

The Senate

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Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

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Introduction

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

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

This Monitor details matters relating to the committee's scrutiny of **138** legislative instruments registered on the Federal Register of Legislation between **27 July** and **31 August 2022**. This includes **120** disallowable instruments and **18** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

Committee information

Terms of reference

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

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

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

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

Undertakings

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

Matters of interest to the Senate

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

Disallowance process¹

The disallowance process is one of the key mechanisms by which Parliament exercises control over delegated legislation. The conditions for the disallowance process are set out in the *Legislation Act 2003* and are reflected in Senate standing order 78.

The committee will give a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of an instrument before the original disallowance period expires. In addition, the committee may give such a notice where the committee requires an undertaking to be implemented before it can conclude its consideration of the instrument. The committee will usually withdraw a 'protective' notice when it receives a satisfactory response to its scrutiny concerns or confirmation that any outstanding undertakings have been implemented.

The committee may also give a notice of motion to disallow an instrument where it considers that the instrument raises significant and unresolved scrutiny concerns, and the committee has therefore resolved to recommend to the Senate that the instrument be disallowed. In these circumstances, the committee will detail its significant scrutiny concerns in Chapter 1 of the Monitor.

1 For further information on the disallowance process see [Odgers' Australian Senate Practice](#) and [Guide to Senate Procedure No. 19 - Disallowance](#).

Publications

Delegated Legislation Monitor

The committee's usual practice is to table its [Delegated Legislation Monitor](#) each Senate sitting week. Legislative instruments detailed in the Monitor are also listed in the [Index of Instruments](#) on the committee's website.

Scrutiny News

[Scrutiny News](#) is a brief newsletter summarising significant matters arising in the Monitor, as well as in the reports of the Senate Standing Committee for the Scrutiny of Bills. Past editions, and information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.

Guidelines

[Guidelines](#) relating to the committee's scrutiny principles are published on the committee's website.

Other resources

Ministerial responses to the committee's concerns can be accessed on the committee's website through either the [Delegated Legislation Monitors](#) webpage or the [Index of Instruments](#).

The [Federal Register of Legislation](#) should be consulted for the text of instruments, explanatory statements, and associated information.

The [Senate Disallowable Instruments List](#) provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.

The [Disallowance Alert](#) records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.

Part I—Technical legislative scrutiny

Part I: Introduction

Part I of the *Delegated Legislation Monitor* (the Monitor) details technical scrutiny concerns which the committee has identified in disallowable and non-disallowable legislative instruments under the technical legislative scrutiny principles set out in Senate standing order 23(3). Where the committee's concerns relate to a disallowable legislative instrument, the committee may give a notice of motion to disallow the instrument to provide the Senate and the committee with additional time to scrutinise the instrument while it is still subject to disallowance.

Chapter 1: New and ongoing matters

Where the committee considers that an instrument raises significant technical scrutiny issues, it details its concerns in Chapter 1 of the Monitor and may request further advice from the relevant minister, or otherwise draw its concerns to the attention of the Senate for consideration.

Chapter 2: Concluded matters

Where the committee has resolved to conclude its examination of an instrument, it details its concluding comments in Chapter 2 of the Monitor.

Chapter 3: Agency engagement

Where the committee identifies potential, minor technical scrutiny concerns in a legislative instrument, it may engage with relevant agencies via its secretariat to gather information or seek clarification to resolve those concerns before drawing them to the attention of the relevant minister. Chapter 3 of the Monitor summarises this engagement.

Chapter 4: Undertakings

The committee may resolve to conclude its examination of a legislative instrument based on an undertaking by the relevant minister or agency to amend an Act, legislative instrument or explanatory statement, or to conduct a review. The committee expects that when a minister or agency has made an undertaking, it will be implemented in a timely manner. Chapter 4 of the Monitor summarises all outstanding and implemented undertakings since the last Monitor was tabled. A full list of undertakings is published on the *Index of Undertakings* on the committee's website.¹

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

Chapter 1

New and ongoing matters

1.1 This Chapter details the committee's significant new and ongoing scrutiny concerns in legislative instruments relating to the committee's technical legislative scrutiny principles in Senate standing order 23(3).

New matters

1.2 At this time, the committee has not resolved to raise significant technical scrutiny concerns in relation to any instruments registered within this period. The committee is continuing to engage with relevant agencies in relation to the instruments listed in Chapter 3.

Ongoing matters

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

Bankruptcy Amendment (Service of Documents) Regulations 2022

FRL No.	F2022L00528 ¹
Purpose	Amends section 102 of the Bankruptcy Regulations 2021 to disapply paragraphs 9(1)(d) and 9(2)(d) of the <i>Electronic Transactions Act 1999</i> to ensure that the valid electronic service of documents required or permitted by the <i>Bankruptcy Act 1966</i> can occur without the need to seek consent from the recipient.
Authorising legislation	<i>Bankruptcy Act 1966</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022)

Overview

1.4 The Bankruptcy Amendment (Service of Documents) Regulations 2022 (the instrument) amends the Bankruptcy Regulations 2021 (the principal regulations) to disapply paragraphs 9(1)(d) and 9(2)(d) of the *Electronic Transactions Act 1999* (the ETA) to ensure that the valid electronic service of documents required or permitted by

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

the *Bankruptcy Act 1966* (the Bankruptcy Act) can occur without the need to seek consent from the recipient.

1.5 The instrument is made under section 315 of the Bankruptcy Act, which provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to that Act. Paragraph 315(2)(g) of the Bankruptcy Act specifies that the regulations may provide for the means of service of documents.

1.6 In *Delegated Legislation Monitor 5 of 2022*, the committee sought advice from the Attorney-General regarding scrutiny concerns, detailed below, on exemptions from the operation of the ETA being included in delegated legislation.² The Attorney-General responded on 23 September 2022.³

Scrutiny concerns

Modification of the operation of primary legislation;⁴ parliamentary oversight⁵

1.7 Paragraphs 9(1)(d) and 9(2)(d) of the ETA provide that information required or permitted to be given to another person under a Commonwealth law can be provided electronically with the recipient's consent. Item 3 of Schedule 1 to the instrument amends section 102 of the principal regulations so that the consent requirements do not apply to the electronic service of documents required or permitted by the Bankruptcy Act or the principal regulations. It appears this exemption from the requirements of primary legislation is intended to remain in force for the ordinary 10 year sunset period.

1.8 The committee noted in its correspondence with the Attorney-General that, where provisions which exempt persons or entities from the operation of primary legislation are included in delegated legislation, the instrument should operate no longer than strictly necessary. In most cases, the committee considers this means the instrument should cease to operate no more than three years after commencement, to facilitate parliamentary oversight. The committee therefore requested the Attorney-General's advice as to why it is necessary and appropriate to use delegated legislation rather than primary legislation to introduce the exemption from the requirements under the ETA, whether the instrument could be amended to provide

2 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 27–28.

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

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

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

that the measures cease within three years after commencement, and whether there is any intention to conduct a review of the provisions to determine whether they remain necessary and appropriate.

Attorney-General's response⁶

1.9 The Attorney-General advised that paragraph 315(2)(g) of the Bankruptcy Act prescribes that regulations may 'provide for the means of service of documents' and sections 7A and 9 of the ETA contemplate the possibility that regulations may provide that provisions of the ETA do not apply, and therefore Parliament has already determined it is necessary and appropriate for delegated legislation to be used to provide for the service of documents. The Attorney-General advised that the Bankruptcy Regulations 1996, which were remade by the principal regulations, did not contain a consent requirement for the electronic transmission of documents and it was not intended that the principal regulations would require this. The instrument therefore rectifies this error in the principal regulations. The Attorney-General also advised this exemption is required to ensure efficient administration of the bankruptcy system.

1.10 The Attorney-General further advised that there is no intention to amend the instrument such that it will cease after three years, as paragraph 315(2)(g) of the Bankruptcy Act provides evidence of Parliament's intention that regulations made under the Bankruptcy Act may provide for the means of service of documents and the ETA contemplates that exemptions from the operation of the ETA may be implemented by regulation. In response to whether there is any intention to conduct a review of the provisions, the Attorney-General advised that the government 'will continually assess whether these laws remain necessary and appropriate'.

Committee view

1.11 The committee's longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation.⁷ If the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. As noted above, the committee considers that in most cases, this means the instrument should cease to operate no more than three years after it commences, to ensure a minimum degree of regular parliamentary oversight.

1.12 In this instance, it appears that the exemption is intended to be longstanding, and may therefore be more appropriate to include it in primary, rather than delegated,

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

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 36.

legislation to ensure regular parliamentary oversight. While the Bankruptcy Act and the ETA envisage regulations may be required to implement the detail of service of documents and exemptions from the operation of the ETA, regular parliamentary oversight over such exemptions is key to ensuring they remain necessary and appropriate and consistent with Parliament's intention regarding the operation of those regimes when they were enacted.

1.13 While noting the Attorney-General's advice, the committee reiterates its concerns about the use of delegated legislation to create exemptions to primary legislation, especially where the long duration of such exemptions limits parliamentary oversight. The committee remains of the view that such exemptions should operate no longer than is strictly necessary, which it generally considers to be no more than three years after commencement. The committee is particularly concerned where the exemptions may be broad, and to this end, seeks further information about the scope of the exemption, including whether it applies to key documents such as bankruptcy notices.

1.14 To assist the committee's further examination of the issue, the committee requests the Attorney-General's advice on the scope of the exemption, including whether the exemption applies in relation to bankruptcy notices.

Compliance with authorising legislation⁸

1.15 As noted above, this instrument amends the principal regulations, made under the Bankruptcy Act, to disapply requirements under another Act, specifically paragraphs 9(1)(d) and 9(2)(d) of the ETA.

1.16 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. Compliance facilitates certainty in the law. In this case, it is not clear what authority is relied upon under the Bankruptcy Act to make regulations to alter the operation of another Act.

1.17 The Attorney-General's response explains that section 315 of the Bankruptcy Act provides that regulations may be made 'prescribing matters required or permitted by the Act to be prescribed', or 'necessary or convenient to be prescribed, for carrying out or giving effect to the Act,' and that paragraph 315(2)(g) prescribes that the regulations may 'provide for the means of service of documents.' The Attorney-General's response also explains that 'Sections 7A and 9 of the [ETA] contemplate the possibility that regulations may provide that all or specified provisions of this Act do not apply'. Section 7A of the ETA enables the Electronic Transactions Regulations 2020

8 Senate standing order 23(3)(a).

to exempt Commonwealth laws from the operation of the ETA, which those regulations do in Schedule 1.

1.18 Notwithstanding this broad regulation making power in the Bankruptcy Act, the committee considers that, in general, delegated legislation can fill out the detail of an Act but cannot extend it; for example, by creating exemptions to the operation of another Act. In this instance, the instrument made under the Bankruptcy Act is creating an exemption to the ETA. Where the power to extend the operation of an Act is claimed, it would need to be clear that the enabling provision contains an exemption-making power; however, it does not appear to the committee that this is the case in relation to this instrument.

1.19 In contrast to the Bankruptcy Act, the committee notes that section 7A of the ETA expressly enables regulations made under that Act to provide for exemptions and otherwise disapply provisions of the ETA to specified laws of the Commonwealth. In this regard, Schedule 1 to the Electronic Transactions Regulations 2020 provides for exemptions to requirements under the ETA, including those in section 9, regarding requirements to give information in writing. It is therefore unclear to the committee why the exemption in this instrument has been made pursuant to the Bankruptcy Act, which appears to lack an equivalent express exemption-making power by regulation.

1.20 The committee therefore requests the Attorney-General's further advice as to the source of authority relied upon to create the exemption to the *Electronic Transactions Act 1999*, noting that the *Bankruptcy Act 1966* does not appear to contain an express exemption-making power by regulation equivalent to section 7A of the *Electronic Transactions Act 1999*.

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021

FRL No.	F2021L01823 ⁹
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on a certain activity administered by the Department of Health.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance; Health and Aged Care
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022) Notice of motion to disallow given on 7 September 2022

Overview

1.21 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers powers on the Commonwealth to make arrangements under which money can be spent and to make grants of financial assistance to a state, territory or other person, as specified in regulations made under the Act.¹⁰ The Financial Framework (Supplementary Powers) Regulations 1997 (the FF(SP) Regulations) specify the relevant arrangements, grants and programs.¹¹

1.22 The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 (the instrument) amends the FF(SP) Regulations to establish legislative authority for government spending to 'develop and maintain Australia's onshore capability to manufacture mRNA products'. It does this by inserting item 531 into Part 4 of Schedule 1AB of the FF(SP) Regulations.

1.23 On 10 March 2022, the committee raised initial technical scrutiny concerns about the instrument with the former Finance Minister (the former minister), regarding the need for appropriate parliamentary oversight over the amount of funding under the program and the use of delegated legislation, rather than primary

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

10 *Financial Framework (Supplementary Powers) Act 1997*, subsection 32B(1).

11 *Financial Framework (Supplementary Powers) Act 1997*, paragraph 32B(1)(b). The Financial Framework (Supplementary Powers) Regulations 1997 are made under section 65 of the FF(SP) Act, which empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

legislation, to provide authority for the program.¹² The former minister did not respond to the committee's concerns prior to the prorogation of the 46th Parliament on 11 April 2022. The current Minister for Finance responded on 26 August 2022, attaching information provided by the Minister for Health and Aged Care (the new minister).

Scrutiny concerns

*Parliamentary oversight*¹³

1.24 The committee initially raised concerns that neither the instrument nor the explanatory statement discloses the amount of Commonwealth funding for the program authorised under the FF(SP) Act, nor do they indicate a maximum cap on the amount of funding. In this regard, the explanatory statement advises:

At this stage, the Commonwealth's final funding commitment is subject to ongoing commercial-in-confidence negotiations with one or more suppliers and potential state government funding partners. The Regulations will enable the Commonwealth to enter into agreements with one or more suppliers...within the total funding commitment, subject to future decisions by the Government.¹⁴

1.25 The committee considers that the scrutiny of instruments made under the FF(SP) Act is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure. Accordingly, it has long been concerned about any uncertainty surrounding the funding being authorised, as this inhibits Parliament's capacity to effectively scrutinise such instruments. While acknowledging the discussion in the explanatory statement, the committee does not consider the statement that information is 'commercial-in-confidence' or the fact that the scope of the program is uncertain to be sufficient justifications for limiting parliamentary oversight of Commonwealth expenditure.

1.26 Accordingly, the committee sought the former minister's further advice as to whether it was intended at any point in the future to inform the Parliament as to the amount of funding expected to be expended on the program.

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

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

14 Explanatory statement, p. 1.

*Minister's response*¹⁵

1.27 The new minister advised that the details of the agreement with Moderna, including the amount of funding, are commercially sensitive and subject to confidentiality clauses. He explained that, at the time of drafting the instrument, the release of this information may have prejudiced ongoing negotiations with Moderna and ultimately led to a less favourable outcome for Australia. Additionally, he noted that the costs under the partnership with Moderna are dependent on variables including Australia's ongoing COVID-19 vaccine needs over the life of the ten-year agreement.

1.28 Regarding the importance of parliamentary oversight of the arrangement, the new minister advised:

It is the intention of the Australian Government to provide greater clarity around the amount of funding allocated for the Moderna mRNA Partnership over the ten years of the agreements. My Department is working with Moderna to provide the required transparency expected by Parliament while ensuring confidential commercial information in the agreements is maintained.

Committee view

1.29 The committee notes the new minister's advice in relation to the commercially sensitive, confidential and variable nature of the information, including financial information, in the agreements with Moderna. However, it reiterates its concerns as to the importance of parliamentary scrutiny over the expenditure of public money. As Part 4 of Schedule 1AB to the FF(SP) Regulations authorises the expenditure of public money under specified programs, the nature of the expenditure and scope of those specified programs is of particular importance. In this regard, the committee welcomes the new minister's undertaking to work with Moderna to provide 'the required transparency expected by Parliament'.

1.30 The committee therefore requests that the new minister undertake to amend the explanatory statement to the instrument to provide further information about the funding arrangements as soon as possible.

Matters more appropriate for parliamentary enactment¹⁶

1.31 The committee raised concerns with the former minister that the instrument contained matters more appropriate for parliamentary enactment. Specifically, the committee was concerned about the use of delegated legislation, rather than primary

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

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

legislation, to authorise expenditure on such a significant national program, particularly noting the purpose of the program is very broadly drafted.

*Minister's response*¹⁷

1.32 The new minister justified the use of delegated legislation, rather than primary legislation, by reference to the urgent need to establish the authority for the program, advising:

The need to establish the authority was considered to be urgent; and an enactment through primary legislation bore the risk that the authority may not be established prior to the execution of one or more of the agreements.

1.33 The new minister also advised that the instrument relates to the procurement of goods and therefore 'does not involve the types of considerations that usually dictate the use of primary legislation', as indicated by the Department of the Prime Minister and Cabinet's Legislation Handbook and the committee's guidelines.¹⁸

Committee view

1.34 The committee remains of the view that arrangements to guarantee the supply of COVID-19 vaccines are a significant matter, notwithstanding that such arrangements relate to the procurement of goods. Nevertheless, the committee acknowledges the new minister's advice as to the need to use delegated legislation in this instance, rather than primary legislation, to respond urgently in the context of the COVID-19 health emergency.

1.35 In light of the information provided by the new minister, the committee concludes its examination of the instrument in relation to this issue.

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

18 Department of the Prime Minister and Cabinet, [Legislation Handbook](#) (February 2017) pp. 2–3; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p 31.

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021

FRL No.	F2021L01825 ¹⁹
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on certain activities administered by the National Recovery and Resilience Agency and the National Indigenous Australians Agency.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance; Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022) Notice of motion to disallow given on 7 September 2022

Overview

1.36 The Financial Framework (Supplementary Powers) Act 1997 (the FF(SP) Act) confers powers on the Commonwealth to make arrangements under which money can be spent and to make grants of financial assistance to a state, territory or other person, as specified in regulations made under the Act.²⁰ The Financial Framework (Supplementary Powers) Regulations 1997 (the FF(SP) Regulations) specify the relevant arrangements, grants and programs.²¹

1.37 The Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021 (the instrument) amends the FF(SP) Regulations to establish legislative authority for government spending on certain activities administered by the National Recovery and Resilience Agency and the National Indigenous Australians Agency. This includes spending to establish and maintain the Territories Stolen Generations Redress Scheme (the Scheme), which is a financial and wellbeing redress package for Stolen Generations survivors who were removed as children in the Northern Territory or the Australian Capital Territory prior

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

20 *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act), subsection 32B(1).

21 FF(SP) Act, paragraph 32B(1)(b). The Financial Framework (Supplementary Powers) Regulations 1997 are made under section 65 of the *Financial Framework (Supplementary Powers) Act 1997*, which empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

to self-government, or the Jervis Bay Territory. It does so by inserting items 528 and 529 into Part 4 of Schedule 1AB into the FF(SP) Regulations.

1.38 The committee first wrote to the former Finance Minister (the former minister) about technical scrutiny concerns with the instrument on 10 March 2022.²² The former minister did not respond to the committee prior to the prorogation of the 46th Parliament on 11 April 2022. The current Minister for Finance responded on 26 August 2022, attaching information provided by the Minister for Indigenous Australians (the minister).²³

Scrutiny concerns

*Matters more appropriate for parliamentary enactment*²⁴

1.39 The committee initially raised concerns that the establishment and maintenance of a nationally significant scheme appears to be a matter more appropriate for parliamentary enactment and should therefore be included in primary legislation, rather than delegated legislation.²⁵ In light of this concern, the committee sought the former minister's advice as to why it was considered necessary and appropriate to use delegated legislation to provide for the Scheme.

*Minister's response*²⁶

1.40 In her response of 26 August 2022, the minister explained that the Scheme is 'largely administratively based' and 'only those elements required to be in legislation to facilitate the establishment and administration of the Scheme have been included in the legislation'. On her advice, the key benefit of this approach is that the Scheme can be:

established and adapted in a timelier and more flexible manner than a legislative scheme... if any issues or unintended consequences for applicants are identified during the administration of the Scheme, they can be addressed more promptly, as most changes would not require legislation to pass Parliament.

22 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 January 2022, p. 37.

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

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

25 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 January 2022, p. 37.

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

Committee view

1.41 The committee thanks the minister for her advice; however, the committee generally does not accept a need to be more 'timely and flexible' to be a sufficient justification for including a significant matter in delegated legislation, rather than primary legislation. As the committee previously indicated, it appears that the Scheme is nationally significant with the potential to impact several thousand applicants. Accordingly, it remains unclear why it is necessary and appropriate for the Scheme to be included in delegated legislation.

1.42 The committee therefore draws to the attention of the Senate the inclusion of matters more appropriate for parliamentary enactment in delegated legislation.

Parliamentary oversight²⁷

1.43 The committee raised concerns with the former minister about a lack of parliamentary oversight of the Scheme, noting that neither the instrument nor the explanatory statement specifies key elements of the Scheme, including the eligibility criteria and evidentiary requirements. The committee sought the former minister's advice about whether key aspects of the Scheme could at least be included in delegated legislation subject to disallowance by the Parliament.

Minister's response²⁸

1.44 The minister explained that the maximum value of redress payments is included in the explanatory statement; however, other elements of the Scheme, such as the eligibility criteria and evidentiary requirements, are set out in policies, procedures and guidelines to allow the Scheme to be 'more accessible and understandable'. The minister also advised that some further detail is contained in the explanatory memoranda for the Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 and the Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021 (now Acts).

Committee view

1.45 While the committee appreciates the minister's advice about this matter, it remains concerned that key elements of the Scheme are in policies, procedures and guideline documents, which are not subject to parliamentary oversight, and could impact legal and administrative certainty for applicants.

1.46 The committee further notes that the inclusion of key information, such as eligibility criteria, across various documents and explanatory materials could hamper

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

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

accessibility and understanding of the Scheme. This concern is heightened by the fact that there is no independent merits review provided for decisions in relation to the Scheme, such as who is eligible or the redress that will be provided to them, as discussed in more detail below.

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

- **the relevant policies, procedures and guidance documents relevant to the Scheme referred to in the response, including where they may be accessed, and whether the explanatory statement to the instrument can be amended to include links to these documents; and**
- **whether, at a minimum, the explanatory statement to the instrument can be amended to include further information about the eligibility criteria for the Scheme.**

Delegation of administrative powers and functions²⁹

1.48 The explanatory statement to the instrument indicates that certain decisions relating to the Scheme, including who will receive payments and final spending decisions, will be made by appropriate delegates. Noting the significance of these decisions, the committee sought the former minister's advice as to who would have authority to make decisions under the Scheme as delegates, and whether there are any limitations or safeguards on the exercise of their powers.³⁰

Minister's response³¹

1.49 The minister advised that final decisions in relation to who will receive payments under the Scheme will be made at the Senior Executive Service Band 1 level or above, and they will be required to have the appropriate 'subject matter expertise'. The minister also provided comprehensive information as to the limited circumstances in which delegations may be exercised by alternative delegates and explained that limiting the delegations to specified positions 'ensures the Scheme decision-makers are qualified and informed to make an appropriate and considered decision. Moreover, fewer decision-makers ensures greater consistency in the decision-making process'.

29 Senate standing order 23(3)(c).

30 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 January 2022, p. 37.

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

Committee view

1.50 The committee welcomes the further information provided by the minister about this issue and is satisfied that the information provided alleviates its scrutiny concern about the delegation of administrative powers. The committee considers that this would be useful information to be included in the instrument's explanatory statement.

1.51 The committee thanks the minister for this additional information and requests that it be included in the explanatory statement to the instrument.

Privacy³²

1.52 In addition to redress payments, the Scheme provides for the facilitation of truth-telling and the recounting of survivors' experiences and impact of removal to senior government officials. The Scheme therefore appears to involve the collection of sensitive personal information.

1.53 In the absence of clarification in the explanatory statement, the committee sought the former minister's advice about the nature, scope and extent of personal information that may be collected under the instrument, and what safeguards apply to protect this personal information, including whether the *Privacy Act 1988* (the Privacy Act) applies.³³

Minister's response

³⁴

1.54 The minister provided detailed information about the personal and sensitive information that will be collected under the Scheme, and confirmed that the collection, use and disclosure of this information is protected by the Privacy Act, the Australian Privacy Principles and the Privacy (Australian Government Agencies — Governance) APP Code 2017.

