



AUSTRALIAN  
SENATE

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

Parliament House, Canberra ACT 2600  
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10 February 2022

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

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

Via email: [minister.littleproud@agriculture.gov.au](mailto:minister.littleproud@agriculture.gov.au); [DLO-MO@agriculture.gov.au](mailto:DLO-MO@agriculture.gov.au)  
[Minister.Hunt.DLO@health.gov.au](mailto:Minister.Hunt.DLO@health.gov.au)

Dear Ministers,

**Various instruments made under the *Biosecurity Act 2015*: [F2021L01620]; [F2021L01621]; [F2021L01698]; [F2021L01718]; [F2021L01757]**

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

The committee considers that the above instruments raise significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's concluding advice is set out in Chapter 1 of its *Delegated Legislation Monitor 2 of 2022*, available on the committee's website at [www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc) and **attached** to this letter.

As set out in the Monitor, the committee maintains and reiterates its view that amendments should be made to:

- section 44 of the Biosecurity Act to provide that any future determinations setting out entry requirements will be subject to disallowance;
- section 174 of the Biosecurity Act to provide that any future determinations of 'conditionally non-prohibited goods' that must not be brought into Australia unless specified considerations are complied with will be subject to disallowance;
- section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance; and
- section 477 of the Biosecurity Act to provide that any future determinations setting out emergency requirements will be subject to disallowance.

Further, as the committee has previously advised, if the government is not amenable to moving such amendments, the committee intends to move its own amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 which is currently before the Parliament, and will continue to draw legislative instruments made under the Biosecurity Act which are exempt from disallowance to the attention of the Senate.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email at [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Yours sincerely,

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

## Part 2

### Exempt instruments raising significant scrutiny issues

1.4 This part details those instruments exempt from disallowance which raise particularly significant scrutiny concerns in relation to the appropriateness of their exemption from disallowance under Senate standing order 23(4A). Where necessary, the committee additionally raises scrutiny concerns in relation to its scrutiny principles set out in Senate standing order 23(3)(3).

### Various instruments made under the *Biosecurity Act 2015*

<b>FRL No.</b>	<a href="#">F2021L01620</a> ; <a href="#">F2021L01621</a> ; <a href="#">F2021L01698</a> ; <a href="#">F2021L01718</a> ; <a href="#">F2021L01757</a> <sup>1</sup>
<b>Purpose</b>	Various purposes responding to the COVID-19 pandemic
<b>Authorising legislation</b>	<i>Biosecurity Act 2015</i>
<b>Portfolio</b>	<b>Health:</b> F2021L01620, F2021L01621, F2021L01718 and F2021L01757 <b>Agriculture, Water and the Environment:</b> F2021L01698
<b>Source of exemption</b>	Subsections 44(3), 174(5), 476(2) and 477(2) of the <i>Biosecurity Act 2015</i>

#### Overview

1.5 Sections 475 and 476 of the *Biosecurity Act 2015* (Biosecurity Act) allow the Governor-General to declare that a human biosecurity emergency exists and to extend the emergency period for further periods of up to three months if the Health Minister is satisfied of certain criteria. During a human biosecurity emergency period, the Health Minister may determine emergency requirements or give directions deemed necessary to prevent or control the entry, emergence, establishment or spread of the relevant disease in Australian territory. On 9 December 2021, the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 4) Instrument 2021 [F2021L01757] was made to extend the emergency period a seventh consecutive time, for a further two months until 17 February 2022.

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

1.6 Subsections 44(2), 174(1), and 477(1) of the *Biosecurity Act 2015* (the Biosecurity Act) empower the minister determine entry requirements, and emergency requirements during a human biosecurity emergency period. The Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination (No. 2) 2021 [F2021L01620], Biosecurity (Emergency Requirements—High Risk Country Travel Pause) Determination (No. 2) 2021 [F2021L01621], and the Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2021 [F2021L01718] were made under the Biosecurity Act in response to the COVID-19 pandemic and introduce a range of measures, including preventing persons travelling from Omicron high risk countries from entering Australian territory.

1.7 Subsection 174(1) of the Biosecurity Act empowers the Director of Biosecurity and the Director of Human Biosecurity to jointly determine that specified classes of goods must not be brought or imported into Australian territory unless specified conditions (including conditions for administrative purposes) are complied with. The Biosecurity (Conditionally Non-prohibited Goods) Amendment (Test Kits) Determination 2021 [F2021L01698] prescribes conditions for importing tests kits (including COVID-19 test kits).

1.8 These five instruments are exempt from disallowance by subsections 44(3), 174(5), 476(2) and 477(2) of the Biosecurity Act.

## Scrutiny concerns

### ***Exemption from disallowance***<sup>2</sup>

1.9 The committee has set out its significant scrutiny concerns in relation to legislative instruments made under the Biosecurity Act which are exempt from disallowance in detail in Chapter 1 of *Delegated Legislation Monitor 14 of 2021*,<sup>3</sup> *Delegated Legislation Monitor 16 of 2021*<sup>4</sup> and *Delegated Legislation Monitor 1 of 2022*.<sup>5</sup> 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

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

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 14 of 2021*, 29 September 2021, pp. 14–21. Accessible at: [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).

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 16 of 2021*, 25 November 2021, pp. 3–10. Accessible at: [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).

5 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2022*, 25 January 2022, pp. 6–9. Accessible at: [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).

committee's inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>6</sup>

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

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

1.12 The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 4) Instrument 2021 [F2021L01757] extends the human biosecurity emergency period for the seventh consecutive time for a further two months to 17 December 2021. The exemption from disallowance in relation to this instrument is particularly concerning as it means that any determinations of emergency requirements made under section 477 of the Biosecurity Act that are still currently in effect will continue to apply for the duration of the extended human biosecurity emergency period (unless revoked earlier). Further, additional determinations may be made during the period, which are also not subject to disallowance by Parliament. The committee's concerns are heightened as there is no limitation on the number of times that the emergency period may be further extended without parliamentary oversight.

1.13 The purpose of the Biosecurity (Conditionally Non-prohibited Goods) Amendment (Test Kits) Determination 2021 [F2021L01698] (the Test Kits Determination) is to facilitate the importation of test kits, including particular COVID-19 test kits, containing animal material, human material or material derived from a disease agent. To achieve this, the Test Kits Determination provides that test kits must not be brought or imported into Australian territory unless they are covered by an import permit or the alternative conditions specified for such test kits are complied with. The provision of alternative conditions for test kits means that an import permit is not required for the import of test kits provided that the alternative conditions are met. The explanatory statement provides that this instrument is appropriately exempt from disallowance because the decision to make the Test Kits Determination relies solely on technical and scientifically-based evidence.

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6 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).

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

1.15 As the Senate Standing Committee for the Scrutiny of Bills has noted, parliamentarians have access to considerable specialist expertise and parliamentarians regularly deal with legal, scientific and technical complexity while undertaking their law-making functions. In addition, parliamentarians are accountable to their electors in relation to how they exercise their law making functions, including the power to disallow a legislative instrument and any resulting outcomes that flow from that disallowance.<sup>7</sup>

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

1.17 The remaining three instruments made under the Biosecurity Act this period are the Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination (No. 2) 2021 [F2021L01620], Biosecurity (Emergency Requirements—High Risk Country Travel Pause) Determination (No. 2) 2021 [F2021L01621] and the Biosecurity Legislation Amendment (Emergency and Entry Requirements) Determination 2021 [F2021L01718]. These instruments introduce significant measures which impact the public, including temporarily imposing requirements to travel and preventing entry into Australian territory. The justification provided for the exemption from disallowance remains the same—that the risk of disallowance would inhibit the Commonwealth's ability to act urgently on public health advice to manage a human biosecurity risk that could threaten or harm human health, as it would create uncertainty as to whether the instrument might be disallowed.

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

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7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, p. 80.

1.19 The committee considers the disallowance process to be an opportunity to work in a constructive manner with the executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to these instruments, which impose significant requirements on the Australian public, the committee considers that the disallowance process is necessary to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.

1.20 The committee appreciates that during an emergency it is necessary for governments to take urgent and decisive action. However, Parliament must also have effective oversight of these critical decisions and retain the ability to scrutinise the actions of governments.

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

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

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

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

- **section 44 of the Biosecurity Act to provide that any future determinations setting out entry requirements will be subject to disallowance;**
- **section 174 of the Biosecurity Act to provide that any future determinations of 'conditionally non-prohibited goods' that must not be brought into Australia unless specified considerations are complied with will be subject to disallowance;**
- **section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance; and**
- **section 477 of the Biosecurity Act to provide that any future determinations setting out emergency requirements will be subject to disallowance.**

**1.25** If the government is not amenable to moving such amendments, the committee intends to move its own amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 which is currently before the Parliament, to ensure that future legislative instruments made under the Biosecurity Act are subject to disallowance.<sup>8</sup>

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

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8 The committee's proposed amendments to the bill were circulated in the Senate on 2 December 2021, see [sheet 1475](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6776) available at: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6776](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6776).





10 February 2022

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

Via email: [dlo@homeaffairs.gov.au](mailto:dlo@homeaffairs.gov.au)

Dear Minister,

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

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

***Exemption from the operation of primary legislation***  
***Exemption from sunseting***

Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to consider each instrument as to whether it is appropriately exempt from the sunseting provisions of the *Legislation Act 2003* (Legislation Act).

This instrument amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the principal instrument) to specify the conditions that must be met so that an issue of an interest in a litigation funding scheme is exempt from the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) and to define the term 'litigation funding scheme'.

The committee's longstanding view is that provisions which modify, or exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation. If the provisions are in delegated legislation, the provisions should operate no longer than strictly necessary. The committee considers that in most cases, this means the provisions should cease to operate no more than three years after they commence to ensure a minimum degree of regular parliamentary oversight.

In addition, as per the committee's guidelines, the committee considers that the explanatory statement should comprehensively justify the nature and scope of the relevant modification or exemption and indicate whether there is any intention to conduct a review of the relevant

provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

In this regard, it remains unclear why it was considered necessary and appropriate to address this matter in delegated legislation, rather than primary legislation.

In light of this, from a scrutiny perspective, the committee considers that the principal instrument should be amended to specify that the provisions inserted into the principal instrument by this instrument cease within three years after they commenced. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

The committee also expects that explanatory statements to instruments which contain measures that will remain in force within a principal instrument that is exempt from sunseting should set out the source of the exemption from sunseting and also provide a thorough justification for the exemption. The committee addressed the impact of exemptions from sunseting in limiting parliamentary oversight of delegated legislation in its 2020-2021 inquiry into the exemption of delegated legislation from parliamentary oversight.

**The committee would therefore appreciate your advice as to:**

- **why it is considered necessary and appropriate to use delegated legislation to set out an exemption from the operation of primary legislation in this instance;**
- **whether the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the principal instrument) can be amended to provide that the measures inserted into the principal instrument by this instrument cease within three years after they commenced;**
- **why the principal instrument is exempt from sunseting, noting that this means that the measures in this instrument will remain in force within the principal instrument until they are proactively repealed; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **24 February 2022**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**

**Chair**

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



10 February 2022

The Hon Josh Frydenberg MP  
Treasurer  
Parliament House  
CANBERRA ACT 2600

Via email: [tsrdlos@treasury.gov.au](mailto:tsrdlos@treasury.gov.au)

CC: Senator the Hon Jane Hume, Minister for Superannuation, Financial Services  
and the Digital Economy, [Jane.hume@treasury.gov.au](mailto:Jane.hume@treasury.gov.au)  
[committeescrutiny@treasury.gov.au](mailto:committeescrutiny@treasury.gov.au)

Dear Treasurer,

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

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

***Privacy***

***Adequacy of explanatory materials***

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The instrument exempts the Australian Energy Market Operator (AEMO) from four privacy safeguards set out in Division 5 of Part IVD of the *Competition and Consumer Act 2010* (the Act).

The explanatory statement to the instrument explains:

Under section 12 of the Consumer Data Right (Energy Sector) Designation 2020 (the Energy Designation), AEMO is specified as the data holder for specified types of information relating to arrangements under which electricity is supplied to consumers. However, AEMO never holds any information that allows it to identify a consumer in relation to any of the designated data it holds and has no direct relationship with any CDR consumer.

However, the explanatory statement also indicates that "... responsibility for CDR data is shared between an energy retailer (who has a direct relationship with the consumer) and the Australian Energy Market Operator (AEMO) (who has no direct relationship with the consumer)" which suggests that the AEMO may in fact hold consumer data.

The committee understands from informal correspondence that your department's position is that the AEMO does not hold any consumer data and that the privacy protections are best placed on the retailer. While noting this, it is unclear whether the AEMO is not considered a data holder because the systems in place have been designed in a manner that prevents the storing of personal data, or because of legislative protections. The committee is concerned that if this practice is not underpinned by legislation, such practices are liable to change and privacy protections may then be required.

**In light of the above, the committee would appreciate your advice as to:**

- **whether it is possible the Australian Energy Market Operator could hold private or personal consumer data in the future; and**
- **why it is considered necessary to remove the privacy safeguards applicable to the Australian Energy Market Operator.**

### ***Exemption from the operation of primary legislation***

#### ***Exemption from sunseting***

Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to consider each instrument as to whether it is appropriately exempt from the sunseting provisions of the *Legislation Act 2003* (Legislation Act).

As noted above, the instrument exempts the AEMO from the operation of privacy safeguards set out in the Act. In addition, the Competition and Consumer Regulations 2010, which are amended by this instrument, are exempt from sunseting.

The committee's longstanding view is that provisions which modify, or exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation. If the provisions are in delegated legislation, the provisions should operate no longer than strictly necessary. The committee considers that in most cases, this means the provisions should cease to operate no more than three years after they commence to ensure a minimum degree of regular parliamentary oversight.

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

In this regard, it remains unclear why it was considered necessary and appropriate to address this matter in delegated legislation, rather than primary legislation.

In light of this, from a scrutiny perspective, the committee considers that the Competition and Consumer Regulations 2010 (the principal instrument) should be amended to specify that the provisions inserted into the principal instrument by this instrument cease within three years after they commenced. If it becomes necessary to extend the operation of these provisions, the committee considers that this should be done by amending the primary legislation or via a subsequent legislative instrument that is subject to disallowance and parliamentary scrutiny.

The committee also expects that explanatory statements to instruments which contain measures that will remain in force within a principal instrument that is exempt from sunseting should set out the source of the exemption from sunseting and also provide a thorough justification for the exemption. The committee addressed the impact of exemptions from sunseting in limiting parliamentary oversight of delegated legislation in its 2020-2021 inquiry into the exemption of delegated legislation from parliamentary oversight.

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

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to exempt the AEMO from the operation of privacy safeguards in the *Competition and Consumer Act 2010*;**
- **whether the Competition and Consumer Regulations 2010 (the principal instrument) can be amended to provide that the measures inserted into the principal instrument by this instrument cease within three years after they commenced;**
- **why the principal instrument is exempt from sunseting, noting that this means that the measures in this instrument will remain in force within the principal instrument until they are proactively repealed; and**
- **whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **24 February 2022**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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



10 February 2022

The Hon Angus Taylor MP  
Minister for Industry, Energy and Emissions Reduction  
Parliament House  
CANBERRA ACT 2600

Via email: [angus.taylor@energy.gov.au](mailto:angus.taylor@energy.gov.au)

CC: [dlotaylor@industry.gov.au](mailto:dlotaylor@industry.gov.au); [legislation@industry.gov.au](mailto:legislation@industry.gov.au)

Dear Minister,

**Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021 [F2021L01708]**

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

***Parliamentary oversight***

***Matters more appropriate for parliamentary enactment***

***Significant matters in delegated legislation***

Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes where an instrument or its explanatory statement fails to disclose the amount of Commonwealth funding for programs authorised under the *Industry Research and Development Act 1986*. Additionally, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation.

This instrument prescribes the Underwriting New Generation Investments Program (the Program) to provide financial support for new investments in dispatchable electricity generation projects.

The explanatory statement to the instrument states that:

The intention is that the shortlisted projects will be considered, in due course, for investment under the proposed \$1 billion Grid Reliability Fund (the Fund) rather than through the mechanisms provided for in the Legislative Instrument. The Fund will be established upon the enactment of the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 (the Bill) (currently before Parliament) and will be administered by the Clean Energy Finance Corporation in accordance with the Clean Energy Finance Corporation Act 2012, as amended by the Bill. Pending the enactment of the Bill, projects will be considered for support through the mechanisms provided for in the Legislative Instrument.

The Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 (the Bill) provides that \$1 billion will be credited to the Grid Reliability Fund, however it is unclear from the instrument and the explanatory statement the total amount of funding that is being authorised for spending by this instrument while the Bill is still before Parliament.

The committee notes that the scrutiny of instruments made under the *Industry Research and Development Act 1986* is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure and any uncertainty surrounding the funding authorised may inhibit Parliament's capacity to effectively scrutinise such instruments.

Additionally, the committee is concerned about the use of delegated legislation to pre-emptively authorise the expenditure of public funds on eligible projects shortlisted under the Program when there is currently a bill before the Parliament in relation to this matter. The committee notes that the Bill may be subject to amendments or may not be passed and if this occurs, it is unclear what the effect of this would be on spending authorised by the instrument. It appears to the committee that there is strong possibility that the purportedly temporary mechanism established by the instrument may continue in operation despite the clearly expressed will of the Parliament should it amend, or fail to pass, the Bill.

**The committee therefore requests your advice as to:**

- **the amount of funding that is authorised to be spent on eligible projects under the Underwriting New Generation Investments Program by this instrument;**
- **why it is considered necessary and appropriate to provide authority for spending on the Program by delegated legislation, when the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 is currently before the Parliament; and**
- **the status of the instrument, and any spending it authorises, if the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 is not passed or is amended before it is passed.**

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **24 February 2022**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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





10 February 2022

Senator the Hon Simon Birmingham  
Minister for Finance  
Parliament House  
CANBERRA ACT 2600

Via email: [financeminister@finance.gov.au](mailto:financeminister@finance.gov.au)

CC: [DLO-Finance@finance.gov.au](mailto:DLO-Finance@finance.gov.au)

The Hon Greg Hunt MP, Minister for Health and Aged Care,  
[Minister.Hunt.DLO@health.gov.au](mailto:Minister.Hunt.DLO@health.gov.au)

Dear Minister,

**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021 [F2021L01430]**

Thank you for your letter of 25 January 2022, and the attached response from the Minister for Health and Aged Care (the Minister) to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the above instrument. The committee considered the response at its private meeting on 9 February 2022 and has resolved to seek your further advice about the issues outlined below.

***Matters more appropriate for parliamentary enactment***

*Timing of primary legislation*

Thank you for advising the instrument was created urgently in parallel with the COVID-19 vaccine rollout to provide legislative authority for payments to be made to eligible claimants, rather than being established through primary legislation as there was a risk that primary legislation may not have been made in the calendar year.

The committee notes the government announced on 19 August 2020 it had entered into an agreement with AstraZeneca to secure a vaccine being developed by the University of Oxford.<sup>1</sup> The government subsequently announced on 5 November 2020 that it had entered into additional agreements for vaccines developed by Novavax and Pfizer/BioNTech.<sup>2</sup> Australians first started

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<sup>1</sup> Prime Minister of Australia, *New Deal Secures Potential COVID-19 Vaccine for Every Australian*, (19 August 2020), <https://www.pm.gov.au/media/new-deal-secures-potential-covid-19-vaccine-every-australian>.

<sup>2</sup> Prime Minister of Australia, *Australia Secures a Further 50 Million Doses of COVID-19 Vaccine*, (5 November 2020), <https://www.pm.gov.au/media/australia-secures-further-50-million-doses-covid-19-vaccine>.

receiving vaccines on 21 February 2021.<sup>3</sup> The national vaccine rollout then continued for nearly eight months before the instrument was registered on 14 October 2021. Given the substantial time that elapsed between the start of the vaccine program and the registration of the instrument, the committee does not accept there was insufficient time to give effect to the measures through primary legislation.

Further, the COVID-19 Vaccine Claims Scheme (the Scheme) Policy appears to have legislative characteristics. Noting the significance of the scheme, it is unclear why at least high-level parameters in relation to the scope of the Scheme were not provided for in primary legislation, with the details of the Scheme to be set out in delegated legislation.

### *Legislation Handbook*

In his response, the Minister stated, 'the Scheme does not involve the kinds of considerations outlined in paragraph 1.10 of the Legislation Handbook that usually dictate the use of primary legislation...'. First, the committee notes that paragraph 1.10 provides guidance on whether matters are more suited for primary or delegated legislation. It does not provide guidance on whether matters are more suited to non-legislative guidance material that has no legal status and can be changed at any time without parliamentary scrutiny. The instrument provides legislative authority for government spending on the Scheme but does not contain any eligibility criteria or procedural details as to the scope of the Scheme. These matters appear to be contained wholly within non-legislative guidance material. Paragraph 1.10(j) of the *Legislation Handbook* provides that 'procedural matters that go to the essence of the legislative scheme' are matters that are generally implemented only through Acts of Parliament. It is therefore of significant concern to the committee that not only has this procedural content not been included in primary legislation, but that it is not even given effect to in delegated legislation.

The committee also notes that paragraph 1.10(b) of the *Legislation Handbook* refers to 'significant questions of policy', which given the size and importance of the Scheme would indicate it is better for it to be established by primary legislation.

### *Committee guidelines*

The Minister also stated, 'the Scheme does not involve features outlined in principle (j) of the Scrutiny Guidelines issued by the Committee in February 2020'. Principle (j) of the committee's guidelines is derived from Senate standing order 23(3)(j) which provides the 'committee shall scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment'. The committee considers that the instrument falls within principle (j) of the guidelines as it relates to a significant a regulatory scheme. The significance of the Scheme is highlighted in the Minister's response which notes that 15,000 applications for compensation have already been lodged with no cap on compensation for claims.

In any event, as the guidelines themselves state they are 'intended as a guide only and are not meant to be definitive'. The guidelines are also intended to assist agencies that develop delegated legislation and do not constrain the interpretation of the Senate standing orders by the committee. Moreover, the committee is composed of senators who are elected members of the legislative branch of government. As such, members of the committee are uniquely placed to assess, report on, and inform their fellow senators on matters they consider are more appropriate for parliamentary enactment and as legislators to determine the nature of such matters.

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<sup>3</sup> Prime Minister of Australia, *First COVID-19 Vaccinations* (21 February 2021), <https://www.pm.gov.au/media/first-covid-19-vaccinations>.

The committee would therefore appreciate your detailed advice as to:

- why was there insufficient time for the Scheme to be established by primary legislation, noting that the vaccine rollout commenced on 21 February 2021;
- whether at least high-level parameters in relation to the scope of Scheme can now be set out in primary legislation, which would allow for full parliamentary consideration of the Scheme; and
- if not, your detailed justification as to why it is not possible for the Scheme to now be given effect to by primary legislation.

#### ***Parliamentary oversight – executive expenditure***

The committee acknowledges there may be some difficulty in anticipating funding by the nature and volume of claims that might be made. Nevertheless, the committee is concerned that the Minister is unable to provide even a high-level indication as to the total amount of funding that is expected to be expended or indication of how much funding has been allocated by the government for the payment of compensation and operational costs of administering the Scheme.

More fundamentally, the committee has significant concerns as to whether the Senate should accept that it is appropriate for regulations made under the *Financial Framework (Supplementary Powers) Act 1997* to be used to authorise expenditure of an undefined amount of money on a non-legislated scheme that provides undefined discretionary powers to low level officials.

**The committee therefore reiterates its request for at least a high-level indication as to the total amount of funding that is expected to be expended on the Scheme, noting the importance of effective parliamentary oversight of executive expenditure.**

#### ***Parliamentary oversight – scope of the Scheme***

Thank you for your response as to why crucial aspects of the Scheme were determined by guidelines and materials that are not legislative instruments subject to disallowance by Parliament. While the committee acknowledges the importance of the government being able to respond quickly to the changing nature of the pandemic it is unclear to the committee as to why such matters of detail could not at least be given effect to by delegated legislation. Indeed, the ability of instruments to be amended quickly to respond to changing circumstances and information is one of the key rationales put forward for the use of delegated legislation. It is therefore unclear to the committee why policy documents that carry no force in law and are not subject to any form of parliamentary scrutiny have been utilised in this instance.

The committee notes subsection 1(6) of the COVID-19 Vaccine Claims Scheme Policy provides that the *Acts Interpretation Act 1901* applies to the document as if it was an instrument to which section 46 of that Act applies. This further heightens the committee's concern that the matters dealt with by the COVID-19 Vaccine Claims Scheme Policy document should be subject to full parliamentary scrutiny.

In this respect, the committee is concerned that the Minister's response cites additional criteria that are not contained in the instrument. For example, the information about the eligibility for tier 1 and tier 2 claims being based on hospitalisation seems to have been added only in policy. The instrument itself is silent on hospitalisation – it only states that the Scheme will 'provide compensation for individuals who suffer loss or injury as a result of being vaccinated against the coronavirus known as COVID-19' without any qualification. There is also no reference to 'hospital' or 'hospitalisation' in the explanatory statement.

**In light of the above, the committee would appreciate your advice as to:**

- **whether the detailed content of the COVID-19 Vaccine Claims Scheme Policy, such as the list of conditions for which a claim may be (or may not be) payable, could at least set out in disallowable delegated legislation; and**
- **if this is not considered possible, your detailed advice as to why that is the case.**

***Availability of independent merits review***

The committee acknowledges that the Administrative Appeals Tribunal (AAT) can only review decisions where the legislation specifically states the AAT may review. However, the committee considers this issue underscores its primary view that such a significant scheme should be given effect to by way of primary legislation. If this were the case the primary legislation would be able to specify the AAT has the ability to review decisions made under the Scheme.

Further, the committee's scrutiny principle does not specifically require appeals to the AAT, but rather 'independent review'. It is possible for an alternative to the AAT to provide that independent review. In contrast, 'internal review' as it is explained in the response, is not sufficient for purposes of the committee's scrutiny principle.

**The committee would therefore appreciate your advice as to:**

- **whether an alternative form of 'independent review' to that of review by the AAT could be provided for in relation to decisions made under the Scheme (unless the Scheme will now be established in primary legislation, in which case AAT review should be provided for); and**
- **if this is not considered possible, your detailed justification as to why this is the case.**

***Delegation of administrative powers and functions***

***Conferral of discretionary powers***

The committee thanks the Minister for his advice as to who will exercise the power to make decisions and recommendations under the Scheme. The committee notes the Minister's response that tier 1 claims, that is claims below \$20,000, are 'anticipated to be relatively straightforward'. However, the committee is concerned that this explanation, as with the information provided in the explanatory statement, indicates the tiers are defined by the amount claimed, not by the complexity of the medical problem related to the vaccination. It would appear possible for there to be a claim below \$20,000, that is within tier 1, which could be complex and difficult to determine. The committee is concerned that this approach unrealistically relies on officials below a Senior Executive Service (SES) classification recognising the complexity of the claim. It is also unclear whether a claim under \$20,000 that has sufficient complexity can be escalated by an official to a higher level or what this process involves.

In terms of safeguards and limitations on the exercise of powers, there are no limits on the scope of discretionary powers under the Scheme set out in the instrument. In this respect the instrument appears to be inconsistent with scrutiny principle (c) as the instrument 'makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers'. As noted above, the committee does not accept non-legislative guidance documents as being a substitute for clearly defining administrative powers in primary or delegated legislation.

**The committee would therefore appreciate your advice as to:**

- **whether a claim under \$20,000 could be considered sufficiently complex to be escalated for consideration by a member of the SES and what this process would involve; and**

- **whether safeguards and limitations on the exercise of discretionary powers under the Scheme can be set out in disallowable delegated legislation.**

### ***Revised explanatory statement***

#### *Reduced claim threshold*

The committee thanks the Minister for requesting that you approve a revised explanatory statement to reflect the reduced claim threshold of \$1,000, and to otherwise address the issues that require further clarification. Given the need for persons interested in the Scheme to have the most up-to-date information, the committee would welcome an update of the explanatory statement to reflect the revised threshold as soon as practicable.

#### *Privacy*

The committee also thanks the Minister for his advice in addressing the privacy concerns of the committee and also requests that you update the explanatory statement to reflect this information.

**In light of the above, the committee requests your advice as to whether a revised explanatory statement could be registered as a matter of urgency to reflect the:**

- **reduced claims threshold of \$1,000; and**
- **information as to the relevant privacy protections as outlined in your letter of 25 January 2022.**

Please note that the committee expects to be in a position to finally report on the instrument while it is still subject to disallowance. Therefore, today the committee gave notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

The committee also takes this opportunity to emphasise that, although the Scheme is already in operation, due to the significant scrutiny concerns that the instrument has raised there is a serious possibility that the committee will recommend that the Senate disallow the instrument if its scrutiny concerns are not resolved.

Noting this, and to facilitate the committee's timely consideration of the matters above, the committee would appreciate your response by **24 February 2022**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your ongoing assistance with this matter.

Yours sincerely,

**Senator the Hon Concetta Fierravanti-Wells**  
**Chair**

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



10 February 2022

The Hon Dr David Gillespie MP  
Minister for Regional Health  
Parliament House  
CANBERRA ACT 2600

Via email: [David.Gillespie.MP@aph.gov.au](mailto:David.Gillespie.MP@aph.gov.au)

CC: [RegOrds@health.gov.au](mailto:RegOrds@health.gov.au)

Dear Minister,

**Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (No. 2) Regulations 2021 [F2021L01750]**

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

***Levying of taxation in delegated legislation***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). This includes where an instrument imposes, or sets the rate of, a tax or levy.

The instrument amends the Australian Radiation Protection and Nuclear Safety (Licence Charges) Regulations 2018 to decrease charges for certain licences and increase charges for certain licences.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, it does not appear there is a cap on the face of the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* as to the amount of tax that may be imposed, which compounds the committee's scrutiny concerns in relation to this tax due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved to draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 2 of 2022*. However, the committee is not seeking any further information or advice from you in relation to this particular instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the Delegated Legislation Monitor.

Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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



10 February 2022

Senator the Hon Jonathon Duniam  
Assistant Minister for Forestry and Fisheries  
Parliament House  
CANBERRA ACT 2600

Via email: [DLO-Duniam@agriculture.gov.au](mailto:DLO-Duniam@agriculture.gov.au)

Dear Assistant Minister,

**Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations 2021 [F2021L01639]**

**Fishing Levy Amendment (2021-2022 Levy Amounts) Regulations 2021 [F2021L01643]**

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

***Levying of taxation in delegated legislation***

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). This includes where an instrument imposes, or sets the rate of, a tax or levy.

The Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations 2021 [F2021L01639] amends the levy amount applicable to fishing licences in the Torres Strait Prawn Fishery. The Fishing Levy Amendment (2021-2022 Levy Amounts) Regulations 2021 [F2021L01643] changes the levy amounts in relation to Commonwealth fishing concessions.

The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this instance, it does not appear there is a cap on the face of either the *Fisheries Levy Act 1984* or the *Fishing Levy Act 1991* as to the amount of tax that may be imposed, which compounds the committee's scrutiny concerns in relation to this tax due to the limited parliamentary oversight afforded to it.

As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved to draw these instruments to the attention of the Senate in its *Delegated Legislation Monitor 2 of 2022*. However, the committee is not seeking any further information or advice from you in relation to this particular instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the Delegated Legislation Monitor.



Should you have any questions please contact the committee's secretariat on (02) 6277 3066, or by email to [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au).

Thank you for your assistance with this matter.

Yours sincerely,

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