directly with the relevant departments and agencies, via its secretariat, to ensure that where an instrument is exempt from sunseting, the explanatory identifies the legislative source of the exemption and provides a justification for the exemption.
- 3.28 While the committee remains concerned about the number of instruments that were made in 2022 that are exempt from sunseting, the committee is pleased to report that many of the departments and agencies with which it has engaged on this issue have made undertakings to include the source and justification in future explanatory statements.
- 3.29 Further, the committee added a new section to its Delegated Legislation Monitor regarding exemptions from sunseting. In this section, the committee draws the Senate's attention to a comprehensive list of all the instruments registered in the reporting period which did not meet its expectations in relation to an exemption from sunseting. This includes instruments that are:
- (a) exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;
  - (b) 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;
  - (c) overrides or modifies primary legislation;
  - (d) triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
  - (e) restricts personal rights and liberties;
  - (f) facilitates the expenditure of public money on an ongoing basis; or
  - (g) otherwise contains a matter requiring parliamentary oversight.
- 3.30 The committee will continue to monitor and report on this scrutiny issue going forward.

**Senator the Hon Linda Reynolds CSC**

**Deputy Chair**

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