

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 **97** legislative instruments registered on the Federal Register of Legislation between **1 September** and **23 September 2022**. This includes **77** disallowable instruments and **20** 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* page 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.

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

FRL No.	F2021L01658 ¹
Purpose	Amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) to specify the conditions that must be met so an issue of an interest in a litigation funding scheme is exempt from the operation of the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> and to define the term litigation funding scheme.
Authorising legislation	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022)

Overview

1.4 The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2) (the instrument) specifies the conditions that must be met for the issue of an interest in a litigation funding scheme to be exempt from the operation of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act).

1.5 The committee first sought advice about potential scrutiny concerns in the instrument in correspondence to the former Minister for Home Affairs (the former minister) on 10 February 2022.² The former minister responded on 25 February 2022.³ The committee sought the former minister's further advice on 31 March 2022.⁴ The former minister responded on 22 April 2022.⁵ The committee retained scrutiny concerns about the instrument and sought the Attorney-General's advice in *Delegated*

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

2 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 9 February 2022, pp. 9–11.

3 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 30 March 2022, pp. 1–4.

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

5 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 30 March 2022, pp. 12–13.

*Legislation Monitor 5.*⁶ The Attorney-General responded to the committee's request for further information on 4 October 2022.⁷

Scrutiny concerns

Exemption from the operation of primary legislation⁸; exemption from sunseting⁹

1.6 Section 248 of the Act empowers the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to make a written instrument which exempts people from provisions of the Act either unconditionally or subject to specified conditions. The breach of such conditions is subject to a civil penalty.

1.7 The committee raised concerns with the former minister as to why the instrument sets out exemptions to the operation of primary legislation, noting the committee's longstanding view that executive-made law should not ordinarily amend the operation of parliamentary enactments. These concerns are heightened by the fact that the measures in the instrument are exempt from sunseting and the explanatory statement does not appear to justify this exemption.

1.8 Accordingly, the committee requested the minister's advice as to why it was considered necessary and appropriate to use delegated legislation to exempt the issue of interests in litigation funding schemes from the operation of the Act and why it was considered necessary and appropriate for the exemption to remain in force indefinitely.

Attorney-General's response¹⁰

1.9 In his response of 4 October 2022, the Attorney-General advised that the exemptions are intended to be enduring and that there is no intention to amend the instrument such that it would cease after three years. The Attorney-General considered that this would have a negative impact on the expectations of reporting entities and exempted entities that they continue on an ongoing basis and would reduce regulatory certainty for industry. Further, he advised that it is not necessary for the exemptions to cease after three years, as they are subject to an ongoing process of development, review and refinement involving scrutiny and feedback from a wide

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp.43–45.

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

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

9 Senate standing order 23(3)(k).

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

range of stakeholders, such as international organisations, Australian government and law enforcement agencies, industry and other interested parties.

1.10 The Attorney-General also advised that the inclusion of exemptions in delegated rather than primary legislation ensures that the CEO of AUSTRAC has sufficient flexibility to make, amend and repeal exemptions, as required, without being delayed by frequent and lengthy legislative amendment processes. In particular, as money laundering and terrorism financing risk is dynamic, it is important that exemptions can be promptly amended or repealed to manage the evolving risks appropriately. Including exemptions in primary legislation would inhibit this and therefore be inconsistent with the risk-based nature of the regime.

Committee view

1.11 The committee notes the Attorney-General's advice that the exemptions are intended to be enduring and that it is necessary to include them in delegated rather than primary legislation, as the longer timeframes associated with amending primary legislation could compromise the flexibility and urgency required in the context of money laundering and counter terrorism financing. The committee also notes the Attorney-General's advice that AUSTRAC will revisit the exemptions in light of the recent Federal Court decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited*,¹¹ and amendments being considered to the Corporations Regulations 2001 (the Corporations Regulations).

1.12 In this instance, while the committee acknowledges the Attorney-General's advice as to need for flexibility, it reiterates its longstanding view that provisions which exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation. If the provisions are in delegated legislation, the instrument should operate no longer than is strictly necessary. 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. In this instance, it appears from the Attorney-General's advice that the exemptions are intended to be longstanding and therefore the committee considers they should be included in primary, rather than delegated, legislation. The committee also considers that the urgent need to establish measures and the delays inherent in amending primary legislation are not, of themselves, sufficient justification for the inclusion of matters in delegated rather than primary legislation.

1.13 In addition, while the committee welcomes AUSTRAC's proposed review of the provisions, the ongoing nature of the exemptions remains of concern. For this reason,

11 *LCM Funding Pty Ltd v Stanwell Corporation Limited* (2022) FCAFC 103, which overturned an earlier finding that litigation funding schemes are subject to the Managed Investment Schemes regime.

in the committee's view, limiting the operation of the exemptions to a period of five years would appear to address the immediate regulatory gap identified by the Attorney-General, whilst ensuring a minimum degree of regular parliamentary oversight and providing time to consider future amendments, including those proposed to the Corporations Regulations.

1.14 The committee therefore requests the Attorney-General's advice as to whether the instrument can be amended to provide that the exemptions to primary legislation inserted by the instrument cease within five years of their commencement.

Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022

FRL No.	F2022L00471 ¹²
Purpose	Amends the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 to increase transparency of the operation and structure of franchise systems, before prospective franchisees enter into franchise agreements.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022) Notice of motion to disallow given on 25 October 2022

Overview

1.15 The Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022 (the instrument) amends the Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (the Franchising Code) to introduce a public Franchise Disclosure Register and increase transparency regarding the operation and structure of franchise systems.

1.16 The committee sought the Treasurer's advice about the instrument in *Delegated Legislation Monitor 5 of 2022*.¹³ The Minister for Small Business (the minister) responded on 5 October 2022.¹⁴

Scrutiny concerns

Parliamentary oversight – tabling documents¹⁵

1.17 New section 53J of the Franchising Code, as inserted by item 4 of schedule 1 to the instrument, requires a written report of a review into the operation of Part 5A of the industry code regulation (the review) to be provided to the minister before 30 June 2024, but the instrument does not require that report to be tabled in

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

13 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 29–30.

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

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

Parliament. The explanatory statement indicates that, while this report will be published online for reasons including to promote transparency and accountability, it will not be tabled.¹⁶

1.18 The committee considers that instruments which provide for the review of significant matters should also require the report of that review to be tabled in Parliament. In this case, it is unclear to the committee why there is no such tabling requirement, and it requested the minister's advice as to why the instrument does not require written reports of the review to be tabled in Parliament and whether the instrument could be amended to include such a requirement.

Minister's response¹⁷

1.19 In her response of 5 October 2022, the minister advised that there is no requirement to table written reports of the review because:

- (a) the review has an operational focus and is not significant – specifically, the review considers whether the operation of a specific part of the Code and amendments inserted by the instrument are operating effectively;
- (b) Parliament will have an opportunity to scrutinise the new provisions through the sunset process as the Franchising Code sunsets on 1 April 2025, one year after the review is expected to occur; and
- (c) other reviews in the industry codes generally do not include tabling requirements and it is important from a legislative framework perspective to take a consistent approach across industry codes to ensure coherency of legislation and a common understanding.

1.20 The minister also noted that the Franchising Code ensures transparency of the review and its outcomes by including public consultation, and the explanatory statement notes that the report will be published. Further, any amendments to the Franchising Code resulting from the review would be subject to parliamentary scrutiny through the usual process.

16 Explanatory statement, p. 11. The explanatory statement provides in this regard that the report will be published online to: 'promote transparency and accountability, as well as ensure appropriate oversight of the review process. It is not necessary for the report to be tabled; since the Regulations have broad support, executive oversight of the review process is sufficient'.

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

Committee view

1.21 The committee thanks the minister for her advice; however, it reiterates the importance of facilitating appropriate formal parliamentary oversight over significant matters. While it appreciates the minister's advice that other reviews in the industry codes generally do not include tabling requirements, the committee notes that the measures included in this instrument followed recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services, which indicates to the committee the significance of this issue and Parliament's special interest in the matter.

1.22 The committee therefore reiterates its request that the instrument be amended to include a requirement that reports of the review conducted under section 53J be tabled in Parliament.

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).

Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021

FRL No.	F2021L01768 ¹
Purpose	Amends the Air Navigation (Aircraft Noise) Regulations 2018 to control the noise impacts of Remotely Piloted Aircraft (RPA) by requiring owners and operators of certain RPAs to obtain approval for the RPA to engage in air navigation.
Authorising legislation	<i>Air Navigation Act 1920</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 8 February 2022) Notice of motion to disallow placed on 7 September 2022

Overview

2.2 The Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021 (the instrument) amends the Air Navigation (Aircraft Noise) Regulations 2018 (the principal regulations) to control the noise impacts of Remotely Piloted Aircraft (RPA) by requiring owners and operators of certain RPAs to obtain approval to engage in air navigation. This includes allowing the secretary to arrange for the use of computer programs for the purposes of deciding under section 16A of the principal regulations whether to approve an application for a remotely piloted aircraft to engage in air navigation.

2.3 The committee raised its initial scrutiny concerns with the former Deputy Prime Minister (the former minister) on 11 March 2022.² The former minister

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

2 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 March 2022, pp. 25–28.

responded on 21 March 2022.³ The committee retained scrutiny concerns about the instrument and sought the new minister's advice in *Delegated Legislation Monitor 5 of 2022*.⁴ The Minister for Infrastructure, Transport, Regional Development and Local Government (the new minister) responded on 29 September 2022.⁵

Scrutiny concerns

Automated decision making;⁶ clarity of drafting⁷

2.4 Section 16A of the principal regulations provides that the secretary may approve an application for an aircraft to engage in air navigation. The secretary must include in the approval the period during which the aircraft may engage in air navigation and any conditions with which the applicant must comply. Section 22A, as inserted by the instrument, provides that the secretary may arrange for the use, under the secretary's control, of computer programs for the purposes of making a decision under section 16A.

2.5 Where an instrument provides for automated decision-making, the committee considers that the explanatory statement should justify why this is necessary and appropriate. The committee also expects an explanation of the extent to which discretion is involved in the making of the relevant decision and what safeguards are in place.

2.6 While the former minister provided helpful information about this matter, including the extent to which discretion is involved in relation to decisions made under section 16A and the complaint mechanism that is available, the committee sought the new minister's advice about the standards or considerations used to determine whether an RPA poses a low, medium or high risk, in order to consider if the relevant decisions are appropriate for automated decision-making. The committee also asked whether the information provided by the former minister can be included in the instrument or the relevant explanatory statement for further clarity.

3 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 21 March 2022, pp. 1–5.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 40–42.

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

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

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

*New minister's response*⁸

2.7 In her response of 29 September 2022, the new minister provided detailed advice about the considerations used to determine whether an RPA posed a low, medium or high risk, and also undertook to amend the explanatory statement to the instrument, including to contain this information.

2.8 Specifically, the new minister advised that, while there are currently no recognised domestic or international standards for certifying RPAs and no process for operators or manufacturers to have aircraft certified, the instrument provides exemptions for drone operations that are considered 'minimal risk'. For drone operations that do not fall within this category, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts considers specified criteria to determine the risk level when deciding if an RPA is low risk, including whether drone operations will fly over noise-sensitive areas such as schools, residences or significant environmental sites; will fly frequently over the same area; or weigh over 150 kg. Operations not meeting these criteria are deemed low risk and will be granted approval through the automated system. The minister added that other operations are deemed medium or high risk, with the scale of risk determined through full assessment by a departmental officer in conjunction with an applicant and including factors such as the size of the drone, proposed flight paths, frequency of planned operations, noise mitigation measures and any community outreach by the applicant. To this end, the new minister enclosed a copy of the department's decision-making tree.⁹

2.9 The new minister further advised that additional information about risk categories other than minimal risk were included in the explanatory statement rather than the instrument. The new minister indicated that the explanatory statement was best placed to draw out the principles and factors considered in noise risk as the RPA industry is rapidly evolving and the department may adjust the risk assessment process from time to time to ensure it accurately reflects that impact of drone noise and community sentiment. The new minister considered that including the guidance in the explanatory statement will help ensure the instrument is sufficiently adaptable.

2.10 Further, the new minister advised that section 22A did not preclude applicants from having a departmental officer conduct the assessment (rather than progressing through the automated system). The new minister further advised that

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

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

the explanatory statement would be amended to make this clearer and would also contain information about the complaint mechanism available.

Committee view

2.11 The committee welcomes the additional information provided by the new minister and her undertaking to amend the explanatory statement to contain this additional information as soon as possible.

2.12 In light of the information provided by the minister and her undertaking to amend the explanatory statement, the committee has concluded its examination of the instrument.

Bankruptcy Amendment (Service of Documents) Regulations 2022

FRL No.	F2022L00528 ¹⁰
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 Portfolio
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022) Notice of motion to disallow given on 25 October 2022

Overview

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

2.14 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.

2.15 In *Delegated Legislation Monitor 5 of 2022*,¹¹ the committee sought advice from the Attorney-General regarding its scrutiny concerns as to the inclusion in delegated legislation of exemptions from the operation of the ETA. The Attorney-General responded on 23 September 2022.¹² The committee retained scrutiny

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

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

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

concerns, specifically regarding the scope of the exemption, and the authority for the exemption in delegated legislation. The committee sought the Attorney-General's further advice about this matter in *Delegated Legislation Monitor 6 of 2022*.¹³ The Attorney-General responded on 18 October 2022.¹⁴

Scrutiny concerns

Modification of the operation of primary legislation;¹⁵ parliamentary oversight¹⁶

2.16 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. This exemption appears to be intended to remain in force for the duration of the principal regulations and is not time limited.

2.17 Noting the committee's longstanding view 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, the committee sought additional information from the Attorney-General as to the scope of the exemption, including whether it applies in relation to key documents such as bankruptcy notices.

Attorney-General's response¹⁷

2.18 In his response of 18 October 2022, the Attorney-General advised that the instrument has the effect that prior consent will not be required to use electronic communication where a person is either required or permitted to give information in writing under the Bankruptcy Act or the principal regulations, including with respect to the service of bankruptcy notices. The Attorney-General explained that this provision has a wide application because it is intended to facilitate the electronic communication of documents in line with the overall purpose of the ETA framework. Additionally, from a general administration perspective, there would be significant

13 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2022](#) (28 September 2022) pp. 5–9.

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

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

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

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

inefficiencies if the recipient's consent had to be given each time a trustee needed to send a notification, as often multiple parties must receive notifications. Consent requirements for electronic communications would also make service costlier because this may result in reliance on other, potentially slower means, such as courier service or hand delivery, to ensure valid service. Finally, the Attorney-General advised that consent requirements prior to electronic communication would be a significant obstruction to effective and efficient administration of the Bankruptcy Act as a debtor could claim they did not consent to receipt of electronic notice to frustrate the bankruptcy process.¹⁸

Committee view

2.19 While the committee thanks the Attorney-General for his advice as to the scope of and reasoning for the exemption, it remains concerned about the wide scope of the exemption. This concern is heightened as the service of documents such as bankruptcy notices and creditors' petitions can have a significant impact on individuals. In the committee's view, it is therefore crucial that the service of key documents such as bankruptcy notices is done in a way that ensures people are adequately served and are not caught unawares. Further, the committee has not previously accepted the need for greater efficiency or cost saving as an adequate justification for an ongoing exemption from the operation of primary legislation. Accordingly, the committee has resolved to draw this matter to the attention of the Senate.

2.20 While the committee thanks the Attorney-General for his advice as to the scope of the exemption, the committee remains concerned about its wide application including to key documents such as bankruptcy notices and creditors' petitions and the potentially significant implications of this. The committee has therefore resolved to draw this matter to the attention of the Senate.

Compliance with authorising legislation¹⁹

2.21 As the instrument amends the principal regulations made under the Bankruptcy Act to disapply requirements under another Act, namely paragraphs 9(1)(d) and 9(2)(d) of the ETA, the committee further requested the Attorney-General's advice as to the source of authority relied on to create that exemption. It further noted that the Bankruptcy Act does not appear to contain an express exemption-making power by regulation, equivalent to section 7A of the ETA.

18 In his correspondence of 18 October 2022, the Attorney-General cited the case of *Pegios in his own capacity and as trustee for Pegios Superannuation Fund v Arambasic* [2022] FedCFamC2G 17, at [19] as an example of where these issues had led to the setting aside of a sequestration order.

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

*Attorney-General's response*²⁰

2.22 The Attorney-General advised that while the intent of subsection 102(3) of the Bankruptcy Regulations is to prescribe an electronic service rule that engages subsection 9(3) of the ETA, he acknowledged the committee's comments and concerns that delegated legislation can fill out the detail of, but cannot extend, an Act. The Attorney-General agreed that regulations made under paragraph 315(2)(g) of the Bankruptcy Act could not override primary legislation in the absence of a specific statutory provision allowing this. Accordingly, he advised that he would instruct his department to pursue an amendment to repeal and replace current section 102(3), to clarify the drafting and address the committee's concerns.

Committee view

2.23 The committee welcomes the Attorney-General's advice that current section 102(3) will be repealed and replaced with a new section, to address the committee's concerns.

2.24 The committee thanks the Attorney-General for his advice and undertaking to address the committee's concerns. The committee therefore concludes its examination of the instrument in relation to this issue.

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

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

FRL No.	F2021L01823 ²¹
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

2.25 The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 (the instrument) amends the Financial Framework (Supplementary Powers) Regulations 1997 (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 to the FF(SP) Regulations.

2.26 On 10 March 2022, the committee raised initial technical scrutiny concerns about the instrument with the former Minister for Finance (the former minister), including regarding the need for appropriate parliamentary oversight over the amount of funding under the 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 new Minister for Finance (the Finance Minister) responded on 26 August 2022, attaching information provided by the new Minister for Health and Aged Care.²² The committee retained scrutiny concerns about the instrument and

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

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

sought the ministers' further advice in *Delegated Legislation Monitor 6 of 2022*.²³ The Finance Minister responded on 19 October 2022.²⁴

Scrutiny concerns

*Parliamentary oversight*²⁵

2.27 The committee initially raised concerns that neither the instrument nor its 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.

2.28 The committee notes that the scrutiny of instruments made under the FF(SP) Act is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure and has long considered that uncertainty surrounding the funding being authorised inhibits Parliament's capacity to effectively scrutinise instruments. Accordingly, the committee asked the ministers whether it was intended in future to inform Parliament as to the amount of funding expected to be expended on the program.

2.29 In the response of 26 August 2022, the Minister for Health and Aged Care indicated that it was the government's intention to provide greater clarity around the amount of funding authorised and that his department was working with Moderna, the supplier, to provide the required transparency expected by Parliament while ensuring confidential commercial information in the agreements was maintained.²⁶ The committee therefore requested that the minister undertake to amend the explanatory statement to provide this further information.²⁷

*Finance Minister's response*²⁸

2.30 In her response of 19 October 2022, the Finance Minister undertook to amend the explanatory statement to provide greater clarity around the amount of funding allocated under the program. However, she indicated that, to ensure confidential commercial information in the relevant agreements is maintained and

23 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2022](#) (28 September 2022) pp. 10–13.

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

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

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 Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2022](#) (28 September 2022) pp. 10–13.

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

disclosure is in line with the final contract terms, the amendment will occur once the contract negotiations are finalised.

Committee view

2.31 The committee welcomes the Finance Minister's undertaking to amend the explanatory statement to include detail about the amount of funding allocated under the program after the contract negotiations about this matter have been finalised.

2.32 In light of the Finance Minister's undertaking to amend the explanatory statement to include the additional information requested by the committee, the committee concludes its examination of the instrument.

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

FRL No.	F2021L01825 ²⁹
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on a certain activity 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

2.33 The Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021 (the instrument) amends the Financial Framework (Supplementary Powers) Regulations 1997 (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 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.

2.34 The committee first wrote to the former Minister for Finance about technical scrutiny concerns with the instrument on 10 March 2022,³⁰ but did not receive a response prior to the prorogation of the 46th Parliament. The current Minister for Finance responded on 26 August 2022, attaching information provided by the Minister for Indigenous Australians (the minister).³¹ The committee sought the

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

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

31 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 26 August 2022, pp. 7–12.

minister's further advice in *Delegated Legislation Monitor 6 of 2022*,³² and received a response on 19 October 2022.³³

Scrutiny concerns

*Parliamentary oversight*³⁴

2.35 The committee initially raised concerns 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 minister's advice as to whether the explanatory statement to the instrument could be amended to include detail of the relevant policies, procedures and guidance documents relevant to the Scheme, including links to where they may be accessed. Additionally, the committee asked whether at a minimum, the explanatory statement to the instrument could be amended to include further information about the eligibility criteria for the Scheme.

*Minister's response*³⁵

2.36 The minister identified six policy and procedure documents relevant to the Scheme and undertook to include this information in the explanatory statement and on the Scheme's website. The minister also advised that the explanatory statement will be amended to include further detail about the Scheme's eligibility criteria, subject to internal approvals and liaison with the Department of Finance.

Committee view

2.37 The committee welcomes the minister's advice and undertaking to amend the explanatory statement in relation to this issue.

2.38 In light of the minister's undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this issue.

32 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 6 of 2022](#) (28 September 2022) pp. 14–20.

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

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

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

Delegation of administrative powers and functions³⁶

2.39 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 initially asked the minister about the delegation for making these decisions. The minister advised that these decisions will be made at the Senior Executive Service Band 1 level, or above, and they will have the relevant subject matter expertise to make such decisions. The committee then requested that the minister include this information in the instrument's explanatory statement.

Minister's response³⁷

2.40 The minister advised that the explanatory statement will be amended to include information about the delegation of powers, subject to internal approvals and liaison with the Department of Finance.

Committee view

2.41 The committee welcomes the minister's advice and undertaking to amend the explanatory statement in relation to this issue.

2.42 In light of the minister's undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this issue.

Availability of independent merits review³⁸

2.43 The committee initially raised concerns as the explanatory statement to the instrument confirms 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'. The minister confirmed that while review by the Administrative Appeals Tribunal (the AAT) is not available, internal review is available, to be conducted by 'Independent Assessors'.

2.44 Noting the significance of these discretionary decisions on the applicants, the committee requested the minister's advice about the extent to which the 'Independent Assessors' conducting the 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 AAT or another form of independent merits-based review.

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

37 This correspondence will be accessible on the [Index of Instruments](#) page on the committee's website.

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

*Minister's response*³⁹

2.45 The minister provided detailed advice about the role and independence of 'Independent Assessors' engaged by the Department to conduct review decisions. She advised that Independent Assessors are engaged under a fee for service arrangement after being selected via an extensive merit selection process. Indigenous recruitment agencies are used to identify potential candidates based on specified requirements. Further, if one Independent Assessor recommends that an application is ineligible for redress, the matter will be referred to a second Independent Assessor to consider, before a final decision is made. The minister advised that, to date, no requests for review have been received, noting the low standard of proof required on applications.

2.46 The minister further advised that the Scheme's internal review process is consistent with the review process for the National Redress Scheme for people who experienced institutional sexual abuse (the National Redress Scheme) and having a different review process for this Scheme could lead to an unintended negative inference of the National Redress Scheme and create disparity between the two Commonwealth redress schemes.

Committee view

2.47 The committee thanks the minister for her detailed advice about this issue. While the committee generally expects that discretionary decisions impacting on individuals' rights, obligations or interests will be subject to independent merits review, the committee acknowledges the minister's further advice as to steps taken to ensure independent internal review is available for applicants. Further, the committee notes the minister's advice about the potential issues with creating disparity between the two Commonwealth redress schemes.

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

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

Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021

FRL No.	F2021L01708 ⁴⁰
Purpose	Prescribes the Underwriting New Generation Investments Program to reduce wholesale electricity prices by increasing competition and supply, assist commercial and industrial customers and smaller retailers to access affordable energy supply arrangements, and improve the reliability of the system by increasing the level of firm capacity.
Authorising legislation	<i>Industry Research and Development Act 1986</i>
Portfolio	Industry, Science and Resources; Climate Change, Energy, the Environment and Water
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ⁴¹ Notice of motion to disallow given on 7 September 2022

Overview

2.49 The *Industry Research and Development Act 1986* (the IRD Act) authorises the Commonwealth to spend public money on programs that the minister prescribes by legislative instruments.

2.50 The Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021 (the instrument) prescribes the Underwriting New Generation Investments Program (the Underwriting Program). The Underwriting Program provides financial support for new investments in dispatchable electricity generation projects.⁴²

2.51 The committee first sought advice about potential scrutiny concerns in the instrument in correspondence to the former Minister for Industry, Energy and Emissions Reduction on 10 February 2022.⁴³ The committee did not receive a

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

41 This instrument was subject to an unresolved disallowance motion in the Senate when the 46th Parliament was prorogued. Pursuant to [subsection 42\(3\)](#) of the *Legislation Act 2003*, the instrument is deemed to be tabled again in the Senate on the first sitting day of the new Parliament.

42 Subsection 5(2).

43 See [correspondence](#) from the Senate Standing Committee for the Scrutiny of Delegated Legislation on 10 February 2022, pp. 15–16.

response prior to the prorogation of the 46th Parliament. The committee retained scrutiny concerns about the instrument and sought advice from the new Minister for Climate Change and Energy (the minister) in *Delegated Legislation Monitor 5 of 2022*.⁴⁴ The minister responded on 12 October 2022.⁴⁵

Scrutiny concerns

Parliamentary oversight;⁴⁶ matters more appropriate for parliamentary enactment⁴⁷

2.52 Subsection 5(1) of the instrument prescribes the Underwriting Program for the purposes of section 33 of the IRD Act. Subsection 5(2) provides that the Underwriting Program gives financial support for new investments in dispatchable electricity generation through various means, including grants and loans.

2.53 Neither the instrument nor its explanatory statement appears to indicate the total amount of funding that is authorised to be allocated to new investments in dispatchable electrical generation under the Underwriting Program. The committee noted that any uncertainty surrounding the funding authorised by instruments under the IRD Act inhibits Parliament's capacity to effectively scrutinise such instruments, and requested advice as to the amount of funding that was authorised on projects under the program via this instrument.⁴⁸

2.54 The committee also noted that the explanatory statement to the instrument indicates that the use of delegated, rather than primary, legislation in this instance was intended as a temporary measure pending the passage of the Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 (the Grid Reliability Fund Bill).⁴⁹ The committee expressed concern that the instrument was being used to pre-emptively authorise expenditure of funds related to the Underwriting Program while the matter was actively before the Parliament, and also noted that the Grid Reliability Fund Bill lapsed following the prorogation of the 46th Parliament. Accordingly, the committee sought advice regarding the current status of the instrument, and why it was considered necessary and appropriate to provide

44 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 54–56.

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

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

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

48 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 55.

49 Explanatory statement, p. 2.

authority for spending on the Underwriting Program by delegated legislation, rather than primary legislation.⁵⁰

*Minister's response*⁵¹

2.55 In his response of 12 October 2022, the minister advised the committee of his intention that the instrument be repealed. The minister further advised that although the Underwriting Program sits under his portfolio, the authority to repeal the instrument rests with a minister in the Industry, Science and Resources portfolio. The minister had therefore also written to the Minister for Industry and Science requesting that he repeal the instrument.

Committee view

2.56 The committee thanks the minister for his engagement on this issue and welcomes his undertaking that the instrument will be repealed.

2.57 In light of the minister's undertaking in relation to repeal of the instrument, the committee concludes its examination of the instrument.

50 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 56.

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

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 1 September and 23 September 2022, the committee commenced engaging with the relevant agency via its secretariat about the following **ten** instruments.¹

Instrument

ASIC Corporations (Product Intervention Order Extension—Binary Options) Instrument 2022/779 [F2022L01169]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 20) Instrument 2022 [F2022L01231]

Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 [F2022L01210]

Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Amendment (Review) Regulations 2022 [F2022L01232]

Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2022 [F2022L01227]

Health Insurance (prudential standard) determination No. 1 of 2022 [F2022L01244]

Industry Fellowships Program (IFP) Grants Guidelines [F2022L01187]

Life Insurance (prudential standard) determination No. 1 of 2022 [F2022L01242]

National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Default Emissions Intensities) Rules 2022 [F2022L01150]

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

Instrument

Public Governance, Performance and Accountability (Section 75 Transfers) Amendment Determination 2022-2023 (No. 1) [F2022L01151]

Ongoing matters

3.4 The committee is continuing to engage with relevant agencies via its secretariat about potential scrutiny concerns raised by **two** instruments.²

Instrument

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

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

Concluded matters

3.5 The committee has concluded its consideration of the following **18** instruments after engagement with relevant agencies via its secretariat.³

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]

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Russia and Ukraine) Amendment (No. 20) Instrument 2022 [F2022L01231]

Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 [F2022L01210]

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

Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2022 [F2022L01227]

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

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

Instrument

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

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

Health Insurance (prudential standard) determination No. 1 of 2022 [F2022L01244]

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

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

Life Insurance (prudential standard) determination No. 1 of 2022 [F2022L01242]

National Greenhouse and Energy Reporting (Safeguard Mechanism) Amendment (Default Emissions Intensities) Rules 2022 [F2022L01150]

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

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

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

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 **16** 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, **seven** 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
Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021 [F2021L01708]	The Minister for Climate Change and Energy undertook to engage with the Minister for Industry and Science to repeal the instrument.	12/10/2022
Bankruptcy Amendment (Service of Documents) Regulations 2022 [F2022L00528]	The Attorney-General undertook to amend the principal regulations to address the committee's scrutiny concerns.	18/10/2022

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; and
- 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 details the instruments which the committee considers raise 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 which 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 interest 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 committee did not identify any instruments specifying expenditure made under the FF(SP) Act and IRD Act registered during the relevant period.

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

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](#).

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 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. 3) Determination 2022 [F2022L01223]	\$129 885 479.08	Determines amounts of general purpose financial assistance to be paid to Western Australia and the Australian Capital Territory.

Specific purpose payments – section 16, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 3) Determination 2022 [F2022L01165]	\$616 132 663.00	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.

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

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?
Fuel Tax (Road User Charge) Determination 2022 [F2022L01192]	No
Private Health Insurance (Complaints Levy) Rules 2022 [F2022L01199]	Yes

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*;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

Biosecurity (Biosecurity Response Zone for Foot and Mouth Disease—Relevant Ports) Determination 2022 [F2022L01241]

Biosecurity (Conditionally Non-prohibited Goods) Amendment (Meat and Meat Products for Personal Use) Determination 2022 [F2022L01176]

Biosecurity (Consequential Amendments and Transitional Provisions) (Extension of First Points of Entry Determinations) Amendment (Norfolk Island Airport) Instrument (No. 2) 2022 [F2022L001207]

Biosecurity (First Point of Entry—Norfolk Island Airport) Amendment (Period of Effect) Determination (No. 2) 2022 [F2022L01208]

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

Bioresecurity (Preventative Bioresecurity Measures—Incoming International Flights) Repeal Determination 2022 [F2022L01180]

Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2022 [F2022L01227]

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 3) Determination 2022 [F2022L01223]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 3) Determination 2022 [F2022L001165]

Food Standards (Proposal M1020 – Maximum Residue Limits (2021)) Variation [F2022L01172]

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 2003* (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

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.

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](#).

7.12 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 2003*;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 guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.⁸

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.

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.

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

Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2022 [F2022L01210]

Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2022 [F2022L01227]

Food Standards (Proposal M1020 – Maximum Residue Limits (2021)) Variation [F2022L01172]

Public Service (Terms and Conditions of Employment) (Department of Climate Change, Energy, the Environment and Water) Determination 2022 [F2022L01174]

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation