

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

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Contents

Membership of the committee	iii
Introduction.....	vii
Chapter 1 – Instruments raising significant scrutiny concerns	1
Part 1 – Disallowable instruments raising significant scrutiny issues.....	2
Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]	2
Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] and Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]	8
Part 2 - Exempt instruments raising significant scrutiny issues.....	14
Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068]	14
Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]	22
Chapter 2 – Matters of interest to the Senate	25
Chapter 3 – Scrutiny of Commonwealth expenditure.....	29
Chapter 4 – Scrutiny of instruments exempt from disallowance	31
Instruments which meet the committee's expectations	31
Instruments which do not meet the committee's expectations	32
Appendix A - New matters	35
Ministerial engagement	35
Agency engagement	36
Appendix B - Ongoing matters	39
Ministerial engagement	39
Agency engagement	41
Appendix C - Concluded matters	43
Ministerial engagement	43
Agency engagement	45

Appendix D - Undertakings 47
 Outstanding undertakings47
 Implemented undertakings53

Introduction

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

On 16 June 2021 the Senate adopted three recommendations of the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight that were directed to the Senate. As a result, from 1 July 2021, the standing orders of the Senate were amended to add two new scrutiny principles to the committee's terms of reference. In addition, the standing orders were amended to allow the committee to consider instruments which are exempt from disallowance.¹

Terms of reference

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

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

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Changes_to_committee_standing_orders

- (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.

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

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

Nature of the committee's scrutiny

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

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

The committee reports on instruments which are exempt from disallowance, including whether they meet the committee's expectations under standing order 23, in Part 2 of Chapter 1 and in Chapter 4 of the *Delegated Legislation Monitor*.

The committee's work is supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.²

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

Publications

The committee's usual practice is to table a report, the *Delegated Legislation Monitor*, each Senate sitting week. The monitor provides an overview of the committee's scrutiny of legislative instruments for the prescribed period. Legislative instruments detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.³

Ministerial correspondence

The committee undertakes formal correspondence with ministers in order to resolve more significant scrutiny concerns. Ministerial correspondence is published on the committee's website.⁴

Agency correspondence

The committee undertakes informal correspondence with agencies via its secretariat to gather information about potential scrutiny concerns. This correspondence assists the committee in deciding whether it is necessary to seek further advice from the relevant minister about those concerns. Agency correspondence is not published; however, a record of the instrument, scrutiny issue and status of the correspondence is included in Appendix A (new matters), Appendix B (ongoing matters) and Appendix C (concluded matters) in the monitor.

Guidelines

Guidelines relating to the committee's scrutiny principles are published on the committee's website.⁵

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.⁶

The Senate Disallowable Instruments List provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.⁷

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.⁸

3 *Index of instruments*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Index.

4 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

5 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines.

6 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

7 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

Instruments considered in this monitor

The committee examined 181 legislative instruments registered on the Federal Register of Legislation between 1 July 2021 and 13 August 2021. This included 160 disallowable instruments and 21 instruments exempt from disallowance.

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

Chapter 1

Instruments raising significant scrutiny concerns

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

1.2 This chapter is divided into two parts. Part 1 deals with instruments subject to disallowance and Part 2 deals with instruments which are exempt from disallowance.

Part 1

Disallowable instruments raising significant scrutiny issues

1.3 This part details those instruments subject to disallowance which raise particularly significant scrutiny concerns. Where necessary, the committee may give a notice of motion to disallow an instrument contained in Part 1 to emphasise its scrutiny concerns or to provide the Senate and the committee with additional time to consider the instrument while it is still subject to disallowance.

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

FRL No.	F2021L00863 ¹
Purpose	To amend the governance standards to provide that registered entities must not engage in conduct that may be dealt with as a relevant kind of summary offence, and to require registered entities to maintain reasonable internal control procedures in relation to its resources.
Authorising legislation	<i>Australian Charities and Not-for-profits Commission Act 2012</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 3 August 2021).

Overview

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

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

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

1.5 Registered entities must comply with these standards in order to qualify for certain exemptions, benefits and concessions under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act). Failure to comply with these governance standards may result in revocation of the entity's registration under section 35-10 of the ACNC Act and the exercise of certain enforcement powers under Part 4-2 of the ACNC Act.

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

Scrutiny concerns

1.7 The committee's most significant outstanding scrutiny concerns with regard to the instrument centre on subsection 45.15(3). This provision requires registered entities to maintain reasonable internal control procedures to ensure that its resources are neither used nor continued to be used to actively promote another entity's unlawful acts or omissions that may be dealt with under paragraphs 45.15(2)(a), (aa) or (b). The committee's comments in relation to these issues are detailed in *Delegated Legislation Monitor 12 of 2021*.³ In summary, the committee is concerned that:

- this provision appears to enable the Australian Charities and Not-for-profits Commission (ACNC) Commissioner to exercise a broad discretion in determining compliance with the governance standards;
- the lack of clarity on what will constitute 'reasonable internal control procedures' may inhibit charities' ability to understand their obligations under the instrument;
- this provision may limit a registered entity's ability to support or promote certain types of political protest, without having committed an unlawful act themselves; and
- it is unclear whether this provision may impermissibly burden the implied freedom of political communication in its terms, operation, or effect.

2 Explanatory statement, p. 4.

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 12 of 2021*.

Actions to date

Initial correspondence

1.8 Since July 2021, the committee has been corresponding with the Assistant Treasurer to resolve its technical scrutiny concerns. The committee also considers that this instrument may raise significant policy issues which should be considered by the Senate. Accordingly, the committee drew the instrument to the attention of the Senate in accordance with Senate standing order 23(4) in *Delegated Legislation Monitor 10 of 2021*,⁴ and wrote to the Senate Economics Legislation Committee.⁵

1.9 Since raising concerns in relation to the instrument, the committee has also received considerable correspondence from numerous charities and non-government organisations in both writing and by telephone. This correspondence has served to heighten the committee's scrutiny concerns about the conferral of discretionary powers on the ACNC Commissioner and the potential impact the instrument may have on the implied freedom of political communication.⁶

Recent correspondence

1.10 As a number of its key concerns were not adequately addressed via correspondence, the committee drew its significant outstanding concerns to the attention of the Senate in *Delegated Legislation Monitor 12 of 2021*. In addition, the committee requested more detailed information from the Assistant Treasurer about:

- what objective test will be applied to determine whether a registered entity has complied with the requirements of subsection 45.15(3);
- what factors the ACNC Commissioner must consider in making this determination; and
- how the instrument as a whole, including subsection 45.15(3), does not impermissibly restrict the implied freedom of political communication.

1.11 The Assistant Treasurer responded to the committee's concerns in a letter dated 26 August 2021.⁷ With regard to the committee's concerns about the conferral of discretionary powers under subsection 45.15(3), the Assistant Treasurer advised that there are no legislatively prescribed factors that the ACNC Commissioner must consider in determining whether a registered entity has complied with the

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 10 of 2021*, p. 4.

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

6 A summary of all prior correspondence on this instrument is set out in *Delegated Legislation Monitor 12 of 2021*.

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

requirements of subsection 45.15(3). Instead, it is a question of fact to be determined on the evidence available to the ACNC Commissioner and what evidence is required will vary from case to case.

1.12 The response further advised that, at a general level, the ACNC Commissioner will be required to comply with administrative law principles. If the ACNC Commissioner is satisfied there has been or will be non-compliance with the governance standards, the decision whether or not to take regulatory action, and what regulatory action to take, is subject to the ACNC Commissioner having regard to the matters set out in section 15-10 of the ACNC Act.

1.13 The Assistant Treasurer also reiterated that the requirement to maintain reasonable internal controls and procedures is a feature in many other governance and external conduct standards in the Principal Regulations, and a note to subsection 45.15(3) provides some examples of the types of matters that may be dealt with in the internal control procedures.

1.14 With regard to the committee comments regarding the impact of the instrument on the implied freedom of political communication, the Assistant Treasurer stated that he does not consider that the instrument burdens the implied freedom of political communication as it does not prevent the registered entity engaging in conduct that is not otherwise already unlawful.

1.15 The response noted that, as the requirement in subsection 45.15(3) centres on the registered entity's governance arrangements around the use of its own resources, the registered entity will not contravene this new requirement simply because another entity has ultimately used the registered entity's resources to actively promote unlawful activities.

Committee comment

1.16 The committee thanks the Assistant Treasurer for his constructive engagement with the committee in relation to this instrument. However, the committee retains significant concerns regarding the instrument.

1.17 As the committee has been unable to resolve these technical scrutiny concerns with the Assistant Treasurer, the committee has resolved to draw some further remarks to the attention of the Senate. The committee's comments with regard to these unresolved concerns are outlined below.

Conferral of discretionary powers

1.18 While noting the Assistant Treasurer's response, it remains unclear to the committee how the ACNC Commissioner will not be required to exercise a broad discretion in exercising their powers under subsection 45.15(3). The committee's view is informed by the fact that the determination of what constitutes a reasonable internal control procedure requires the ACNC Commissioner to consider the individual circumstances of each registered entity.

1.19 In the absence of a convincing explanation from the Assistant Treasurer, it does not appear to the committee that determinations made for the purposes of subsection 45.15(3) will be limited to questions of objective fact. In this regard, it appears that this will require the ACNC Commissioner to exercise a broad discretion in determining whether a registered entity has complied with the governance standard.

1.20 In addition, the committee considers that the amendments to both subsections 45.15(2) and 45.15(3) significantly expand the discretion granted to the ACNC Commissioner to exercise revocation powers under section 35-10 and enforcement powers under Part 4-2 of the ACNC Act without sufficient guidance being provided in the law as to how this discretion is to be exercised. In particular, the committee notes that the revocation and enforcement powers may be exercised in circumstances where the Commissioner reasonably believes that 'it is more likely than not' that an entity will not comply with the significantly expanded scope of government standard 3 to encompass what, in at least some cases, are relatively minor summary offences.

1.21 Where an instrument confers broad discretionary powers on a person, the committee considers that there should be a clear explanation of the factors that must be considered in exercising this power and the safeguards in place. In this instance, the committee does not consider that requiring the ACNC Commissioner to comply with broad level administrative law principles is a sufficient substitute for legislatively prescribed criteria to guide the exercise of their powers. Moreover, the committee does not consider that consistency with existing arrangements, including other governance standards, is a sufficient justification for the lack of clarity in this instance.

1.22 The committee reiterates that the lack of clarity around what constitutes 'reasonable internal control procedures' may inhibit registered entities' ability to understand their obligations under the instrument and, as such, may ultimately lead to the deregistration of the entity if they fail to comply. The committee generally considers that provisions which impose obligations on a person should be drafted with sufficient clarity to enable them to understand those obligations. Failure to do so undermines legal clarity and certainty.

1.23 The committee's concerns in this instance have been heightened noting the potential impact this may have on registered entities. In this regard, the committee notes that, since initially seeking advice from the Assistant Treasurer, it has continued to receive correspondence from registered entities outlining concerns about the lack of clarity in the governance standards.

1.24 From a scrutiny perspective, the committee considers that the instrument, as drafted, confers an overly broad discretion on the ACNC Commissioner in circumstances where sufficient guidance is not provided in the law as to how this discretion is to be exercised.

Implied freedom of political communication

1.25 While noting that subsection 45.15(3) centres on the use of a registered entity's own resources, rather than just the unlawful activities of another entity, it remains unclear to the committee whether the instrument as a whole could burden the implied freedom of political communication.

1.26 Whilst acknowledging the Assistant Treasurer's view that the instrument does not prevent registered entities from engaging in activity that is not already unlawful, it remains unclear to the committee whether any element of the obligations imposed in the instrument could limit the implied freedom. In this regard, while the instrument does not create new offences which may make a registered entity's actions unlawful, this does not necessarily preclude the instrument from affecting the implied freedom as it may still restrict the behaviour of registered entities. The committee does not consider that the Assistant Treasurer has adequately engaged with how the restrictions on the actions and behaviour of registered entities imposed by the instrument could impact on the implied freedom.

1.27 The committee retains the view that, at a minimum, any potential limitations on the implied freedom should be soundly explained and justified.

1.28 While appreciating his responsiveness to the committee, the committee does not consider that the Assistant Treasurer has provided a sufficient explanation for why the instrument as a whole does not impermissibly limit the implied freedom. In absence of such an explanation, the committee does not consider that the instrument meets its expectations under standing order 23(3).

1.29 In light of the comments above, the committee draws the attention of the Senate to the committee's significant scrutiny concerns regarding the conferral of broad discretionary powers on the ACNC Commissioner and the impact of the instrument on the implied constitutional freedom of political communication.

1.30 Noting the significance of its technical scrutiny concerns, the committee recommends that the Senate disallow the instrument.

1.31 On 18 October 2021 the committee intends to give notice of a motion to disallow the instrument, to be moved 15 sitting days after that day. Based on the current sitting pattern this would mean that the motion would be moved on the fourth sitting day in 2022 to provide the Senate with additional time to consider the instrument and the committee's recommendation that the instrument be disallowed. The committee notes that, under section 45-20 of the ACNC Act, the instrument will not commence until the day after:

- **the disallowance notice is resolved;⁸ or**
- **both Houses of the Parliament pass a resolution approving the instrument.**

8 The disallowance notice may be resolved by being withdrawn or negated by the Senate. The disallowance notice would also be resolved if it was agreed to by the Senate or it was not considered at all by the Senate by the end of the 15th sitting day after it was given. In both of these latter instances the instrument would not commence at all.

Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021

Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021

FRL No.	F2021L00590 and F2021L01043 ⁹
Purpose	<p>F2021L00590: To expand the operating remit of the Australian Renewable Energy Agency and permit the agency to invest in a wider range of clean energy technologies to deliver programs announced in the 2020-21 Budget.</p> <p>F2021L01043: To expand the operating remit of the Australian Renewable Energy Agency to permit it to invest in a wider range of technologies for the deployment of initiatives announced in the 2020-21 Budget.</p>
Authorising legislation	<i>Australian Renewable Energy Agency Act 2011</i>
Portfolio	Industry, Science, Energy and Resources
Disallowance	F2021L01043: 15 sitting days after tabling (tabled in the Senate on 3 August 2021).

Overview

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

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

1.33 The first ARENA instrument was disallowed by the Senate on 22 June 2021.

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

1.34 On 29 July 2021 the Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043] (the second ARENA instrument) was registered on the Federal Register of Legislation.¹⁰ This instrument enables the ARENA to provide financial assistance in relation to the following programs announced in the 2020-21 Budget:

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

1.35 It also confers functions on the ARENA in relation to priority low emissions technologies.¹¹ Both instruments are made under the *Australian Renewable Energy Agency Act 2011* (the ARENA Act).

Scrutiny concerns

Significant matters in delegated legislation

Compliance with Legislation Act 2003 – same in substance

Compliance with authorising legislation

1.36 In *Delegated Legislation Monitor 12 of 2021* the committee set out its detailed scrutiny concerns in relation to whether the instruments comply with their authorising legislation and provide for significant matters more appropriate for parliamentary enactment. The committee requested further information from the minister in relation to these scrutiny concerns.

1.37 The committee also requested advice from the minister as to how the second ARENA instrument differs from the disallowed ARENA instrument in substance.

1.38 The committee set out its concluding comments on the adequacy of consultation undertaken in relation to each ARENA instrument.

10 The priority low emissions technologies relate to aluminium and steel technologies, carbon capture and storage technologies, clean hydrogen technologies, energy storage technologies and soil carbon technologies.

11 *Delegated Legislation Monitor 12 of 2021* stated that the second ARENA instrument amends the Australian Renewable Energy Agency Regulation 2016 (the 2016 Regulation). However, as reflected in the comments above, while the first ARENA instrument sought to amend the 2016 Regulation, the second ARENA instrument is in fact a standalone instrument.

Minister's response

1.39 The minister responded to the committee's concerns in a letter dated 8 September 2021, and this response is addressed in relation to the relevant scrutiny concerns below.

Compliance with Legislation Act 2003 – same in substance

1.40 The minister pointed to the explanatory statement to the second ARENA instrument which advises it makes 'material changes to the nature and scope of the new functions and programs intended to be supported by ARENA, as well as changing aspects of the context in which they will be deployed and reported on'. The minister also advised that in addressing the committee's concerns in relation to both ARENA regulations in one letter, the intention was not to draw comparisons between the actual content of the regulations but to rather highlight the fact that the instruments were made under the same legislative head of power.

Significant matters in delegated legislation

1.41 The minister advised that the use of regulations in this instance is similar to the way regulations under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986* empower Commonwealth spending.

1.42 The minister also reiterated that the measures are suited to delegated legislation to provide for prompt delivery of government commitments to reduce greenhouse gas emissions, and that the ARENA is the most appropriate vehicle to deliver these measures due to its expertise.

Compliance with authorising legislation

1.43 The minister reiterated his advice that the ARENA instruments are made in compliance with the ARENA Act. The minister set out his view that there is nothing in the regulation-making power in paragraph 8(f) of the ARENA Act which limits delegated legislation to prescribing additional functions relating only to renewable energy. The minister suggested that, as there is no reason to depart from the plain meaning of the provision, section 15AB of the *Acts Interpretation Act 1901* (which deals with the use of extrinsic material in the interpretation of an Act) is not engaged.

1.44 In his response, the minister explained that the terms of the Act provide a wider scope for the ARENA to have functions beyond those related to renewable energy and that this is "demonstrated by the extended definition given to the term 'renewable energy'" as supported by the constitutional basis of the Act and the inclusion of a broad regulation making power.

1.45 The minister also advised that the context of the bill's passage through the Parliament supports this view, as the second reading speech made on 12 October 2011 confirms that the purpose of the Act is to support clean energy including broader emissions reduction technology.

1.46 Further, the minister pointed to the fact that the definition of ‘renewable energy’ in the ARENA Act includes hybrid technologies and technologies that are related to renewable energy technologies. The minister advised that ‘it could be argued that at least some of the ‘non-renewable’ technologies in the first and second 2021 Regulations are better understood as hybrid, enabling or related technologies in the wider context of renewable energy supply and security in Australia’.

Committee comment

1.47 The committee thanks the minister for his constructive engagement with the committee in relation to this instrument. However, the committee retains significant concerns regarding the instrument.

1.48 As the committee has been unable to resolve these technical scrutiny concerns with the minister, the committee has resolved to draw some further remarks to the attention of the Senate. The committee’s comments with regard to these unresolved concerns are outlined below.

Compliance with Legislation Act 2003 – same in substance

1.49 The committee notes the minister’s advice that the two ARENA instruments are not the same in substance. As noted in *Odgers’ Australian Senate Practice*,¹² the expression ‘the same in substance’ has been judicially construed by the High Court to refer to ‘any regulation which is substantially the same ... in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect’.¹³ However, in 2015, a single Federal Court judge gave the term a narrower construction, requiring that for an instrument to be invalid, ‘it be in substance or legal effect, identical to the previously disallowed measure’.¹⁴

1.50 The committee acknowledges that the two ARENA instruments are not identical; however, at a broad level, both instruments permit the ARENA to invest in non-renewable technologies and are designed to support the delivery of programs announced in the 2020-21 Budget. As relatively few cases have considered this matter, the committee considers that this issue is ultimately a matter that could only be resolved by judicial consideration.

Significant matters in delegated legislation

1.51 In relation to the inclusion of significant matters in delegated legislation, the committee maintains its view that the measures in the ARENA instrument go beyond filling out the detail of the Act and therefore appear more appropriate for parliamentary enactment. The committee does not generally consider that consistency with existing legislative arrangements, the need for operational

12 Rosemary Laing (ed.), *Odgers’ Australian Senate Practice*, 14th ed, 2016, p. 444.

13 *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 347, 364.

14 *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834, [29].

flexibility, or a need to promptly deliver government policies are sufficient justifications for including significant matters in delegated legislation.

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

Compliance with authorising legislation

1.53 From a scrutiny perspective, the committee remains of the view that the second ARENA instrument is expanding the remit of the ARENA beyond what was envisaged by Parliament when the Act was passed. The committee notes that the minister's position is that the absence of a clearly drafted legislative limit or an express statement in the explanatory memorandum that the ARENA is limited to renewable energy indicates that Parliament did not intend the ARENA to be so limited. Respectfully, the committee does not accept this, and considers that the express references to renewable energy in the Act and the explanatory memorandum are a clear indication of Parliament's intent.

1.54 The purpose of the ARENA Act is made clear in the title of the Act itself, and in section 3 which sets out the objects of the Act. Section 15AA of the *Acts Interpretation Act 1901* provides that in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation. In this regard, the committee's position is that the interpretation that would best achieve the purpose or object of the Act is one that limits the functions of the ARENA to investing in renewable energy technologies.

1.55 While the committee welcomes the minister's advice in relation additional evidence to support the view that Parliament intended that functions not relating to renewable energy could be conferred on the ARENA, it remains that case, as acknowledged by the minister, that there is no reason to depart from the plain meaning of the text of the provisions of the Act.

1.56 The committee recognises that the definition of 'renewable technology' in section 4 of the ARENA Act includes hybrid technologies. However, for the instrument to be empowered under this definition of hybrid technologies in the ARENA Act, the committee's view is that the instrument would need to be redrafted to make it clear that non-renewable aspects are connected to renewable aspects. As the instrument is currently drafted this does not appear to be the case.

1.57 Finally, the committee has consistently stated its view that its scrutiny concerns go beyond any one provision of the instrument and focus on whether the instrument as a whole is authorised by the ARENA Act. In addition, as noted above,

the committee is concerned that the measures in the instrument as a whole are more appropriate for parliamentary enactment.

1.58 In light of the comments above, the committee draws the attention of the Senate to the committee's significant scrutiny concerns regarding the inclusion of significant matters in delegated legislation in the second ARENA instrument and the compliance of the instrument with its authorising legislation.

1.59 Noting the significance of its technical scrutiny concerns, the committee recommends that the Senate disallow the instrument.

1.60 On 18 October 2021 the committee intends to give notice of a motion to disallow the instrument, to be moved 15 sitting days after that day. Based on the current sitting pattern this would mean that the motion would be moved on the fourth sitting day in 2022 to provide the Senate with additional time to consider the instrument and the committee's recommendation that the instrument be disallowed.

Part 2

Exempt instruments raising significant scrutiny issues

1.61 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).

Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021

FRL No.	[F2021L01068] ¹⁵
Purpose	To amend the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 to remove the automatic exemption for a person who ordinarily resides in another country and replace it with a discretionary exemption and make consequential amendments to the Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2020.
Authorising legislation	<i>Biosecurity Act 2015</i>
Portfolio	Health
Source of exemption	Subsection 477(2) of the <i>Biosecurity Act 2015</i>

Overview

1.62 Subsection 477(1) of the *Biosecurity Act 2015* (Biosecurity Act) empowers the minister to make emergency requirements to prevent or control the spread of a listed human disease within Australia or to another country. The Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020 (principal instrument) specifies such emergency requirements restricting overseas travel by Australian citizens or permanent residents and sets out some exemptions for certain classes of individuals.

1.63 The Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 (the instrument) amends the principal instrument to remove the automatic exemption for persons who ordinarily reside in another

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

country from the overseas travel ban. This has the effect of preventing such persons from travelling overseas unless they are granted an exemption due to exceptional circumstances by the Australian Border Force Commissioner (the Commissioner) or an Australian Border Force (ABF) employee under subsection 7(1) of the principal instrument.

Scrutiny concerns

Exemption from disallowance

1.64 Senate standing order 23(4A) empowers the committee to scrutinise delegated legislation that is exempt from disallowance against all scrutiny principles set out in standing order 23. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.

1.65 The instrument is made under subsection 477(1) of the Biosecurity Act. Subsection 477(2) of the Biosecurity Act provides that instruments made under subsection 477(1) are exempt from disallowance.

1.66 The committee has significant concerns about the exemption of legislative instruments from disallowance by the Parliament, with particular regard to exempt instruments made under the Biosecurity Act. These concerns are set out in detail in the interim report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight.¹⁶ The committee takes this opportunity to express its significant concern that the government has not yet responded to the interim report which was tabled in the Senate on 2 December 2020.

1.67 Noting this, it appears to the committee that the government has failed to substantively engage with the committee's significant concerns. By continuing to make instruments under section 477 of the Biosecurity Act which are exempt from disallowance and failing to provide an adequate explanation for why it is necessary to do so, the committee considers that the minister has flagrantly disregarded the recommendations of the committee's interim report. The committee intends 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.

1.68 The committee considers that emergency delegated legislation should be subject to appropriate parliamentary oversight, with limited exemptions from disallowance. This approach ensures respect for Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties. It also accords with the Senate's

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Exemption of delegated legislation from parliamentary oversight: Interim Report](#) (November 2020).

requirement that that exemptions should only be made in exceptional circumstances and will only be justified in rare cases.¹⁷

1.69 Where such an instrument is nevertheless exempt from disallowance, the committee expects that a sound justification should be provided in the explanatory statement. In this instance, the explanatory statement states:

The risk of such 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.¹⁸

1.70 While noting this explanation, the committee does not consider the need to act urgently or 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 instrument. 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. In the absence of further information in the explanatory statement, it is unclear whether there is another justification for the exemption of the instrument from disallowance.

1.71 The committee's concerns with regard to the exemption of the instrument from disallowance are heightened, noting that the instrument appears to raise a number of significant technical scrutiny issues. The committee's comments regarding these issues are outlined below.

1.72 The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate for the instrument to be exempt from disallowance; and**
- **whether the government will consider moving amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 to amend section 477 of the Biosecurity Act to provide that any determinations setting out emergency requirements in the future will be subject to disallowance.**

1.73 The committee notes that if the government is not amenable to moving such an amendment it may consider moving its own amendment to bill.

17 *Senate resolution 53B: Delegated legislation—disallowance and sunseting*, agreed to on 16 June 2021, https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/Resolutions_expressing_opinions_of_the_Senate/.

18 Explanatory statement, p. 2.

Freedom of movement

1.74 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 freedom of movement.

1.75 The instrument removes the automatic exemption from the existing overseas travel ban for Australian citizens and permanent residents who ordinarily reside in a country other than Australia. This amendment ensures that those Australians who ordinarily live overseas will no longer be able to automatically leave Australia if they come back to visit, and will instead need to apply for an exemption, demonstrating a compelling reason to leave Australia. Failure to comply with emergency requirements may also attract a custodial penalty of up to five years' imprisonment or a fine of 300 penalty units (\$63,000), or both.¹⁹ Accordingly, it appears that these measures may significantly limit the freedom of movement of these individuals.

1.76 Where an instrument may significantly limit the personal rights and liberties, the committee considers that an explanation should be provided as to the scope of the limitations and outline what impacts this may have. In this instance, the explanatory statement to the instrument explains:

As repatriation flights continue, it will be critical to manage the numbers of people leaving Australia with the intention of returning in the near future to ensure flight and quarantine availability is prioritised for individuals who have been stranded overseas for some time. The amendment will reduce the pressure on Australia's quarantine capacity, reduce the risks posed to the Australian population from COVID-19, and assist in returning vulnerable Australians back home.²⁰

1.77 However, in the absence of further information, it is unclear what the expected impact of the measures may be on the rights of relevant individuals. In this regard, the committee notes that the explanatory statement does not contain a statement of compatibility with human rights.

1.78 The committee therefore requests the minister's advice as to:

- **what the expected impact of the measures implemented by the instrument will be on the freedom of movement of Australian citizens and permanent residents who ordinarily reside in another country, including the number of individuals who may be affected by the amendments; and**
- **whether the explanatory statement to the instrument can be amended to include this information.**

19 *Biosecurity Act 2015*, subsection 479(3).

20 Explanatory statement, p. 2.

Matters for appropriate for parliamentary enactment

Modification of the operation of primary legislation

1.79 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. Senate standing order 23(3)(l) also requires the committee to consider whether an instrument contains provisions which amend or modify the operation of primary legislation.

1.80 As noted above, the principal instrument establishes emergency requirements for the purposes of subsection 477(1) of the Biosecurity Act. Subsection 477(5) provides that such emergency requirements have effect despite 'any provision of any other Australian law' and may override the operation of primary legislation.

1.81 The committee has long been concerned with provisions in delegated legislation which modify or override primary legislation. The committee considers that, at a minimum, such provisions should be soundly justified in the explanatory statement. In this instance, the explanatory statement does not appear to explain why it is necessary and appropriate to specify that the relevant requirements may override any Australian law.

1.82 Further, the committee's longstanding view is that instruments which modify or override primary legislation should be time limited to ensure a minimum degree of regular parliamentary oversight. The committee considers that limiting the duration of emergency delegated legislation is particularly necessary to guard against the risk that temporary extraordinary measures enacted in response to the emergency become an ongoing part of the law without appropriate parliamentary scrutiny.

1.83 In this instance, the requirements set out in the instrument may remain in force for the duration of a human biosecurity emergency period declared under section 475 of the Biosecurity Act. The human biosecurity emergency period is due to end on 17 December 2021 and has been extended six times since originally declared in March 2020. Most recently the emergency period was extended by the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 3) Instrument 2021 [F2021L01232].²¹ The committee is concerned that there is no limitation on the number of times that the period may be further extended without effective parliamentary oversight. In this regard, the committee notes that instruments which extend the human biosecurity emergency period are similarly exempt from disallowance by the Parliament.²² As

21 This instrument will be formally considered by the committee in an upcoming *Delegated Legislation Monitor*.

22 *Biosecurity Act 2015*, subsection 476(3).

such, there is very limited parliamentary oversight of the amount of time in which significant emergency measures, such as the overseas travel ban, may remain in place. This significantly undermines Parliament's ability to fulfil its rights-assessing and rights-protecting responsibilities with respect to delegated legislation. Although the committee has, on multiple occasions, raised concerns about the exemption of the human biosecurity emergency provisions of the Biosecurity Act from disallowance and the continued extension of the emergency period without parliamentary oversight, it appears that the government has failed to consider significance of these concerns.

1.84 The committee's concerns with regard to this issue are heightened, noting the significant impact of the instrument on the personal rights and liberties of individuals. Matters which have a significant impact on personal rights and liberties are more appropriately enacted via primary legislation rather than delegated legislation. Where such matters are nevertheless included in delegated legislation, the committee expects that a sound justification should be provided in the explanatory statement. In the absence of further information in the explanatory statement to this instrument, it is unclear why it is necessary and appropriate to include these matters in delegated, rather than primary, legislation.

1.85 In light of the matters outlined above, the committee requests the minister's advice as to:

- **why it is considered necessary and appropriate for the emergency requirements outlined in the instrument to override any Australian law;**
- **why it is considered necessary and appropriate to include significant matters, which may limit the freedom of movement of a broad class of Australian citizens and permanent residents, in delegated legislation;**
- **whether the explanatory statement to the instrument can be amended to include this information; and**
- **whether the government will consider moving amendments to the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 to amend section 476 of the Biosecurity Act to provide that any future variations to extend a human biosecurity emergency period will be subject to disallowance.**

1.86 The committee notes that if the government is not amenable to moving such an amendment it may consider moving its own amendment to bill.

Conferral of discretionary powers

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

1.88 As noted above, the instrument removes the automatic exemption from the restriction on overseas travel for persons who ordinarily reside in another country. This has the effect of preventing such persons from travelling overseas unless they are granted an exemption due to exceptional circumstances by the Commissioner or an ABF employee under subsection 7(1) of the principal instrument. In this regard, the instrument appears to expand the class of persons to whom they may exercise their discretionary powers under subsection 7(1).

1.89 The committee considers that instruments that confer discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion and why it is necessary, and explain who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to explain the nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

1.90 In this instance, the explanatory statement to the instrument does not appear to explain what the effect of the amendments will be in relation to the discretionary powers under subsection 7(1) of the principal instrument. Additionally, the explanatory statement does not provide details as to the scope of the discretion, including the factors that will be considered in exercising the powers, or outline any relevant safeguards.

1.91 The committee therefore requests the minister's advice as to whether the instrument expands the class of persons for whom discretionary powers under subsection 7(1) of the principal instrument may be exercised, and if so:

- **the factors that must be considered in exercising this discretion, including guidance as to the 'exceptional circumstances' in which an exemption may be granted from the overseas travel ban;**
- **which ABF employees will be exercising discretionary powers under subsection 7(1), including whether they possess the appropriate qualifications and necessary skills; and**
- **whether there are any safeguards or limitations on the exercise of the discretionary powers, including whether they are contained in law or policy.**

1.92 The committee also requests that the explanatory statement be amended to include this information.

Consultation with experts and persons affected by the instrument

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

1.94 Section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether the consultation undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the instrument had an adequate opportunity to comment on its proposed content, as per paragraph 17(2)(b) of the Legislation Act. In addition, the rule-maker may have regard to the extent to which the consultation drew on the knowledge of persons with expertise in fields relevant to the proposed instrument, as per paragraph 17(2)(a) of the Legislation Act.

1.95 The committee therefore expects that explanatory statements to instruments should provide details of any consultation that was undertaken with persons likely to be affected by the instrument and with persons with expertise in fields relevant to the instrument. If no such consultation was undertaken, the committee expects explanatory statements to justify the reason for this.

1.96 The explanatory statement to this instrument provides that consultation was undertaken with a number of government departments, including the Department of Home Affairs, the Australian Border Force, the Department of Foreign Affairs and Trade, and the Department of the Prime Minister and Cabinet.

1.97 Despite the significant impact of these measures on Australian citizens and permanent residents who ordinarily reside overseas, it is unclear whether experts or individuals or groups likely to be impacted by the measures were consulted. This is particularly concerning to the committee given the restrictive nature of the measures being introduced, heightened by the fact the instrument is exempt from disallowance. Moreover, the effect of the overseas travel ban on Australian expatriates has been a live issue since the making of the principal instrument in March 2020 and the six subsequent extensions of the human biosecurity emergency period. Noting this, the committee considers there has been sufficient time to consult with people who are now impacted by the measures set out in this instrument. Additionally, the explanatory statement does not contain any justification for why relevant individuals or experts were not consulted in this instance.

1.98 The committee therefore requests the minister's advice as to:

- **whether consultation was undertaken in relation to the instrument with persons with relevant expertise;**
- **whether consultation was undertaken in relation to the instrument with individuals likely to be impacted by the measures; and**
- **if no consultation was undertaken with experts or individuals likely to be impacted, the justification for not undertaking this consultation, and whether this justification can be included in the explanatory statement to the instrument.**

Northern Australia Infrastructure Facility Investment Mandate Direction 2021

FRL No.	[F2021L00942] ²³
Purpose	To provide a direction to the Northern Australia Infrastructure Facility's Board in relation to the performance of the functions of the Facility.
Authorising legislation	<i>Northern Australia Infrastructure Facility Act 2016</i>
Portfolio	Infrastructure, Transport, Regional Development and Communications
Source of exemption	Item 2 of section 9 of Legislation (Exemptions and Other Matters) Regulation 2015

Overview

1.99 The Northern Australia Infrastructure Facility (the Facility) provides financial assistance to States, Territories and other entities to develop economic infrastructure in Northern Australia.

1.100 The Northern Australia Infrastructure Facility Investment Mandate Direction 2021 (the instrument) provides an investment mandate to the Facility to guide the functions of the Facility and how it invests.

Scrutiny concerns

Exemption from disallowance

1.101 Senate standing order 23(4A) empowers the committee to scrutinise delegated legislation that is exempt from disallowance against all scrutiny principles set out in standing order 23. For such instruments the committee may also consider whether it is appropriate for the instrument to be exempt from disallowance.

1.102 At a minimum, the committee expects all explanatory statements to exempt instruments to identify the source of the exemption and justify why the exemption is appropriate in the specific context of the instrument.

1.103 In this regard, the explanatory statement identifies the source of the exemption from disallowance as section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015, as it is a ministerial direction. However, it makes no attempt to justify why it is appropriate for this ministerial direction to be exempt.

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

1.104 In its final report of the inquiry into the exemption of delegated legislation from parliamentary oversight (the final report), the committee highlighted specific concerns in relation to the use of framework laws which leave crucial details regarding how public money will be spent or invested to delegated legislation which is exempt from disallowance.²⁴ The committee takes this opportunity to express its significant concern that the government has not yet responded to the final report which was tabled in the Senate on 16 March 2021.

1.105 Noting the above, the committee's clear view is that it is inappropriate for this instrument to be exempt from disallowance. This accords with the Senate's requirement that that exemptions should only be made in exceptional circumstances and will only be justified in rare cases.²⁵ The classification of this instrument as exempt from disallowance prevents parliamentary oversight of how public money will be invested by the Facility. The committee notes the following explanation of the measures in the explanatory statement:

It is a major initiative of the Commonwealth's White Paper on Developing Northern Australia (Our North, Our Future), and integral to the Commonwealth's strategy for Northern Australia. The Facility is a \$5 billion Corporate Commonwealth Entity offering equity, and/or concessional debt to encourage investment in infrastructure in Northern Australia.²⁶

1.106 The explanatory statement indicates the importance of the measures for the government's strategy for Northern Australia, and the significant funding of \$5 billion. As such, the committee considers that it is not appropriate for the Parliament's role to be so limited by the exemption from disallowance.

1.107 The committee notes that commercial and operational certainty of the measures can be maintained while still providing for effective parliamentary oversight. As set out in the final report, many concerns in relation to subjecting an instrument to disallowance could be addressed by an instrument not coming into force until such time as the disallowance period has passed, by shorter disallowance periods in some limited cases, or by providing for an instrument to be approved through a vote of the Houses of the Parliament. This latter option could potentially

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report of the inquiry into the exemption of delegated legislation from parliamentary oversight*, 16 March 2021, pp. 32-3, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report.

25 *Senate resolution 53B: Delegated legislation—disallowance and sunseting*, agreed to on 16 June 2021, https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/Resolutions_expressing_opinions_of_the_Senate/.

26 Explanatory statement, p. 2.

allow for an instrument to be approved and enter into force more quickly than might otherwise occur under the typical 15 sitting day disallowance period.²⁷

1.108 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate for the instrument to be exempt from disallowance.

27 A recent instance of this was the Australian Charities and Not-for-Profits Commission Amendment (2021 Measures No. 1) Regulations 2021, which was tabled and approved by the Senate in two sitting days. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Final report of the inquiry into the exemption of delegated legislation from parliamentary oversight*, 16 March 2021, p. 109, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight/Final_report.

Chapter 2

Matters of interest to the Senate

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

2.2 This chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4), with the exception of instruments which specify significant executive expenditure, which are listed in Chapter 3.¹

Instrument	Purpose	Portfolio committee
Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068]	This instrument removes the automatic exemption from the overseas travel ban for persons who ordinarily reside in another country and replaces it with a discretionary exemption.	Senate Community Affairs Legislation Committee Senate Select Committee on COVID-19
Commonwealth Electoral (Authorisation of Voter Communication) Determination 2021 [F2021L00961]	<p>This instrument sets out:</p> <ul style="list-style-type: none">requirements for notifying particulars in relation to a communication for the purposes of the <i>Commonwealth Electoral Act 1918</i>, <i>Referendum (Machinery Provisions) Act 1984</i> and certain Broadcasting Acts; andcommunications which are exempt from the authorisation requirements. <p>In particular, the instrument:</p> <ul style="list-style-type: none">requires particulars in relation to a communication to be notified in English and any other language used for the rest of the communication;requires particulars in relation to a communication to be formatted and placed in a certain way so as to be legible and reasonably prominent;	Senate Finance and Public Administration Legislation Committee

1 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the committee's website: https://www.apb.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Matters_of_interest_to_the_Senate.

Instrument	Purpose	Portfolio committee
	<ul style="list-style-type: none"> sets out where the particulars of a printed communication must be notified and where or when the particulars of a non-printed communication such as speech, music or electronic billboard must be notified; and exempts media releases and envelopes that contain the name and address of the notifying entity. 	
Fair Work Amendment (Respect at Work) Regulations 2021 [F2021L00972]	<p>This instrument gives effect to recommendation 31 of the <i>Respect@Work: National Inquiry into Sexual Harassment in the Workplace</i> by, among other matters:</p> <ul style="list-style-type: none"> adding sexual harassment to the list of conduct falling within the definition of ‘serious misconduct’ in the Fair Work Regulations 2009; and supporting amendments made by the <i>Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021</i> to include ‘sexual harassment’ in the Fair Work Commission’s existing stop-bullying jurisdiction. 	Senate Education and Employment Legislation Committee
Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]	<p>This instrument is a direction to the Northern Australia Infrastructure Facility (NAIF) Board in relation to the performance of the functions of the Facility.</p> <p>In particular, the instrument enhances the impact of the Facility in line with recommendations made by the 2020 Statutory Review of the NAIF, including expanding eligibility for NAIF financial assistance to include elements associated with the development of a project (such as purchase of plant and equipment), facilitating on-lending arrangements to support smaller projects, and removing the prohibition on the Commonwealth assuming the majority of risk in any project. The 2021 instrument provides a clear framework on the use of higher-risk instruments such as derivatives and equity investments. It also provides some clarifications as to how the Facility should consider whether a project delivers public benefit.</p>	Senate Rural and Regional Affairs Legislation Committee
Therapeutic Goods (Medicinal Cannabis Products) (Information) Specification 2021 [F2021L01087]	<p>This instrument specifies the kinds of therapeutic goods information relating to the supply of medicinal cannabis products in Australia that the Secretary may release to the public under section 61 of the <i>Therapeutic Goods Act 1989</i>.</p> <p>Specifically, the instrument facilitates the publication of aggregated and de-identified statistical information including the numbers of applications or notifications (collectively, “submissions”) made in relation to medicinal cannabis products under the authorised prescriber, special access scheme category A and special access scheme category B pathways in Australia. The numbers of submissions are specified in the instrument with reference to one or more parameters including:</p>	Senate Community Affairs Legislation Committee

Instrument	Purpose	Portfolio committee
	<ul style="list-style-type: none"> • time periods; • the relevant state or territory in which the medicinal cannabis products are prescribed; • the indications for which the products have been prescribed; • the active ingredients relating to those products; and • the status of the submissions (such as approved, withdrawn, refused, pending or received). 	
Treasury Laws Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021 [F2021L01077]	<p>This instrument supports the implementation of an annual superannuation performance test and comparison tool for superannuation products. Among other matters, the instrument specifies:</p> <ul style="list-style-type: none"> • when APRA must conduct the annual performance test, which products are subject to the annual performance test and the requirements for the annual performance test; • the form and content requirements for the notice a trustee is required to give to beneficiaries who hold a product that has failed the performance test; and • the circumstances where APRA may lift a prohibition on a trustee from accepting new beneficiaries into an underperforming product. 	Senate Economics Legislation Committee
Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021 [F2021L01073]	<p>This instrument supports the single default superannuation account reforms in Schedule 1 to the <i>Treasury Laws Amendment (Your Future, Your Super) Act 2021</i>. Among other matters, the instrument specifies:</p> <ul style="list-style-type: none"> • requirements that a fund must meet to be a stapled fund; and • procedural matters relating to requests to and responses from the Commissioner of Taxation about stapled funds. 	Senate Economics Legislation Committee

Chapter 3

Scrutiny of Commonwealth expenditure

3.1 The *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act) and the *Industry Research and Development Act 1986* (IRD Act) authorise the Commonwealth to spend public money on grants and programs specified in instruments made under those Acts. Consequently, the specification of expenditure in an instrument made under these Acts effectively authorises the Commonwealth to spend public moneys on the relevant grant or program. The scrutiny of such instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.¹

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

3.3 The tables below outline the expenditure specified in legislative instruments registered between 1 July 2021 and 13 August 2021.

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

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

2 Details of all instruments which specify Commonwealth expenditure are published on the committee's website: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure.

Instrument	Grant/ Program	Amount	Description	Portfolio committee
Industry Research and Development (Regional Decentralisation Agenda—Securing Raw Materials Program) Instrument 2021 [F2021L00973]	Regional Decentralisation Agenda—Securing Raw Materials Program	\$35 million from 2021-22	<p>The program provides funding for businesses to do one or more of the following activities:</p> <ul style="list-style-type: none"> • relocate to regional areas; • establish new operations, branches or outposts in regional areas; • partner with regional universities or research organisations to conduct research and development in relation to locally sourced raw materials; • commercialise the outcomes of that research and development; • establish new facilities in regional areas to extract, process, use or otherwise add value to locally sourced raw materials. <p>Eligible activities within the projects include research into, and development of, new or improved raw materials, methods of processing raw materials, technologies to produce raw materials or methods of growing raw materials, or new uses for existing raw materials. They can also be proof of concept of the outcomes of research or commercialising the outcomes of research.</p> <p>Grants will be a minimum of \$250,000 up to a maximum of \$5 million. The grant amount may be up to 50 per cent of eligible project costs.</p>	Senate Rural and Regional Affairs and Transport Legislation Committee

Chapter 4

Scrutiny of instruments exempt from disallowance

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

4.2 This chapter identifies the instruments exempt from disallowance which the committee has resolved to draw to the attention of the Senate and the relevant minister under standing order 23(4A), in relation to the appropriateness of their exemption from disallowance.

4.3 The committee has considered all legislative instruments which are exempt from disallowance registered on the Federal Register of Legislation between 1 July 2021 and 13 August 2021. The sections below identify those instruments which meet or do not meet the committee's expectations under standing order 23(4A).

4.4 The instruments may not meet the committee's expectations because:

- the explanatory statement accompanying the instrument does not contain a sufficient explanation for why the instrument is exempt from disallowance and therefore the committee has not been able to assess whether it is appropriate for the instrument to be exempt from disallowance; or
- a substantive explanation for exemption is provided but the committee considers that the explanation does not meet the Senate's requirement that exemptions should only be made in exceptional circumstances and will only be justified in rare cases.¹

Instruments which meet the committee's expectations

4.5 No instruments exempt from disallowance meet the committee's expectations under standing order 23(4A) for this period.

1 *Senate resolution 53B: Delegated legislation—disallowance and sunseting*, agreed to on 16 June 2021, https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/Resolutions_expressing_opinions_of_the_Senate/.

Instruments which do not meet the committee's expectations

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

Instrument	Portfolio
Academic Integrity Rule 2021 [F2021L00997]	Education, Skills and Employment
Appeals Rule 2021 [F2021L00999]	Education, Skills and Employment
Australia New Zealand Food Standards Code — Schedule 20 — Maximum residue limits Variation Instrument No. APVMA 4, 2021 [F2021L00976]	Health
Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068]	Health
Consumer Goods (Projectile Toys) Amendment Safety Standard 2021 [F2021L01065]	Treasury
Consumer Goods (Self-balancing Scooters) Amendment Safety Standard 2021 [F2021L00937]	Treasury
Discipline Rule 2021 [F2021L00998]	Education, Skills and Employment
Federal Financial Relations (General Purpose Financial Assistance—2021-22 Payment No. 1) Determination 2021 [F2021L01001]	Treasury
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 1) Determination 2021 [F2021L00955]	Treasury
Federal Financial Relations (National Partnership Payments—2021-22 Payment No. 2) Determination 2021 [F2021L01075]	Treasury
Food Standards (Application A1193 – Irradiation as a phytosanitary measure for all fresh fruit and vegetables) Variation [F2021L00983]	Health
Food Standards (Application A1206 – Subtilisin from GM <i>Bacillus licheniformis</i> as a processing aid (enzyme)) Variation [F2021L00984]	Health
Food Standards (Application A1207 – Rebaudioside M as Steviol Glycoside) Variation [F2021L00985]	Health
Food Standards (Application A1216 – Food derived from herbicide-tolerant canola line MON94100) Variation [F2021L00986]	Health
Linkage Program Grant Guidelines (2021 edition) [F2021L01008]	Education, Skills and Employment
Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]	Infrastructure, Transport, Regional Development and Communications

Instrument	Portfolio
Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2019-2020 (No. 12) [F2021L01016]	Finance
Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2020-2021 (No. 5) [F2021L01015]	Finance
Radiocommunications (Spectrum Licence Limits—850/900 MHz Band) Direction 2021 [F2021L01088]	Infrastructure, Transport, Regional Development and Communications
Research Awards Rule 2021 [F2021L00996]	Education, Skills and Employment
Social Security (Australian Government Disaster Recovery Payment—Victorian storms and floods) Determination 2021 (No. 7) [F2021L00960]	Home Affairs

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation

Appendix A

New matters

5.1 The committee engages with relevant ministers and agencies to attempt to resolve its concerns about scrutiny issues raised by disallowable legislative instruments. This appendix documents the committee's new scrutiny concerns in relation to disallowable legislative instruments registered on the Federal Register of Legislation between 1 July 2021 and 13 August 2021.

Ministerial engagement

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

Instrument	Issue	Status
Biosecurity (Human Coronavirus with Pandemic Potential) Amendment (No. 1) Determination 2021 [F2021L01068]	Standing order 23(4A) – exemption from disallowance Principle (c) conferral of discretionary powers Principle (d) adequacy of consultation Principle (h) freedom of movement Principle (j) matters for appropriate for parliamentary enactment Principle (l) modification of the operation of primary legislation	Seeking advice from the minister.
Civil Dispute Resolution Regulations 2021 [F2021L01031]	Principle (l) exemption from the operation of primary legislation Principle (m) parliamentary oversight	Seeking advice from the Attorney-General.
Education Services for Overseas Students (Exempt Courses) Instrument 2021 [F2021L00877]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Seeking advice from the minister.
Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]	Principle (l) exemption from the operation of primary legislation Principle (m) parliamentary oversight	Seeking advice from the Treasurer.

1 See www.aph.gov.au/senate_sd/c.

Instrument	Issue	Status
Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 [F2021L00843]	Principle (a) compliance with <i>Legislation Act 2003</i> Principle (m) parliamentary oversight	Seeking advice from the minister.
Industry Research and Development (Regional Decentralisation Agenda—Securing Raw Materials Program) Instrument 2021 [F2021L00973]	Principle (b) constitutional validity Principle (g) adequacy of explanatory materials Principle (m) parliamentary oversight	Seeking advice from the minister.
Northern Australia Infrastructure Facility Investment Mandate Direction 2021 [F2021L00942]	Standing order 23(4A) – exemption from disallowance	Seeking advice from the minister.

Agency engagement

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

Instrument	Issue	Status
Aged Care Legislation Amendment (Care Recipients and Service Staff Vaccination Recording and Reporting) Principles 2021 [F2021L00981]	Principle (h) privacy	Concluded following response from the agency on 07/09/2021. The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Agricultural and Veterinary Chemicals Code (Conditions of Approval or Registration) Order 2021 [F2021L01044]	Principle (e) clarity of drafting Principle (g) adequacy of explanatory materials	Committee secretariat considering response.
CASA 50/21 – Designation of Airspace for Broadcast Requirements – Locations with Surveillance Flight Information Service [F2021L01100]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Concluded following response from the agency on 06/09/2021. The Civil Aviation Safety Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.

Instrument	Issue	Status
Defence Determination, Conditions of service Amendment (Miscellaneous amendments) Determination 2021 (No. 16) [F2021L01117]	Principle (g) adequacy of explanatory materials	Concluded following response from the agency on 09/09/2021. The Department of Defence amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Federal Circuit and Family Court of Australia (Terms and Conditions of Serving Judges) Determination 2021²	Principle (a) compliance with <i>Legislation Act 2003</i> – registration of instrument	Committee secretariat considering response.
Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021 [F2021L01072]	Principle (c) scope of administrative powers Principle (h) infringement notices	Committee secretariat considering response.
Higher Education Provider Approval No 2 of 2021 [F2021L00965]	Principle (g) adequacy of explanatory materials	Concluded following response from the agency on 16/09/2021. The Department of Education, Skills and Employment undertook to amend the instrument and the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Medical and Midwife Indemnity Legislation Amendment (Run-off Claims) Rules 2021 [F2021L00950]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Committee secretariat considering response.
Migration Amendment (Subclass 417 and 462 Visas) Regulations 2021 [F2021L01030]	Principle (h) procedural fairness	Committee secretariat considering response.
National Vocational Education and Training Regulator (Financial Viability Risk Assessment Requirements) Instrument 2021 [F2021L01040]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation Principle (f) incorporated materials freely accessible	Concluded following response from the agency on 02/09/2021. The Australian Skills Quality Authority amended the instrument and the explanatory statement to the instrument in response to the committee's scrutiny concerns.

2 Note this instrument has not been registered on the Federal Register of Legislation.

Instrument	Issue	Status
Therapeutic Goods Legislation Amendment (2021 Measures No. 2) Regulations 2021 [F2021L01032]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Concluded following response from the agency on 27/08/2021. The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Treasury Laws Amendment (Your Future, Your Super—Addressing Underperformance in Superannuation) Regulations 2021 [F2021L01077]	Principle (c) conferral of discretionary powers Principle (h) retrospective effect Principle (i) availability of independent merits review	Committee secretariat considering response.

Appendix B

Ongoing matters

6.1 This appendix documents the committee's ongoing scrutiny concerns in relation to matters raised in previous *Delegated Legislation Monitors*. Instruments registered before 1 July 2021 have been marked with an asterisk and will continue to be scrutinised under the committee's previous scrutiny principles until they are concluded.¹

Ministerial engagement

6.2 The committee is continuing to engage with the relevant minister about the scrutiny issues raised by the instruments listed below. Copies of the ministerial correspondence are available on the committee's website.²

Instrument	Issue	Status
Aged Care Legislation Amendment (Royal Commission Response No.1) Principles 2021 [F2021L00923]*	Principle (c) conferral of discretionary powers Principle (e) clarity of drafting Principle (j) matters more appropriate for parliamentary enactment Principle (j) significant impact on personal rights and liberties	Seeking further advice from the minister.
Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021 [F2021L00863]*	Principle (b) implied freedom of political communication Principle (c) conferral of discretionary powers Principle (e) clarity of drafting	Drawing to the attention of the Senate. The committee recommends disallowing the instrument. ³

1 On 16 June 2021 the Senate adopted three recommendations of the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight that were directed to the Senate. As a result, from 1 July 2021, the standing orders of the Senate were amended to add two new scrutiny principles to the committee's terms of reference. In addition, the standing orders were amended to allow the committee to consider instruments which are exempt from disallowance.

2 See www.aph.gov.au/senate_sdlic.

3 See Chapter 1 for further details.

Instrument	Issue	Status
Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021 [F2021L01043]*	Principle (a) compliance with authorising legislation Principle (a) compliance with <i>Legislation Act 2003</i> – same in substance Principle (j) significant matters in delegated legislation	Drawing to the attention of the Senate. The committee recommends disallowing the instrument. ⁴
Aviation Transport Security Amendment (Screening Information) Regulations 2021 [F2021L00736]*	Principle (c) conferral of discretionary powers Principle (h) strict liability Principle (j) significant penalties in delegated legislation	Committee considering response. Notice of motion to disallow placed on 25/08/2021.
Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021 [F2021L00567]*	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 24/08/2021.
Industry Research and Development (Boosting Australia's Diesel Storage Program) Instrument 2021 [F2021L00610]*	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 24/08/2021.
Industry Research and Development (Carbon Capture, Use and Storage Development Program) Instrument 2021 [F2021L00547]*	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 11/08/2021.
Industry Research and Development (Growing Australia's Cyber Skills Program) Instrument 2021 [F2021L00536]*	Principle (g) adequacy of explanatory materials Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 11/08/2021.
Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021 [F2021L00539]*	Principle (g) adequacy of explanatory materials Principle (j) matters more appropriate for parliamentary enactment Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 11/08/2021.

4 See Chapter 1 for further details.

Instrument	Issue	Status
Legislation (Exemptions and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00859]*	Principle (j) matters more appropriate for parliamentary enactment Principle (k) parliamentary oversight – exemption from disallowance Principle (k) parliamentary oversight – exemption from sunseting	Committee considering response.
Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021 [F2021L00651]*	Principle (j) exemptions from primary legislation Principle (k) parliamentary oversight	Seeking further advice from the minister. Notice of motion to disallow placed on 24/08/2021.

Agency engagement

6.3 The committee is not currently engaging with agencies via its secretariat to seek further information about potential scrutiny concerns raised by any instruments raised in previous *Delegated Legislation Monitors*.

Appendix C

Concluded matters

7.1 This appendix records the instruments in relation to which the committee has concluded its inquiries, following correspondence with the relevant minister or agency. Instruments registered before 1 July 2021 have been marked with an asterisk and will continue to be scrutinised under the committee's previous scrutiny principles until they are concluded.¹

Ministerial engagement

7.2 The committee has concluded its examination of the instruments listed below following correspondence with the relevant minister. Copies of the ministerial correspondence are available on the committee's website.²

Instrument	Issue	Status
Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]*	Principle (j) significant matters in delegated legislation Principle (k) parliamentary oversight	Concluded following response from the minister on 24/08/2021. The Minister for Senior Australians and Aged Care Services amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021 [F2021L00590]*	Principle (a) compliance with authorising legislation Principle (d) consultation with persons affected Principle (j) significant matters in delegated legislation	The committee has concluded its examination of the instrument.

1 On 16 June 2021 the Senate adopted three recommendations of the final report of the committee's inquiry into the exemption of delegated legislation from parliamentary oversight that were directed to the Senate. As a result, from 1 July 2021, the standing orders of the Senate were amended to add two new scrutiny principles to the committee's terms of reference. In addition, the standing orders were amended to allow the committee to consider instruments which are exempt from disallowance.

2 See www.aph.gov.au/senate_sdlic.

Instrument	Issue	Status
Charter of the United Nations Lists [F2021L00626] [F2021L00627] [F2021L00628] [F2021L00631] [F2021L00632] [F2021L00633] [F2021L00634] [F2021L00635] [F2021L00636] [F2021L00637] [F2021L00638] [F2021L00639] [F2021L00640] [F2021L00641] [F2021L00642] [F2021L00643] [F2021L00644] [F2021L00645] [F2021L00647] [F2021L00648] [F2021L00649]*	Principle (a) compliance with <i>Legislation Act 2003</i> – registration of instruments Principle (g) adequacy of explanatory materials	Concluded following response from the minister on 02/09/2021. The Minister for Foreign Affairs undertook to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021 [F2021L00290]*	Principle (j) matters more appropriate for parliamentary enactment Principle (k) parliamentary oversight	Concluded following response from the minister on 24/08/2021. The Minister for Finance undertook to amend the instrument in response to the committee's scrutiny concerns.
High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021 [F2021L00391]*	Principle (c) conferral of discretionary powers Principle (e) clarity of drafting Principle (g) adequacy of explanatory materials	Concluded following response from the Chief Executive and Principal Registrar of the High Court of Australia on 16/09/2021. The Chief Executive and Principal Registrar of the High Court of Australia undertook to amend the instrument in response to the committee's scrutiny concerns.
Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 [F2021L00277]*	Principle (d) adequacy of consultation Principle (k) parliamentary oversight – sunseting	Concluded following response from the minister on 24/08/2021. The Minister for Communications, Urban Infrastructure, Cities and the Arts undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.

Agency engagement

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

Instrument	Issue	Status
Aged Care Legislation Amendment (Care Recipients and Service Staff Vaccination Recording and Reporting) Principles 2021 [F2021L00981]	Principle (h) privacy	Concluded following response from the agency on 07/09/2021. The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.
CASA 50/21 – Designation of Airspace for Broadcast Requirements – Locations with Surveillance Flight Information Service [F2021L01100]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Concluded following response from the agency on 06/09/2021. The Civil Aviation Safety Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Defence Determination, Conditions of service Amendment (Miscellaneous amendments) Determination 2021 (No. 16) [F2021L01117]	Principle (g) adequacy of explanatory materials	Concluded following response from the agency on 09/09/2021. The Department of Defence amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2021 [F2021L00864]*	Principle (c) delegation of administrative powers and functions	Concluded following response from the agency on 03/09/2021. The Department of Finance amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Higher Education Provider Approval No 2 of 2021 [F2021L00965]	Principle (g) adequacy of explanatory materials	Concluded following response from the agency on 16/09/2021. The Department of Education, Skills and Employment undertook to amend the instrument and the explanatory statement to the instrument in response to the committee's scrutiny concerns.
National Health (Medication Program for Homeless People) Special Arrangement 2021 [F2021L00844]*	Principle (i) availability of independent merits review	Concluded following response from the agency on 14/09/2021. The Department of Health amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.

Instrument	Issue	Status
National Vocational Education and Training Regulator (Financial Viability Risk Assessment Requirements) Instrument 2021 [F2021L01040]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation Principle (f) incorporated materials freely accessible	Concluded following response from the agency on 02/09/2021. The Australian Skills Quality Authority amended the instrument and the explanatory statement to the instrument in response to the committee's scrutiny concerns.
Therapeutic Goods Legislation Amendment (2021 Measures No. 2) Regulations 2021 [F2021L01032]	Principle (a) compliance with <i>Legislation Act 2003</i> – incorporation	Concluded following response from the agency on 27/08/2021. The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.

Appendix D

Undertakings

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

Outstanding undertakings

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

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

Instrument	Undertaking	Date of Undertaking
Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations (No. 2) 2020 [F2020L01620]	The Department of Agriculture, Water Resources and the Environment undertook to revoke the instrument in response to the committee's scrutiny concerns.	16/03/2021
Industry Research and Development (Digital Directors Program) Instrument 2020 [F2020L01554]	The Department of Industry, Science, Energy and Resources undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	06/04/2021
Corporations Amendment (Corporate Insolvency Reforms) Regulations 2020 [F2020L01654]	The Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	09/04/2021
Part 133 (Australian Air Transport Operations—Rotorcraft) Manual of Standards 2020 [F2020L01614]	The Civil Aviation Safety Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	20/04/2021
Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 2) 2021 [F2021L00178]	The Greenhouse and Energy Minimum Standards Regulator undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	07/05/2021
Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021 [F2021L00200]	The Civil Aviation Safety Authority undertook to amend the instrument in response to the committee's scrutiny concerns.	21/05/2021
Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 10) 2021 [F2021L00305]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	04/06/2021
Export Control (Tariff Rate Quotas) Amendment (Brexit) Order 2021 [F2021L00243]	The Department of Agriculture, Water and the Environment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	04/06/2021
Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021 [F2021L00200]	The Civil Aviation Safety Authority undertook to amend the instrument in response to the committee's scrutiny concerns.	08/06/2021
Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020 [F2020L01506]	The Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	16/06/2021
Income Tax Assessment (1997 Act) Regulations 2021 [F2021L00206]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	18/06/2021

Instrument	Undertaking	Date of Undertaking
Export Control Rules 2021 - various instruments [F2021L00312] [F2021L00317] [F2021L00334] [F2021L00304] [F2021L00315] [F2021L00310] [F2021L00308] [F2021L00313]	The Department of Agriculture, Water and the Environment undertook to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.	02/07/2021
Student Assistance Regulations 2021 [F2021L00201]	<p>The Minister for Families and Social Services undertook to amend the instrument in response to the committee's scrutiny concerns.</p> <p>The Minister for Families and Social Services undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	06/07/2021
CASA 30/21 – Required Communication Performance and Required Surveillance Performance (RCP 240 and RSP 180) Capability Declarations – Direction 2021 [F2021L00504]	The Civil Aviation Safety Authority undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	09/07/2021
Export Control (Wood and Woodchips) Rules 2021 [F2021L00318]	The Minister for Agriculture and Northern Australia undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	13/07/2021
Bankruptcy Regulations 2021 [F2021L00261]	The Assistant Minister to the Attorney-General undertook to advise the committee of the outcome of the government's targeted review of the appropriateness of modifying provisions currently prescribed in the instrument.	26/07/2021
Paid Parental Leave Rules 2021 [F2021L00384]	<p>The Minister for Families and Social Services undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p> <p>The Minister for Families and Social Services advised that the Office of Parliamentary Counsel would make minor changes to the instrument in response to the committee's scrutiny concerns.</p>	30/07/2021
Therapeutic Goods Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00450]	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	30/07/2021

Instrument	Undertaking	Date of Undertaking
ASIC Market Integrity Rules (Capital) 2021 [F2021L00765]	<p>The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p> <p>The Department of the Treasury undertook to amend the instrument in response to the committee's scrutiny concerns.</p>	04/08/2021
Charter of the United Nations Lists [F2021L00626] [F2021L00627] [F2021L00628] [F2021L00631] [F2021L00632] [F2021L00633] [F2021L00634] [F2021L00635] [F2021L00636] [F2021L00637] [F2021L00638] [F2021L00639] [F2021L00640] [F2021L00641] [F2021L00642] [F2021L00643] [F2021L00644] [F2021L00645] [F2021L00647] [F2021L00648] [F2021L00649]	<p>The Minister for Foreign Affairs undertook to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.</p>	06/08/2021
Higher Education Standards Framework (Threshold Standards) 2021 [F2021L00488]	<p>The Department of Education, Skills and Employment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	09/08/2021
Health Insurance (Section 3C General Medical Services—Transcatheter Mitral Valve Repair) Determination 2021 [F2021L00800]	<p>The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	11/08/2021
Higher Education Provider Approval No 1 of 2021 [F2021L00747]	<p>The Department of Education, Skills and Employment undertook to amend the instrument in response to the committee's scrutiny concerns.</p> <p>The Department of Education, Skills and Employment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	12/08/2021
Recycling and Waste Reduction (Product Stewardship—Televisions and Computers) Rules 2021 [F2021L00624]	<p>The Department of Agriculture, Water and the Environment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	12/08/2021
Treasury Laws Amendment (Miscellaneous and Technical Amendments) Regulations 2021 [F2021L00848]	<p>The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.</p>	12/08/2021

Instrument	Undertaking	Date of Undertaking
Road Vehicle Standards (Model Reports—Compliance with Standards) Determination 2021 [F2021L00838]	The Department of Infrastructure, Transport, Regional Development and Communications undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	16/08/2021
Bankruptcy Regulations 2021 [F2021L00261]	The Assistant Minister to the Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	17/08/2021
Aged Care Legislation Amendment (Service Staff Vaccination Recording and Reporting) Principles 2021 [F2021L00697]	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	18/08/2021
Road Vehicle Standards (Limit of Acceptable Damage or Corrosion) Determination 2021 [F2021L00823] Road Vehicle Standards (Verification of Road Vehicles) Determination 2021 [F2021L00850]	The Department of Infrastructure, Transport, Regional Development and Communications undertook to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.	18/08/2021
Veterans' Entitlements (Counselling) Extended Eligibility Determination 2021 [F2021L00804]	The Department of Veterans' Affairs undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	23/08/2021
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021 [F2021L00290]	The Minister for Finance undertook to amend the instrument in response to the committee's scrutiny concerns.	24/08/2021
Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021 [F2021L00277]	The Minister for Communications, Urban Infrastructure, Cities and the Arts undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	24/08/2021
Therapeutic Goods Legislation Amendment (2021 Measures No. 2) Regulations 2021 [F2021L01032]	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/08/2021

Instrument	Undertaking	Date of Undertaking
Charter of the United Nations Lists [F2021L00626] [F2021L00627] [F2021L00628] [F2021L00631] [F2021L00632] [F2021L00633] [F2021L00634] [F2021L00635] [F2021L00636] [F2021L00637] [F2021L00638] [F2021L00639] [F2021L00640] [F2021L00641] [F2021L00642] [F2021L00643] [F2021L00644] [F2021L00645] [F2021L00647] [F2021L00648] [F2021L00649]	The Minister for Foreign Affairs undertook to amend the explanatory statements to the instruments in response to the committee's scrutiny concerns.	02/09/2021
Aged Care Legislation Amendment (Care Recipients and Service Staff Vaccination Recording and Reporting) Principles 2021 [F2021L00981]	The Department of Health undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	07/09/2021
High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021 [F2021L00391]	The Chief Executive and Principal Registrar of the High Court of Australia undertook to amend the instrument in response to the committee's scrutiny concerns.	16/09/2021
Higher Education Provider Approval No 2 of 2021 [F2021L00965]	The Department of Education, Skills and Employment undertook to amend the instrument in response to the committee's scrutiny concerns. The Department of Education, Skills and Employment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	16/09/2021

Implemented undertakings

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

Instrument	Undertaking	Date implemented
Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021 [F2021L00222]	The Minister for Senior Australians and Aged Care Services amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26/08/2021
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 1) [F2021L00759]	The Australian Transaction Reports and Analysis Centre amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/08/2021
Health Insurance Legislation Amendment (2021 Measures No. 1) Regulations 2021 [F2021L00681]	The Department of Health amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	30/08/2021
Radiocommunications (Class Licence) Amendment Instrument 2021 (No.1) [F2021L00734]	The Australian Communications and Media Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	02/09/2021
Radiocommunications (Conditions of Frequency Assignment Certificates - Apparatus Licences) Determination 2021 [F2021L00755]	The Australian Communications and Media Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	02/09/2021
Radiocommunications (Spectrum Access Charges – 20 GHz and 30 GHz Bands) Determination 2021 [F2021L00230]	The Australian Communications and Media Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	02/09/2021
Radiocommunications Equipment (General) Rules 2021 [F2021L00661]	The Australian Communications and Media Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	02/09/2021
Broadcasting Services (Parental Lock) Amendment Technical Standard 2021 (No.1) [F2021L00543]	The Australian Communications and Media Authority amended the instrument in response to the committee's scrutiny concerns.	06/09/2021
Defence Determination, Conditions of service Amendment (Miscellaneous amendments) Determination 2021 (No. 16) [F2021L01117]	The Department of Defence amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	07/09/2021

Instrument	Undertaking	Date implemented
CASA 50/21 – Designation of Airspace for Broadcast Requirements – Locations with Surveillance Flight Information Service [F2021L01100]	The Civil Aviation Safety Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	08/09/2021
Inspector-General of the Australian Defence Force Amendment Regulations 2021 [F2021L00591]	The Department of Defence amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	10/09/2021
National Health (Medication Program for Homeless People) Special Arrangement 2021 [F2021L00844]	The Department of Health amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	14/09/2021
Road Vehicle Standards Amendment (2021 Measures No. 1) Rules 2021 [F2021L00376]	The Department of Infrastructure, Transport, Regional Development and Communications amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	14/09/2021
Vehicle Standard (Australian Design Rule) Amendment Instrument 2021 (No.1) [F2021L00570]	The Department of Infrastructure, Transport, Regional Development and Communications amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	15/09/2021
Aged Care Legislation Amendment (Requirements for Staff Members and Volunteers) Instrument 2021 [F2021L00758]	The Department of Health amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	16/09/2021
CASA EX16/21 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2021 [F2021L00149]	The Civil Aviation Safety Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	16/09/2021
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2021 [F2021L00864]	The Department of Finance amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	22/09/2021
National Vocational Education and Training Regulator (Financial Viability Risk Assessment Requirements) Instrument 2021 [F2021L01040]	The Australian Skills Quality Authority amended the instrument in response to the committee's scrutiny concerns. The Australian Skills Quality Authority amended the explanatory statement to the instrument in response to the committee's scrutiny concerns.	22/09/2021