Committee view

1.55 The committee welcomes the information provided by the minister. Noting that the personal information collected under the instrument will be subject to relevant statutory safeguards, the committee is satisfied that this additional information alleviates its scrutiny concerns in relation to privacy.

32 Senate standing order 23(3)(h).

33 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 January 2022, p. 37.

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

1.56 In light of the information provided by the minister, the committee concludes its examination of the instrument in relation to privacy.

Availability of independent merits review³⁵

1.57 The explanatory statement to the instrument advises that around 3600 survivors may be eligible for the Scheme, and financial payments of up to \$75 000 per person, as well as non-monetary redress may be provided.³⁶ It also advises that:

the framework for decision making, and review of decisions on eligibility, is currently being developed. It may include procedural fairness arrangements before a decision is made and a formal internal merits review process on final decisions, where requested by an applicant.³⁷

1.58 However, the explanatory statement does confirm that independent merits review is not available for redress decisions under the Scheme, on the basis that such review 'could result in delays to delivery of the Scheme'. It further explains that:

As many of Stolen Generations survivors are now elderly and suffering life-threatening illnesses, a delay in the provision of payments involves a significant public interest element.³⁸

1.59 In correspondence with the former minister, the committee expressed concern about this justification, noting that the issue of redress for the Stolen Generations has been known for many years, and the provision of review would not, of itself, necessarily result in extensive delays to the administration of the Scheme.

1.60 The committee therefore requested the former minister's advice about whether independent merits review, either by the Administrative Appeals Tribunal (AAT) or another person or body, can be provided for in relation to redress decisions made under the Scheme, noting its significance.³⁹

Minister's response⁴⁰

1.61 The minister advised that at the time the explanatory statement for this instrument was being prepared, the review process for the Scheme was in development. The review process has now been determined, and the minister

35 Senate standing order 23(3)(i).

36 Explanatory statement, p. 6.

37 Explanatory statement, p. 8.

38 Explanatory statement, p. 8.

39 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 January 2022, p. 37.

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

confirmed that applicants can request an internal review of the decision, which will be conducted by an Independent Assessor who was not previously involved with the application. The minister also advised that decisions under the Scheme have not been designed for review by the AAT, but it 'would be open to an applicant to request a review by the AAT, and ultimately up to the AAT to decide if it has jurisdiction'.

Committee view

1.62 The committee generally expects that discretionary decisions impacting on individuals' rights, obligations or interests will be subject to independent merits review. As discussed above, the committee's concern regarding the absence of independent merits review under the Scheme is heightened by the fact that the eligibility criteria and evidentiary requirements for the Scheme are not set out in the law in primary, or even delegated, legislation but rather in informal policies, procedures and guidelines which are not subject to parliamentary oversight. Further, the committee does not consider the potential for delays to be a sufficient reason to exclude merits review where it is otherwise appropriate.

1.63 The committee notes the minister's advice that it 'would be open to an applicant to request a review by the AAT, and ultimately up to the AAT to decide if it has jurisdiction'.⁴¹ However, it remains unclear to the committee how a decision could be reviewed by the AAT in the absence of a legislative basis for the review.⁴² In this regard, the committee considers that merits review could be made available if the Scheme were set out in primary legislation or otherwise expressly provided for in delegated legislation.

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

- **the extent to which 'Independent Assessors' conducting internal review of decisions under the Scheme are independent from the original decision-makers; and**
- **whether independent merits review can be expressly provided for in relation to decisions made under the Scheme, either by the Administrative Appeals Tribunal or another form of independent merits-based review.**

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

42 *Administrative Appeals Tribunal Act 1975*, section 25.

Chapter 2

Concluded matters

2.1 This Chapter details the committee's concluding comments on significant technical scrutiny issues in legislative instruments relating to the committee's principles in Senate standing order 23(3).

Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022

FRL No.	F2022L01004 ¹
Purpose	To amend the Australian Renewable Energy Agency Regulation 2016 to remove 'clean energy technologies' from the functions of the Australian Renewable Energy Agency (ARENA) and add 'energy efficiency' and 'electrification' as new functions.
Authorising legislation	<i>Australian Renewable Energy Agency Act 2011</i>
Portfolio	Climate Change, Energy, the Environment and Water
Disallowance	15 sitting days after tabling (tabled in the Senate on 27 July 2022)

Overview

2.2 The Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022 (the instrument) amends the Australian Renewable Energy Agency Regulation 2016 (the principal regulations) to prescribe 'energy efficiency technologies' and 'electrification technologies' as functions of the Australian Renewable Energy Agency (ARENA) and remove 'clean energy technologies' from the list of prescribed functions.

2.3 The instrument is made under section 74 of the *Australian Renewable Energy Act 2011* (the ARENA Act), which empowers the Governor-General to make regulations under that Act.

2.4 Section 3 of the ARENA Act sets out its objects. Prior to 14 September 2022, the main objects of the Act were to 'improve the competitiveness of renewable energy technologies' and to 'increase the supply of renewable energy in Australia'.²

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

2 *Australian Renewable Energy Agency Act 2011* (ARENA Act), section 3, as at 13 September 2022.

Amendments to the ARENA Act made by the *Climate Change (Consequential Amendments) Act 2022* inserted an additional object to 'facilitate the achievement of Australia's greenhouse gas emissions reduction targets', with effect from 14 September 2022.

2.5 Section 8 of the ARENA Act prescribes ARENA's functions. These functions relate to research and development of renewable energy technologies. Paragraph 8(f) provides that further functions can be prescribed via regulations made under the Act. In addition, paragraph 8(h) permits ARENA to do anything 'incidental or conducive to' the performance of its legislated functions. Recent amendments to the ARENA Act, which commenced on 14 September 2022, inserted a note section 8 which provides that 'Paragraph 8(f) allows additional functions to be prescribed related to renewable energy technologies as well as electrification technologies or energy efficiency technologies'.³

2.6 Prior to these amendments, the committee raised scrutiny concerns about the compliance of three legislative instruments which similarly sought to expand the functions of ARENA.⁴ The Senate subsequently disallowed two of these instruments. The third instrument, the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulations 2022 [F2022L00481], has since been amended by this instrument.⁵

2.7 On 7 September 2022, the committee sought advice from the Minister for Climate Change and Energy (the minister) about scrutiny concerns in relation to this instrument's compliance with authorising legislation and the extent of consultation undertaken with persons affected.⁶ The minister responded to the committee on 15 September 2022, following the commencement of the amendments to the ARENA Act made by the *Climate Change (Consequential Amendments) Act 2022* (the Climate Change (Consequential Amendments) Act).⁷

3 *Australian Renewable Energy Agency Act 2011*, section 8, as inserted by item 2 of Schedule 1 to the *Climate Change (Consequential Amendments) Act 2022*.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 8 of 2021](#) (16 June 2021) p. 15; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 12 of 2021](#) (11 August 2021) pp. 8, 27; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 14 of 2021](#) (29 September 2021) p. 43; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2022](#) (30 March 2022) p. 27.

5 The committee's concerns in relation to that instrument are set out in Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 16–19.

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 20–26.

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

Scrutiny concerns

Compliance with authorising legislation⁸

2.8 Items 2 to 4 of Schedule 1 to the instrument amend section 6 of the principal regulations to omit 'clean energy technologies' from the list of ARENA's prescribed functions and substitute it with 'energy efficiency technologies' and 'electrification technologies'. This has the effect of providing that ARENA can give financial assistance to invest in these types of technologies.

2.9 Based on the information provided in the explanatory statement it was unclear to the committee whether the functions prescribed by the instrument in relation to 'energy efficiency technologies' were incidental or conducive to renewable energy or otherwise fell within the scope of the ARENA Act. The committee was therefore concerned that this instrument, similar to the previous instrument made under paragraph 8(f), expanded the remit of ARENA beyond what was envisaged by Parliament when the ARENA Act was passed.⁹

2.10 Accordingly, the committee requested the minister's advice as to:

- why the functions conferred on ARENA in relation to energy efficiency technologies were not explicitly limited to those incidental or conducive to renewable energy; and
- whether the definition of energy efficiency technologies in the instrument could be narrowed to focus on those incidental or conducive to renewable energy.

2.11 The committee notes that following its request, the Parliament agreed to amendments to sections 3 and 8 of the ARENA Act, with effect from 14 September 2022.¹⁰ The implications of these amendments are discussed below.

Minister's response¹¹

2.12 In his response of 15 September 2022, the minister advised that the government is confident that the principal regulations, as amended by the instrument, 'are consistent with objects and broader context of the *Australian Renewable Energy Act*'.

8 Senate standing order 23(3)(a).

9 The committee's concerns are detailed in [Delegated Legislation Monitor 5 of 2022](#) (September 2022) pp. 20-25.

10 Climate Change (Consequential Amendments) Act, Schedule 1, items 1 and 2.

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

2.13 Referring to the amendments made by the Climate Change (Consequential Amendments) Act, the minister advised that the insertion of the note to section 8 of the ARENA Act means that 'the scope of the regulation making function in paragraph 8(f) [of] the ARENA Act has received a considered response by Parliament'. In the minister's view, 'this significant update addresses the committee's concerns'.

2.14 The minister also provided further information as to the links between energy efficiency and electrification technologies and the scope of the ARENA Act. Noting the recent expansion of ARENA's objects 'to facilitate the achievement of Australia's greenhouse gas emissions reduction targets', the minister explained that the 'renewable energy and energy efficiency technologies are aligned in purpose' and provided several examples of the 'synergies between renewable energy and energy efficiency' as detailed by the International Renewable Energy Agency.

2.15 Whilst acknowledging that the amendments to the ARENA Act occurred after the instrument was made, the minister reiterated that he is satisfied that section 7 of the principal regulations adequately limited the functions of ARENA prior to the amendments to preserve the validity of the principal regulations, such that they do not need to be remade.¹²

Committee view

2.16 The minister's advice helpfully clarifies the relationship between energy efficiency technologies and renewable energy, indicating that such technologies could reasonably be described as 'conducive to' renewable energy or otherwise fall within the scope of the ARENA Act. The subsequent expansion of the objects of the ARENA Act to facilitate the achievement of Australia's greenhouse gas emissions reduction targets, together with the addition of the note to section 8, provides further, welcome clarity as to the legislative basis of regulations which prescribe energy efficiency technologies as a function of ARENA.

2.17 The committee has previously queried the effect of section 7 of the principal regulations, noting that subsection 13(2) of the *Legislation Act 2003* already provides that if the making of a legislative instrument would be construed as being in excess of the power to make the instrument, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power.¹³ However, in light of the minister's advice as to the connection between energy efficiency technologies and renewable

12 Australian Renewable Energy Agency Regulation 2016, section 7, as inserted by item 9 of Schedule 1 to the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulation 2022 and amended by item 5 of Schedule 1 to the Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022.

13 The committee's concerns are detailed in [Delegated Legislation Monitor 5 of 2022](#) (September 2022) pp. 16-19.

energy, and the subsequent amendments to the ARENA Act, the committee has resolved to make no further comment on this issue.

2.18 The committee thanks the new minister and departmental officers for their constructive engagement with the committee on this matter.

2.19 In light of the information provided by the minister, the committee concludes its examination of the instrument in relation to this matter.

Consultation with persons affected¹⁴

2.20 The explanatory statement to the instrument advises that ARENA was consulted on a draft version of the instrument and intends to undertake further consultation. Noting the prominence of ARENA and the significant interest in similar instruments made to expand its remit, the committee sought further advice from the minister as to why consultation with stakeholders outside ARENA was considered unnecessary.

Minister's response

¹⁵

2.21 The minister advised that, in addition to consultation with ARENA on the drafting of the changes to the principal regulations, key organisations were briefed on the proposal, including the Clean Energy Council and Smart Energy Council. The minister added that decisions as to the scope of the amendments made by the instrument were also informed by discussions with stakeholders about the amendments made to the principal regulations by the Australian Renewable Energy Agency Amendment (Clean Energy Technologies) Regulation 2022. In light of this consultation and the urgent need to address the prior regulations, the minister advised that he was satisfied that appropriate consultation was undertaken before progressing the instrument.

Committee view

2.22 The committee thanks the minister for his advice as to the additional briefings and consultation undertaken in relation to the instrument, notwithstanding the urgency of addressing the previous regulation. On the basis of the additional information provided by the minister, and, noting the circumstances in which the instrument was drafted, the committee is satisfied that adequate consultation was undertaken.

14 Senate standing order 23(3)(d).

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

2.23 In light of the further information provided by the minister, the committee has concluded its examination of the instrument in relation to this matter.

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021

FRL No.	F2021L01824 ¹⁶
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on certain activities administered by the Department of Home Affairs.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance; Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022) Notice of motion to disallow given on 7 September 2022

Overview

2.24 The Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021 (the instrument) amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (the FF(SP) Regulations) to establish legislative authority for government spending on certain activities administered by the Department of Home Affairs, including the Community Refugee Integration and Settlement Pilot, the Economic Pathways to Refugee Integration program, the Assisted Passage Program and the National Cybercrime Capability Fund. It does so by adding items 513, 514, 524 and 525 into Schedule 1AB to the FF (SP) Regulations.

2.25 On 10 March 2022, the committee sought advice from the former Minister for Finance, copying in the former Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the former minister), about scrutiny concerns in relation to item 514: the Economic Pathways to Refugee Integration program. The former minister did not respond to the committee's concerns prior to the prorogation of the 46th Parliament on 11 April 2022. The current Minister for Home Affairs (the minister) responded on 26 August 2022.

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

Scrutiny concerns

*Clarity of drafting*¹⁷

2.26 The instrument inserts item 514 into Part 4 of Schedule 1AB to the Regulations to include the Economic Pathways to Refugee Integration program. This table item provides authority for funding to support refugees to, among other things, directly access employment with a 'large employer'. The committee expressed concern that neither the instrument nor the explanatory statement clarifies what constitutes a 'large employer' and requested the former minister's advice as to whether the instrument can be amended to clarify the intended meaning of 'large employer'.

*Minister's response*¹⁸

2.27 The minister advised that a 'large employer' is intended to align with the Australian Bureau of Statistics' definition of a large business, meaning a 'business employing 200 or more people'. The minister further advised that item 514 provides a list of non-exhaustive examples of initiatives to help refugees and humanitarian entrants' economic participation, including supporting refugees to access a role with an employer of any size, and therefore the definition of a large employer in this context does not have a significant impact on the outcomes sought by the program.

2.28 The minister advised that the explanatory statement to the instrument can be replaced to clarify the definition of 'large employer' to align with the Australian Bureau of Statistics' definition and to clarify that the list of initiatives to help refugees and humanitarian entrants in item 514 are only examples and not an exhaustive list.

Committee view

2.29 The minister's advice helpfully clarifies the intended meaning of 'large employer' and therefore the scope of the Economic Pathways to Refugees Integration program as inserted into the FF(SP) Regulations.

2.30 The committee welcomes the minister's undertaking to amend the explanatory statement to clarify the definition of 'large employer' and the non-exhaustive nature of the list in item 514 of the instrument.¹⁹

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

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

19 This undertaking is listed on the [Index of Undertakings](#) page on the committee's website.

2.31 In light of the information provided by the minister, the committee welcomes the minister's undertaking to amend the explanatory statement and concludes its examination of the instrument.

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022

FRL No.	F2022L00240 ²⁰
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on the Australian Future Leaders Program, which is administered by the Department of the Prime Minister and Cabinet.
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Portfolio	Finance; Prime Minister and Cabinet
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 March 2022) Notice of motion to disallow given on 26 September 2022; disallowed on the motion of another senator on 26 September 2022 ²¹

Overview

2.32 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers powers on the Commonwealth to make arrangements under which money can be spent or to make grants of financial assistance to a state, territory or other person, as specified in regulations made under the Act. The Financial Framework (Supplementary Powers) Regulations 1997 (the primary regulations) specify the relevant arrangements, grants and programs.²²

2.33 The Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022 (the instrument) amends the principal regulations to establish legislative authority for the government to provide funding to the Australian Future Leaders Foundation Limited (the

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

21 The motion was moved by Senator Lambie, at the request of Senator Tyrrell: *Journals of the Senate*, [No. 13](#), 26 September 2022, p. 304.

22 The Financial Framework (Supplementary Powers) Regulations 1997 are made under section 65 of the *Financial Framework (Supplementary Powers) Act 1997*, which empowers the Governor-General to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Foundation) to deliver the Australia's Future Leaders Program. It does this by inserting item 544 into Part 4 of Schedule 1AB to the Regulations.

2.34 The explanatory statement to the instrument explains that the program, administered by the Department of the Prime Minister and Cabinet, is a leadership development opportunity for emerging mid-career leaders from government and non-government sectors including academia, not-for-profit and corporate. It further explains that funding of \$14 million over four years will be available for the program.²³

2.35 The committee's secretariat, on behalf of the committee, engaged with the Department of Finance about this instrument in May 2022. On 7 September 2022, the committee subsequently sought advice from the Finance Minister about scrutiny concerns in relation to the adequacy of explanatory materials and parliamentary oversight.²⁴

2.36 The committee gave a notice of motion to disallow the instrument on 26 September 2022, to enable it to consider the minister's response while the instrument was still subject to disallowance. Later that day, the Senate resolved to disallow the instrument on the motion of another senator.²⁵ The committee subsequently received the Finance Minister's response on 27 September 2022, attaching information provided by the Assistant Minister to the Prime Minister (the assistant minister), on behalf of the Prime Minister.²⁶

Scrutiny concerns

Adequacy of explanatory materials;²⁷ parliamentary oversight²⁸

2.37 While the explanatory statement to the instrument sets out the amount of funding authorised for spending on the program (\$14 million over four years from 2021–22), the committee expressed concern that it contains limited information about the eligibility criteria for the program. In this regard, the committee noted that the explanatory statement provides only that 'the program is a leadership development opportunity for emerging mid-career leaders from both government and non-government sectors including academia, not-for-profit and

23 Explanatory statement, p. 2.

24 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 34–36.

25 *Journals of the Senate*, [No. 13](#), 26 September 2022, p. 304.

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

27 Senate standing order 23(3)(g).

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

corporate'.²⁹ The item inserted by the instrument describes the program in similarly broad terms, as a 'national leadership development program'.

2.38 In the absence of further information in the explanatory statement, the committee was also unclear as to the status of the funding recipients and whether the relevant funding had been expended on the program.³⁰ In this regard, the explanatory statement provides only that the regulations 'establish legislative authority for the Government to provide a grant to the [Foundation] to deliver the [Program]'.

2.39 Accordingly, the committee had requested the Finance Minister's advice as to:

- whether, and when, the eligibility criteria could be made publicly available;
- whether the funding authorised by the instrument had been expended on the program;
- the status of the entity or entities to which funding was proposed to be provided; and
- whether the explanatory statement could be amended to include this information.³¹

*Assistant minister's response*³²

2.40 In his response of 26 September 2022,³³ the assistant minister confirmed that no funding authorised by the instrument has been expended on the program and no contractual agreement has been entered into with the Foundation.

2.41 The assistant minister also confirmed that the Treasurer had publicly announced that the funding allocated for the program by the previous government would not proceed. Accordingly, the assistant minister did not propose to update the explanatory statement to reflect the information the committee had requested.

29 Explanatory statement, p. 2.

30 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 34–36.

31 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 36.

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

33 While this response was dated 26 September 2022, the committee received it on 27 September.

Committee view

2.42 The assistant minister's advice helpfully clarifies that the relevant funding has not been expended on the program as authorised by the instrument, and there is no intention to proceed with the relevant funding. In light of the assistant minister's advice, and noting the subsequent disallowance of the instrument, the committee makes no further comment in relation to this instrument. More generally, the committee reiterates the importance of facilitating appropriate parliamentary oversight of the expenditure of public money on programs specified by delegated legislation.

2.43 In light of the information provided by the assistant minister, the committee concludes its examination of the instrument.

Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022

FRL No.	F2022L00328 ³⁴
Purpose	Repeals and re-makes the Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011, specifies certain facilities as 'fibre-ready facilities' for the purposes of Part 20A of the <i>Telecommunications Act 1997</i> , and also provides exemptions from requirements of that Part.
Authorising legislation	<i>Telecommunications Act 1997</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 March 2022) Notice of motion to disallow given on 26 September 2022

Overview

2.44 The Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022 (the instrument) repeals and re-makes the Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011, to specify certain facilities as 'fibre-ready facilities' for the purposes of Part 20A of the *Telecommunications Act 1997* (the Act) and to exempt certain conduct and projects from the requirements under the Act.

2.45 In *Delegated Legislation Monitor 5 of 2022*, the committee sought advice from the Minister for Infrastructure, Transport, Regional Development, Communications and the Arts (the minister) regarding scrutiny concerns, detailed below, on exemptions from the operation of the Act being included in delegated legislation.³⁵ The minister responded on 21 September 2022.³⁶

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

35 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 37–39.

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

Scrutiny concerns

Exemption from the operation of primary legislation;³⁷ parliamentary oversight³⁸

2.46 Part 3 of the instrument creates exemptions from the statutory requirements relating to the installation of fibre-ready facilities contained in Part 20A division 3 of the Act. These include exemptions from the requirement to install fixed line facilities used in connection with different networks in subsections 372E(2) and 372F(2) of the Act,³⁹ and exemptions for certain real estate development projects from the operation of section 372G of the Act.⁴⁰ The second category of exemptions enables real estate development projects in rural and remote areas to be undertaken without having functioning fibre-ready facilities.

2.47 The committee noted that, where provisions which exempt persons or entities from the operation of primary legislation are included in delegated legislation, the instrument should operate no longer than strictly necessary. In most cases, the committee considers this means the instrument should cease to operate no more than three years after commencement, to facilitate parliamentary oversight. The committee expressed concern that these exemptions have been in force since 2011 and the instrument continues these exemptions until 2032, under the standard sunseting regime of the *Legislation Act 2003*. Noting the apparent ongoing need for such exemptions, the committee requested the minister's advice as to whether the exemptions as continued by the instrument can be set out in primary legislation, and if not, why not.

Minister's response⁴¹

2.48 The minister advised that Part 20A of the Act is intended to be 'broad in nature and depends on exemptions to tailor its practical operation to the real world and the Parliament passed it on this basis'. The minister noted this is likely due to the 'level of detail generally required for such exemptions' and also the 'need for flexibility so that changes in circumstances can be addressed quickly as needed'.

2.49 The minister also advised that, following previous comments by the committee on the Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2021, another instrument that similarly contained exemptions under Part 20A of the Act, a review was undertaken to consider the

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

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

39 Part 3 division 1.

40 Part 3 division 2.

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

suitability of the exemptions and whether they could be incorporated into the Act. The review was undertaken between November 2021 and February 2022 and the minister advised that on this matter, the 'consensus view in the submissions received was that the exemptions are of continuing importance for industry, but, given the ongoing changes in the telecommunications industry, the exemptions should remain in legislative instruments rather than be placed in statute' given the complexity of detail required by the exemptions and to provide for greater flexibility. The minister further advised that her department was continuing to look at whether some parts of the exemptions could practically be placed in the Act.

Committee view

2.50 The committee's longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation.⁴² If the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. As noted above, the committee considers that in most cases, this means the instrument should cease to operate no more than three years after it commences, to ensure a minimum degree of regular parliamentary oversight.

2.51 The exemptions continued by the instrument are longstanding and are intended to remain in force for some time. In this regard, the committee notes the minister's advice that this is to ensure sufficient flexibility in case of changing circumstances. The committee acknowledges the complexity and detail of exemptions to Part 20A of the Act. Nevertheless, the committee considers that the need for flexibility is not, of itself, a sufficient justification for including exemptions from primary legislation in delegated legislation. The committee also reiterates its view that given the ongoing nature of these exemptions, it is more appropriate to include them within the Act.

2.52 The committee welcomes the department's review of instruments providing for exemptions to Part 20A of the Act and consideration of whether these may more appropriately be included in the Act. The committee also welcomes the minister's advice that her department will continue to consider the exemptions and their suitability for inclusion in the Act.

2.53 Noting the minister's advice on the basis of this review, the committee concludes its examination of the instrument but reiterates its concerns about the inclusion of exemptions to primary legislation within delegated legislation and its limitation on parliamentary oversight. This includes its concerns that such exemptions should operate no longer than is strictly necessary, which it generally considers to be no more than three years after commencement.

42 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p. 36.

2.54 In light of the information provided by the minister, the committee concludes its examination of the instrument but draws its concerns about the inclusion of longstanding exemptions to primary legislation in delegated legislation and consequent impact on parliamentary oversight to the attention of the Senate.

Chapter 3

Agency engagement

3.1 As part of its technical scrutiny of legislative instruments, the committee may engage with relevant agencies via its secretariat to gather information or seek clarification to resolve minor technical scrutiny concerns. While this correspondence is confidential, the committee lists the relevant instruments on its website and provides a statistical overview of the relevant scrutiny issues raised in its *Annual Reports*. The committee reports on matters which cannot be satisfactorily resolved via engagement with the relevant agency in Chapter 1 of the Monitor.

3.2 Some instruments may be listed as both 'new' and 'concluded', where the committee via its secretariat has both raised and resolved concerns with the relevant agency in the period covered by the Monitor.

New matters

3.3 Of the instruments registered on the Federal Register of Legislation between 27 July and 31 August 2022, the committee commenced engaging with the relevant agency via its secretariat about the following **19** instruments.¹

Instrument

Aged Care Legislation Amendment (Independent Health and Aged Care Pricing Authority) Instrument 2022 [F2022L01059]

ASIC Corporations (Amendment) Instrument 2022/623 [F2022L01022]

Australian Radiation Protection and Nuclear Safety Amendment (2022 Measures No. 1) Regulations 2022 [F2022L01050]

Australian Renewable Energy Agency (General Funding Strategy) Approval 2022 [F2022L01014]

Cape Leeuwin Lighthouse Heritage Management Plan 2022 [F2022L01056]

Defence (Payments to ADF Cadets) Determination 2022 [F2022L01083]

Financial Framework (Supplementary Powers) Amendment (Treasury Measures No. 1) Regulations 2022 [F2022L01082]

Fisheries Management (Logbooks for Fisheries) Determination 2022 [F2022L01072]

Food Standards (Proposal P1052 – Primary Production and Processing Requirements for Horticulture (Berries, Leafy Vegetables and Melons) – Consequential Amendments) Variation [F2022L01064]

Health Insurance Legislation Amendment (2022 Measures No. 3) Regulations 2022 [F2022L01099]

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

Instrument

Insurance (prudential standard) determination No. 5 of 2022 [F2022L01070]

Migration (Arrangements for bridging visa applications) Amendment Instrument (LIN22/030) 2022 [F2022L01029]

Migration Amendment (Subclass 202 Visas) Regulations 2022 [F2022L01087]

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

National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2022 (No. 9) [F2022L01119]

National Self-exclusion Register (Cost Recovery Levy) Determination 2022 [F2022L01073]

Remuneration Tribunal (Members of Parliament) Amendment Determination (No. 2) 2022 [F2022L01066]

Safety, Rehabilitation and Compensation (97E(1) – Premium Determination) Guidelines 2022 [F2022L01140]

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

Ongoing matters

3.4 Since the last Monitor was tabled, the committee has concluded all outstanding matters involving agencies that were listed as new or ongoing in *Delegated Legislation Monitor 5 of 2022*. These instruments are listed below as concluded agency matters.

Concluded matters

3.5 The committee has concluded its consideration of the following **21** instruments after engagement with relevant agencies via its secretariat.²

Instrument

ASIC Derivative Transaction Rules (Clearing) Amendment Instrument 2022/224 [F2022L00697]

Auditing Standard ASA 600 Special Considerations—Audits of a Group Financial Report (Including the Work of Component Auditors) [F2022L00709]

Cape Leeuwin Lighthouse Heritage Management Plan 2022 [F2022L01056]

Cape Wickham Lighthouse Heritage Management Plan [F2022L00967]

Food Standards (Proposal P1052 – Primary Production and Processing Requirements for Horticulture (Berries, Leafy Vegetables and Melons) – Consequential Amendments) Variation [F2022L01064]

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022 [F2022L00999]

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

Instrument

Insurance (prudential standard) determination No. 1 of 2022 [F2022L00880]

Insurance (prudential standard) determination No. 2 of 2022 [F2022L00881]

Insurance (prudential standard) determination No. 3 of 2022 [F2022L00882]

Insurance (prudential standard) determination No. 4 of 2022 [F2022L00883]

Interactive Gambling (National Self-Exclusion Register) Register Rules 2022 [F2022L00953]

Migration (Arrangements for bridging visa applications) Amendment Instrument (LIN22/030) 2022 [F2022L01029]

Migration Amendment (Subclass 202 Visas) Regulations 2022 [F2022L01087]

National Health (Electronic National Residential Medication Chart Trial) Amendment (Transitional Conformant Software Systems) Special Arrangement 2022 [F2022L00799]

Privacy (Credit Reporting) Code 2014 (Version 2.3) [F2022L00746]

Remuneration Tribunal (Members of Parliament) Amendment Determination (No. 2) 2022 [F2022L01066]

Remuneration Tribunal (Members of Parliament) Determination 2022 [F2022L00769]

Taxation Administration Withholding Schedules 2022 [F2022L00819]

Veterans' Entitlements (Special Disability Trust—Discretionary Spending) Determination 2022 [F2022L00904]

Veterans' Affairs (Treatment Principles – Extend Support Provided Under the Psychiatric Assistance Dog Program) Amendment Determination 2022 [F2022L00921]

West Block and the Dugout Heritage Management Plan 2022 [F2022L00620]

Chapter 4

Undertakings

4.1 This Chapter contains a summary of undertakings that the committee is aware have been implemented or remain outstanding since the committee's last Monitor.

4.2 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.¹ Further information about the scrutiny concerns leading to these undertakings can be found through the links published on the *Index of Instruments* available on the committee's website.²

Implemented undertakings

4.3 Since the last Monitor was tabled, amendments were made to **six** explanatory statements in response to the committee's scrutiny concerns. The committee is not aware of any undertakings to amend an Act, legislative instrument or conduct a review that have been implemented since the last Monitor was tabled.

Outstanding undertakings

4.4 During this period, **nine** new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. The following table records new undertakings to amend an Act, legislative instrument or conduct a review in the relevant period that remain outstanding. The committee draws these undertakings to the attention of the Senate.

Instrument	Undertaking	Date of Undertaking
Veterans' Affairs (Treatment Principles – Extend Support Provided Under the Psychiatric Assistance Dog Program) Amendment Determination 2022 [F2022L00921]	The Department of Veterans' Affairs undertook to consider the committee's scrutiny concerns as part of a review of the Act.	07/09/2022

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

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

Part II—Matters of interest to the Senate

Part II: Introduction

Part II of the *Delegated Legislation Monitor* (the Monitor) identifies the instruments which the committee has resolved to draw to the attention of the Senate under Senate standing order 23(4) because they:

- contain significant issues;
- specify, prescribe or otherwise provide for Commonwealth expenditure or taxation; or
- do not meet the committee's expectations in relation to the source and appropriateness of exemptions from disallowance and sunseting, following scrutiny under standing orders 23(4A) and 23(3)(k).

Chapter 5: Instruments raising significant issues

This Chapter identifies the instruments which the committee considers contain significant issues under standing order 23(4). In practice, this may include instruments which:

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

Chapter 6: Expenditure and taxation in delegated legislation

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

Chapter 7: Exemptions from disallowance and sunseting

This Chapter identifies the instruments registered in the relevant period which are exempt from disallowance and sunseting, and do not satisfy the committee's expectations in relation to the source and appropriateness of those exemptions under standing orders 23(4A) and 23(3)(k).¹

1 The committee's expectations in relation to the source and appropriateness of the exemptions from disallowance and sunseting are informed by the interim and final reports of the committee's [inquiry into the exemption of delegated legislation from parliamentary oversight](#).

Chapter 5

Instruments raising significant issues

5.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4), on the basis that they raise significant issues.¹ This may include instruments which:

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

5.2 In this Monitor, there are no instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4) on the basis that they raise significant issues.

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

Chapter 6

Expenditure and taxation in delegated legislation

6.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) in the interests of promoting appropriate parliamentary scrutiny and control of Commonwealth expenditure in delegated legislation.¹ This Chapter is divided into two sections, covering expenditure-related matters and the levying of taxation in delegated legislation.

Commonwealth expenditure

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

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

Advance to the Finance Minister determinations

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

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

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

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

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

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

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

6.6 The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified in instruments made under those Acts. Consequently, the specification of expenditure in an instrument made under these Acts effectively authorises the Commonwealth to spend public monies on the relevant grant or program. The scrutiny of these instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.⁵ Accordingly, the committee has resolved to draw the Senate's attention to Commonwealth expenditure authorised by delegated legislation made under the FF(SP) Act and IRD Act under Senate standing order 23(4).⁶

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

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- 3 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 59–60, 71; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 59, 70.
 - 4 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the [committee's website](#).
 - 5 For further information see the committee's guideline on [Scrutiny of Commonwealth expenditure](#) and Chapter 7 of the report of the committee's inquiry, [Parliamentary scrutiny of delegated legislation](#).
 - 6 Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Employment and Workplace Relations Measures No. 1) Regulations 2022 [F2022L01086]	\$26.4 million over two years from 2022-23	Foundation Skills for Your Future Program
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 1) Regulations 2022 [F2022L01084]	\$30 million over two years from 2021-22	ADS-B Rebate Program
Financial Framework (Supplementary Powers) Amendment (Treasury Measures No. 1) Regulations 2022 [F2022L01082]	\$2.4 billion over four years from 2021-22	Australian Apprenticeships Incentive System
Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 2) Regulations 2022 [F2022L01088]	\$13.7 million over three years from 2022-23	Grants to Australian Kookaburra Kids Foundation Incorporated
	\$9 million over three years from 2022-23	Grant to Australian International Military Games
	\$1.9 million over three years from 2022-23	Veterans' Chaplaincy Program—Pilot

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

6.8 The *Federal Financial Relations Act 2009* (the Federal Financial Relations Act) is a key source of legislative authority for funding provided by the Commonwealth to the states and territories. It empowers the relevant minister to make determinations providing for payments of general revenue assistance to the states and territories (under section 9) and specific purposes agreed with a state or territory (under section 16). Such instruments are not subject to disallowance by Parliament.⁷

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

⁷ *Federal Financial Relations Act 2009*, sections 9(5) and 16(5).

determinations, the committee has resolved to draw these instruments to the attention of the Senate under standing order 23(4).

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

General revenue assistance – section 9, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 2) Determination 2022 [F2022L01081]	\$113 909 750.55	Determines amounts of general purpose financial assistance to be paid to Western Australia, the Australian Capital Territory and the Northern Territory.

Specific purpose payments – section 16, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 2) Determination 2022 [F2022L01038]	\$253 984 331.62	Determines amounts of financial assistance to be paid to the States, the Australian Capital Territory and the Northern Territory to support the delivery of agreed outputs or projects, facilitate State and Territory reforms, and reward States and Territories for nationally significant reforms.

Instruments providing for expenditure pursuant to special accounts

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

6.12 Where special accounts are established by primary legislation under section 80 of the PGPA Act, legislative instruments relating to the expenditure under

the special account may be made. Such instruments may, for example, relate to investment of the expenditure or caps on the amount of expenditure under the special account.

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

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

Levying of taxation in delegated legislation

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

6.16 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). This includes where an instrument imposes, or sets the rate of, a tax or levy. As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved to draw the following instruments to the attention of the Senate under standing order 23(4).

Instrument	Limit on the taxation amount in primary legislation?
Industrial Chemicals Charges (Customs) Amendment Regulations 2022 [F2022L01077]	No
Industrial Chemicals Charges (Excise) Amendment Regulations 2022 [F2022L01080]	No
Industrial Chemicals Charges (General) Amendment Regulations 2022 [F2022L01079]	No

Chapter 7

Exemptions from disallowance and sunseting

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

Exemptions from disallowance

7.2 On 16 June 2021, the Senate resolved that delegated legislation should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.¹

7.3 Senate standing order 23(4A) provides that the committee may consider instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance. Noting the Senate's concern about the exemption of delegated legislation from disallowance, this section identifies the instruments which do not satisfy the committee's expectations regarding the circumstances of their exemption from disallowance.

7.4 Subject to exceptional circumstances, the committee's expectations will not be met where the instrument:

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;²
- is exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the *Legislation Act 2003* (the Legislation Act);³

1 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

2 Items 1 to 4 of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from disallowance: instruments requiring the approval of either or both Houses of Parliament; instruments that are directions by a minister to any person or body; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money, including Advance to the Finance Minister determinations; or
- otherwise contains a matter requiring parliamentary oversight.

7.5 To assess whether an instrument is appropriately exempt from disallowance, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from disallowance.

7.6 Further information about the committee's expectations regarding the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.⁴

Instruments which do not meet the committee's expectations

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

Instrument

Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation
Instrument No. APVMA 4, 2022 [F2022L01102]

Australia New Zealand Food Standards Code – Standard 4.2.7 – Primary Production and Processing
Standard for Berries [F2022L01060]

Australia New Zealand Food Standards Code – Standard 4.2.8 – Primary Production and Processing
Standard for Leafy Vegetables [F2022L01062]

Australia New Zealand Food Standards Code – Standard 4.2.9 – Primary Production and Processing
Standard for Melons [F2022L01063]

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) pp. 47–49; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 61–72; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 99–123.

Instrument

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 2) Determination 2022 [F2022L01081]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 2) Determination 2022 [F2022L01038]

Food Standards (Application A1215 – Cetylpyridinium chloride (CPC) as a processing aid) Variation [F2022L01125]

Food Standards (Proposal M1019 – Review of Schedule 22 – Foods and classes of foods) Variation [F2022L01115]

Food Standards (Proposal M1019 – Review of Schedule 22 – Foods and classes of foods – Consequential Amendments) Variation [F2022L01118]

Food Standards (Proposal P1030 – Composition and Labelling of Electrolyte Drinks) Variation [F2022L01061]

Food Standards (Proposal P1052 – Primary Production and Processing Requirements for Horticulture (Berries, Leafy Vegetables and Melons) – Consequential Amendments) Variation [F2022L01064]

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

Exemptions from sunseting

7.8 Senate standing order 23(3)(k) requires the committee to scrutinise instruments which are exempt from the sunseting provisions of the Legislation Act, including whether it is appropriate for these instruments to be exempt from sunseting.

7.9 The sunseting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. Sunseting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

7.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.⁵

5 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

7.11 Where an instrument is exempt from sunseting, Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether the exemption is appropriate. Noting the Senate's concern about the exemption of delegated legislation from sunseting, this section identifies instruments which do not satisfy the committee's expectations regarding the appropriateness of their exemption from sunseting.

7.12 Subject to exceptional circumstances, the committee's expectations will not be met where the instrument:

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁶
- is exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the Legislation Act ;⁷
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

7.13 To assess whether an instrument is appropriately exempt from sunseting, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from sunseting.

7.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's

6 Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunseting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [*Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*](#) (March 2021) pp. 50–53 and 106–107.

guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.⁸

Instruments which do not meet the committee's expectations

7.15 Instruments listed below do not meet the committee's expectations under standing order 23(3)(k).

Instrument

Agricultural and Veterinary Chemicals Code (Allowable Variation in Concentrations of Constituents in Agricultural Chemical Products) Standard 2022 [F2022L01068]

Agricultural and Veterinary Chemicals Code (MRL Standard) Amendment Instrument (No. 6) 2022 [F2022L01094]

Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation Instrument No. APVMA 4, 2022 [F2022L01102]

Australia New Zealand Food Standards Code – Standard 4.2.7 – Primary Production and Processing Standard for Berries [F2022L01060]

Australia New Zealand Food Standards Code – Standard 4.2.8 – Primary Production and Processing Standard for Leafy Vegetables [F2022L01062]

Australia New Zealand Food Standards Code – Standard 4.2.9 – Primary Production and Processing Standard for Melons [F2022L01063]

Food Standards (Application A1215 – Cetylpyridinium chloride (CPC) as a processing aid) Variation [F2022L01125]

Food Standards (Proposal M1019 – Review of Schedule 22 – Foods and classes of foods) Variation [F2022L01115]

Food Standards (Proposal M1019 – Review of Schedule 22 – Foods and classes of foods – Consequential Amendments) Variation [F2022L01118]

Food Standards (Proposal P1030 – Composition and Labelling of Electrolyte Drinks) Variation [F2022L01061]

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) pp. 34–35; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 87–88 and 99–123.

Instrument

Food Standards (Proposal P1052 – Primary Production and Processing Requirements for Horticulture (Berries, Leafy Vegetables and Melons) – Consequential Amendments) Variation [F2022L01064]

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation