

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

Monitor 4 of 2023

29 March 2023

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ISSN: 2652-4139 (print)

ISSN: 2652-4147 (online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Delegated Legislation and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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 **91** legislative instruments registered on the Federal Register of Legislation between **21 February 2023** and **15 March 2023**.<sup>1</sup> This includes **78** disallowable instruments and **13** 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;

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1 Two disallowable legislative instruments, the CASA EX18/23 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2023 [F2023L00144] and the CASA EX30/23 — Part 145 Exposition (CAR Maintenance Activities) Exemption 2023 [F2023L00152], were registered during this period without explanatory statements. Scrutiny of these instruments has been deferred until explanatory statements are registered. These two instruments are not included in these statistics.

- (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 process<sup>2</sup>**

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

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

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.

## **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.

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## **Part I—Technical legislative scrutiny**

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## 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.<sup>1</sup>

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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 The committee has identified significant technical scrutiny concerns in relation to the instrument listed below.

### Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023

<b>FRL No.</b>	F2023L00193 <sup>1</sup>
<b>Purpose</b>	Amends the Corporations Regulations 2001 to exempt the issuers of income management accounts from the obligation to make a target market determination under Part 7.8A of the <i>Corporations Act 2001</i> .
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 7 March 2023)

### Overview

1.3 This instrument amends the Corporations Regulations 2001 (the Corporations Regulations) to provide income management regimes with an explicit exemption from the target market determination provisions in the *Corporations Act 2001* (the Corporations Act).

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

## Scrutiny concerns

### ***Exemption from the operation of primary legislation;<sup>2</sup> parliamentary oversight<sup>3</sup>***

1.4 This instrument provides for income management regimes within the meaning of Parts 3AA and 3B of the *Social Security (Administration) Act 1999* to be exempt from the target market determination requirements set out in section 994B of the Corporations Act.

1.5 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions from the operation of primary legislation. In addition, Senate standing order 23(3)(m) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

1.6 The committee's longstanding view is that provisions which amend or create exemptions to 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 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.

1.7 In addition, as per the committee's guidelines, the committee considers that the explanatory statement should comprehensively justify the nature and scope of the relevant exemptions, including whether it is appropriate to include the provisions in delegated legislation.

1.8 In this regard, the explanatory statement provides that the exemption set out in this instrument is justified as 'the design and distribution features of relevant income management accounts are not determined by the issuer of the product but are set out in the *Social Security (Administration) Act 1999*'. Additionally, the explanatory statement sets out that the exemption is 'consistent with the existing exemptions provided to related welfare management payment accounts under subclause 7(4) of *ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784* [the ASIC instrument]'.

1.9 However, the explanatory statement does not explain why it was considered necessary and appropriate to address this matter in delegated rather than primary legislation. Further, the measures in this instrument are inserted into the Corporations

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

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



Regulations, which are exempt from the ordinary sunseting regime, and so appear to be in force on an ongoing basis.

1.10 Noting that the ASIC instrument and other instruments made under the *Social Security (Administration) Act 1999* to implement the new income management regime are subject to sunseting, it is unclear why it is appropriate for the exemption provided for in this instrument to be exempt from sunseting and be in force on an ongoing basis.

**1.11 The committee therefore requests the Assistant Treasurer's advice as to:**

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to introduce this exemption to requirements in the Corporations Act;**
- **how the exemption in this instrument is consistent with the exemptions in the ASIC Corporations (Design and Distribution Obligations Interim Measures) Instrument 2021/784, noting that the ASIC instrument appears to self-repeal on 5 October 2023 and is subject to sunseting while the Corporations Regulations are not; and**
- **whether there is any intention to include these exemptions in the Corporations Act and, if not, whether the instrument can be amended to provide that the measures cease within three years after commencement.**

## Ongoing matters

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

### Corporations Amendment (Litigation Funding) Regulations 2022

<b>FRL No.</b>	F2022L01614 <sup>4</sup>
<b>Purpose</b>	Amends the Corporations Regulations 2001 to provide litigation funding schemes with an explicit exemption from the managed investment scheme regime, Australian Financial Services Licence requirements, product disclosure regime and anti-hawking provisions in the <i>Corporations Act 2001</i> .
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 February 2023)

## Overview

1.13 This instrument amends the Corporations Regulations 2001 (the Corporations Regulations) to provide litigation funding schemes with an explicit exemption from the managed investment scheme regime, Australian Financial Services Licence requirements, product disclosure regime and anti-hawking provisions in the *Corporations Act 2001* (the Corporations Act).

1.14 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 1 of 2022*, on 25 January 2023.<sup>5</sup> The Assistant Treasurer responded on 20 February 2023.<sup>6</sup> As the committee retained scrutiny concerns, it sought the Assistant Treasurer's further advice in *Delegated Legislation Monitor 3 of 2023*.<sup>7</sup> The Assistant Treasurer responded on 23 March 2023.<sup>8</sup>

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

5 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023) p. 5.

6 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 20 February 2023, pp. 6–8.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2023](#) (8 March 2023) pp. 10–15.

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

## Scrutiny issues

### ***Compliance with authorising legislation<sup>9</sup>***

1.15 The committee initially raised concerns as the instrument provides that it is made under the Corporations Act and its explanatory statement indicates that it is made under section 1364. As these are general enabling provisions, the committee requested the Assistant Treasurer's advice as to the specific exemption-making powers.

1.16 In response, the Assistant Treasurer advised the committee of the relevant specific powers in the Corporations Act.<sup>10</sup> The committee requested the Assistant Treasurer's further advice as to whether the explanatory statement could be amended to include this further information.

### ***Assistant Treasurer's response<sup>11</sup>***

1.17 In his response of 23 March 2023, the Assistant Treasurer agreed to amend the explanatory statement to include information regarding the specific legal authority provided in the Corporations Act.

### ***Committee view***

1.18 The committee welcomes the Assistant Treasurer's undertaking.

**1.19 In light of the Assistant Treasurer's undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this issue.**

### ***Exemption from the operation of primary legislation;<sup>12</sup> parliamentary oversight<sup>13</sup>***

1.20 The instrument provides litigation funding schemes with explicit exemptions from the Corporations Act's managed investment scheme regime, Australian Financial

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

10 Paragraphs 9(n), 911A(2)(k), 1020G(1)(a) and 992A(2)(c) of the Corporations Act. See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 20 February 2023, pp. 6–7.

11 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 20 February 2023, pp. 6–8.

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

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

Services Licence requirements, product disclosure regime and anti-hawking provisions.<sup>14</sup>

1.21 Noting the committee's longstanding views about the use of delegated legislation to create ongoing exemptions to primary legislation, it requested the Assistant Treasurer's advice as to why the exemptions were required, given that the Full Federal Court case of *LCM Funding v Stanwell Corporation* (the LCM funding case)<sup>15</sup> reflected the current state of the law, and whether the Corporations Act could be amended to include the relevant exemptions. The committee also sought advice as to how the instrument differed from the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 (the Hawking Regulations) which the Assistant Treasurer previously undertook to amend to be time-limited to three years.

1.22 Finally, as the Assistant Treasurer had advised that delegated legislation was the appropriate place for the exemptions, including because changes should fit within 'existing legal hierarchies', the committee asked the Assistant Treasurer for further detail about that concept and how it is applied in practice when determining where to place relevant exemptions.

#### *Assistant Treasurer's response*<sup>16</sup>

1.23 In his response, the Assistant Treasurer advised that:

- the exemptions are necessary to provide certainty about the regulatory arrangements that apply for litigation funding schemes under the Corporations Act. As this also includes Australian Financial Services Licence requirements, the product disclosure regime and anti-hawking provisions, it is broader than the LCM funding case, which only related to whether litigation funding schemes are subject to the managed investment scheme regime;
- the exemptions inserted by the instrument are consistent with similar pre-existing exemptions in the regulations relating to insolvency litigation funding schemes and arrangements. It would be significantly more complex and affect

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14 For example, Schedule 1, item 1 of the instrument provides for litigation funding schemes to be exempt from the definition of a managed investment scheme in section 9 of the Act. Item 13 provides an explicit exemption for litigation funding schemes from the Act's requirement to hold an Australian Financial Services Licence, while item 20 creates an exemption from the Act's anti-hawking provisions. Further, item 22 exempts litigation funding schemes from the Act's Part 7.9 disclosure obligations.

15 [2022] FCAFC 103.

16 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 20 February 2023, pp. 6–8.

clarity and navigability of the law to include bespoke exemptions for litigation funding schemes directly in the Act;

- the amendments which the instrument makes to the regulations include amendments to the prohibition on hawking, which was originally inserted by the Hawking Regulations. While time-limiting the Hawking Regulations was a 'show of good faith', the Assistant Treasurer nevertheless confirmed that the exemptions to the hawking provisions for litigation funding schemes will also be subject to a three-year limitation; and
- finally, in relation to the existing legal hierarchy, the Corporations Act provides legal authority to prescribe various matters in regulations, reflecting Parliament's intention that delegated legislation has an important role in removing prescriptive detail from the primary legislation. Decisions about where individual exemptions sit within the hierarchy are 'made on a case-by-case basis taking into account matters such as the application of the exemptions, the time available to progress the change, and the location of similar exemptions'.

#### *Committee view*

1.24 While the committee thanks the Assistant Treasurer for his response, it retains and reiterates its longstanding significant scrutiny concerns both with this instrument and with the justifications provided for introducing ongoing exemptions from the operation of primary legislation in delegated legislation.

1.25 While the committee welcomes the Assistant Treasurer's advice that the exemptions this instrument makes to the hawking provisions will be time-limited to three years, consistent with the Hawking Regulations, it remains concerned that the instrument provides for a number of other exemptions from certain provisions of the Corporations Act, which do not appear to be similarly time-limited.

1.26 The committee's longstanding view is that provisions that amend or create exemptions to primary legislation should be included in primary, rather than delegated, legislation. However, if the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary, which in most cases should be no more than three years after commencement, in order to ensure regular parliamentary oversight. It is also a requirement of the Senate under standing order 23(3)(l) that the committee examines such instruments as to whether they are in force 'only for as long as strictly necessary'. Further, the committee's expectation about such instruments is informed by its longstanding view that such delegated legislation should not continue to be in force for such a period as to act as a de facto amendment to primary legislation.

1.27 In this regard, the exemptions this instrument makes regarding the managed investment scheme regime, Australian Financial Services Licence requirements and the product disclosure regime appear to be ongoing, as they do not appear to be

subject to the ordinary ten-year sunseting regime, which is a minimum expectation of the committee. The committee does appreciate that some measures are required to operate on an ongoing basis, in which case it considers they should be included in primary legislation. In this regard, it is unclear to the committee, why the hawking-related exemptions in this instrument are able to be time-limited but the other measures which similarly relate to litigation-funding schemes cannot be. The committee is concerned about time-limiting some exemptions but not others, noting the impact this has on consistency of the law and particularly given the Assistant Treasurer's advice about the need for clarity and navigability of the law.

1.28 The committee notes the additional information provided about the legal hierarchy; however, it regards this explanation as contrary to Senate standing order 23(3)(l) and the committee's longstanding view that delegated legislation should add detail, rather than 'removing prescriptive detail' from the Act so as to act as a de facto amendment to primary legislation.

1.29 Finally, the committee notes that it has resolved to place a protective notice of motion to disallow the instrument, to provide the committee more time to engage with the Assistant Treasurer to resolve this significant scrutiny issue.

**1.30 Accordingly, the committee requests the Assistant Treasurer's further advice as to:**

- **why the amendments this instrument makes to the managed investment scheme regime, Australian Financial Services Licence requirements and product disclosure regime cannot be time-limited to three years or at least subject to sunseting, when the hawking-related amendments will be, noting the concerns around clarity and consistency in the law; and**
- **noting the Assistant Treasurer's advice that creating bespoke exemptions in the Act for litigation funding schemes would affect clarity and navigability, whether it is possible to move not only these exemptions but also other exemptions into the Corporations Act.**

## Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022

<b>FRL No.</b>	F2022L01629 <sup>17</sup>
<b>Purpose</b>	Amends the Corporations Regulations 2001 and the National Consumer Credit Regulations 2010 to incorporate longstanding and accepted matters currently contained in ASIC legislative instruments into the regulations.
<b>Authorising legislation</b>	<i>Corporations Act 2001; National Consumer Credit Protection Act 2009</i>
<b>Portfolio</b>	Treasury
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 February 2023)

### Overview

1.31 The Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 (the instrument) amends the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010 (together, the principal regulations) to add a number of exemptions from primary legislation, which are currently contained in Australian Securities and Investments Commission (ASIC) legislative instruments, into the principal regulations.

1.32 These are exemptions, in specified circumstances, from the requirements to hold an Australian Financial Services Licence under section 911A of the *Corporations Act 2001* (the Corporations Act) and to hold a credit licence under section 29 of the *National Consumer Credit Protection Act 2009* (the Consumer Credit Protection Act).<sup>18</sup>

1.33 The committee first sought advice about scrutiny concerns in the instrument in *Delegated Legislation Monitor 1 of 2023*, on 25 January 2023.<sup>19</sup> The Assistant Treasurer responded on 20 February 2023.<sup>20</sup> The committee retained scrutiny concerns and sought the Assistant Treasurer's further advice in *Delegated Legislation*

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

18 Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022, Schedules 1 and 2.

19 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023) pp. 9–11.

20 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 20 February 2023, pp. 16.

*Monitor 3 of 2023*, on 8 March 2023.<sup>21</sup> The Assistant Treasurer responded on 23 March 2023.<sup>22</sup>

## Scrutiny concerns

### ***Compliance with authorising legislation***<sup>23</sup>

1.34 Section 3 of the instrument provides that the instrument is made under the Corporations Act and the Consumer Credit Protection Act. The explanatory statement indicates that the instrument is made under sections 1364 and 329 of those Acts, respectively. As these are general enabling provisions, the committee requested the Assistant Treasurer's advice as to the specific exemption-making powers. The Assistant Treasurer advised of the relevant powers in his response of 20 February 2023.<sup>24</sup> Following this, the committee requested that the explanatory statement be amended to include the specific legal authority.

### *Assistant Treasurer's response*<sup>25</sup>

1.35 The Assistant Treasurer agreed to amend the explanatory statement so that it includes specific legal authority for the exemptions in the regulations.

### *Committee view*

1.36 The committee welcomes the Assistant Treasurer's undertaking.

**1.37 In light of the Assistant Treasurer's undertaking to amend the explanatory statement, the committee has concluded its examination of the instrument in relation to this issue.**

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21 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2023](#) (8 March 2023) pp. 26–31.

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

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

24 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 20 February 2023, pp. 16.

25 This correspondence was tabled with this Monitor and will be accessible on the committee's [website](#).



### ***Exemption from the operation of primary legislation;<sup>26</sup> parliamentary oversight<sup>27</sup>***

1.38 The instrument inserts ongoing exemptions from the requirements of the Corporations Act and the Consumer Credit Protection Act via the principal regulations. The explanatory statement indicates that the relevant amendments 'form part of a program of legislative amendments intended to simplify and improve the navigability of Treasury legislation' and 'incorporate longstanding and accepted matters currently contained in [ASIC] legislative instruments' into the principal regulations.

1.39 However, the explanatory statement does not explain why it was considered appropriate to include the relevant provisions in delegated legislation, where they will not be time-limited, as the principal regulations are not subject to sunseting.

1.40 It is the committee's longstanding view that provisions that amend or create exemptions to primary legislation should be included in primary legislation. However, if the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary, which in most cases should be no more than three years after commencement. This is to ensure a minimum degree of regular parliamentary oversight.

1.41 For these reasons, the committee sought the Assistant Treasurer's advice as to why it was considered necessary and appropriate to include the exemptions to the Corporations Act and Consumer Credit Protection Act in delegated legislation, rather than primary legislation. Further, the committee asked whether there was any intention to include these exemptions in the primary legislation and, if not, whether the instrument could be amended to provide that the measures cease within three years.

1.42 In his response of 20 February 2023, the Assistant Treasurer advised that delegated legislation plays an important role in removing prescriptive detail from the primary legislation and new changes should fit within 'existing legal hierarchies'. As such, he did not intend to include these exemptions in the primary legislation.

1.43 The Assistant Treasurer also advised that adding the large number of specific exemptions to the Corporations Act would 'clutter' the Act, which is already complex and contains a great volume of operative provisions. He added that, noting the specificity of some of the exemptions, it would be inappropriate to include them in the primary legislation.

1.44 The Assistant Treasurer further advised that including the exemptions in the principal regulations ensures they are in proximity with each other, which simplifies and improves the navigability of the legislation. Finally, he advised that he did not

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

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

intend to time-limit the exemptions as this would introduce uncertainty and confusion.

1.45 Following this advice, the committee retained scrutiny concerns and asked the Assistant Treasurer:

- why it was considered appropriate to move the ASIC exemptions from time-limited individual instruments into principal regulations that are exempt from sunset and therefore operate indefinitely;
- whether the Corporations Act can be amended to include the relevant exemptions;
- why the principal regulations are exempt from sunset, and if they could be amended to sunset, to ensure a minimum level of parliamentary oversight; and
- further detail about what was meant by 'existing legal hierarchies' and how this concept is applied in practice when determining where to place exemptions from primary legislation.

*Assistant Treasurer's response*<sup>28</sup>

1.46 The Assistant Treasurer advised that the instrument is part of the Treasury's Law Improvement Program, which includes incorporating matters contained in ASIC-made legislative instruments into the regulations and primary legislation. Additionally, he advised the exemptions in the instrument are necessary on an ongoing basis and as such, they have not been time-limited. Further, after considering the nature of the amendments and their content, a decision was made to co-locate them with similar exemptions contained in the principal regulations.

1.47 The Assistant Treasurer also advised that:

The new location of the exemptions in the regulations invites a higher degree of scrutiny and enhanced oversight than the former ASIC made legislative instruments. That is because the Office of Parliamentary Counsel must draft all regulations and the Governor General makes regulations following advice from the relevant Minister and the Federal Executive Council, providing an additional layer of accountability.

1.48 Regarding the committee's request as to whether the exemptions could be included in primary legislation or at least be subject to sunset, the Assistant Treasurer advised that incorporating the exemptions into the primary legislation would be more complex and would affect the clarity and navigability of the law. Additionally, he advised that the principal regulations are exempt from sunset

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

because they are 'integral to intergovernmental schemes between the Commonwealth, States and Territories'. Further, the exemption from sunseting provides 'certainty to stakeholders, and the regular review and amendment of individual provisions'.

#### *Committee view*

1.49 While the committee thanks the Assistant Treasurer for his response, it retains significant scrutiny concerns with this instrument and the justifications provided for including ongoing exemptions from the operation of primary legislation in delegated legislation.

1.50 While the committee appreciates that, in some cases, exemptions to primary legislation may be necessary on an ongoing basis, it considers that, if this is the case, they should be included in the primary legislation itself. Not only does this provide stakeholders with certainty, it also ensures an appropriate level of parliamentary oversight.

1.51 If this approach is not feasible, the committee expects that the exemptions will be time-limited to as long as strictly necessary. This usually means that the exemption should operate no longer than three years after commencement, to ensure a minimum degree of regular parliamentary oversight. This expectation is set by the Senate and reflected in standing order 23(3)(I), which requires that the committee considers whether such instruments are in force 'only for as long as strictly necessary'. The committee has considered this issue in detail in its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>29</sup>

1.52 In this instance, the committee's concerns are heightened as the measures are being inserted into regulations that are exempt from sunseting. The committee notes the importance of sunseting requirements (because they require executive-made law to repeal 10 years from commencement) to ensure the law remains fit for purpose and up to date.

1.53 The committee is concerned that this instrument is moving measures that previously repealed after three to five years into principal regulations so that they operate on an ongoing basis. These principal regulations are not even subject to the ordinary 10-year sunseting period, which is a minimum expectation of the committee.

1.54 It appears that convenience, certainty for stakeholders and ease of navigation have been prioritized over parliamentary oversight, which the committee has not

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29 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of delegated legislation from parliamentary oversight: [Interim report](#)* (December 2020); *[Final report](#)* (March 2021).

previously accepted as an adequate justification for the inclusion of ongoing exemptions to primary legislation in delegated legislation.

1.55 It is also unclear to the committee how locating the measures in the principal regulations 'invites a higher degree of scrutiny and enhanced oversight than the former ASIC made legislative instruments', as none of the additional measures identified by the Assistant Treasurer supporting this justification impact or improve on parliamentary scrutiny.

1.56 The committee has resolved to place a protective notice of motion to disallow the instrument, to provide the committee more time to engage with the Assistant Treasurer to resolve this significant scrutiny issue.

**1.57 The committee therefore requests the Assistant Treasurer's advice as to:**

- **further detail about the Law Improvement Program;**
- **whether the committee's principles were considered in developing the Law Improvement Program, particularly in relation to the principle in Senate standing order 23(3)(I);**
- **what factors were considered when deciding to shift time-limited exemptions from primary legislation into ongoing measures which are not subject to sunseting; and**
- **noting the Assistant Treasurer's advice that the exemption from sunseting provides 'certainty to stakeholders, and the regular review and amendment of individual provisions', further detail about what 'regular review' means in this context, including any formal review mechanisms that apply and the frequency of such reviews to ensure the measures remain fit for purpose and up to date.**

## 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).

#### **Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022**

<b>FRL No.</b>	F2022L01457 <sup>1</sup>
<b>Purpose</b>	Amends the Aged Care Quality and Safety Commission Rules 2018 to make provision for the Code of Conduct for Aged Care, which establishes minimum standards of conduct for approved providers and their aged care workers and governing persons.
<b>Authorising legislation</b>	<i>Aged Care Quality and Safety Commission Act 2018</i>
<b>Portfolio</b>	Health and Aged Care
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 21 November 2022)  Notice of motion to disallow given on 7 March 2023

#### **Overview**

2.2 The *Aged Care Quality and Safety Commission Act 2018* (the Act) establishes the Aged Care Quality and Safety Commission,<sup>2</sup> and empowers the minister to make the Aged Care Quality and Safety Commission Rules 2018 (the Commission Rules).<sup>3</sup> Further, the Act enables the Commission Rules to provide for, or in relation to, both the performance of the Commissioner's functions under the Act,<sup>4</sup> and the taking of action in relation to compliance with the Code of Conduct.<sup>5</sup>

2.3 The Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 (the instrument) amends the Commission Rules to

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

2 *Aged Care Quality and Safety Commission Act 2018*, s 11.

3 *Aged Care Quality and Safety Commission Act 2018*, s 77.

4 *Aged Care Quality and Safety Commission Act 2018*, s 21(1).

5 *Aged Care Quality and Safety Commission Act 2018*, s 21(3A).

include a Code of Conduct which establishes minimum standards of conduct for approved aged care providers, workers, and governing persons, and to enable the Commissioner to take action relating to compliance with the Code of Conduct.<sup>6</sup>

2.4 The committee's secretariat, on behalf of the committee, engaged with the Department of Health and Aged Care in relation to the instrument in January 2023. The committee retained scrutiny concerns and sought advice from the Minister for Aged Care (the minister) in *Delegated Legislation Monitor 1 of 2023*.<sup>7</sup> The minister responded on 24 February 2023.<sup>8</sup> The committee requested the minister's further advice in *Delegated Legislation Monitor 3 of 2023*.<sup>9</sup> The minister responded on 23 March 2023.<sup>10</sup>

## Scrutiny concerns

### ***Conferral of discretionary powers;<sup>11</sup> adequacy of explanatory materials<sup>12</sup>***

2.5 Section 23BE of the instrument provides that, if an investigation is undertaken in relation to compliance under section 23BD, the Commissioner may 'take any action' to deal with the outcome of an investigation that they consider appropriate. The explanatory statement provides four examples of actions that the Commissioner may take following an investigation but notes that this list is not exhaustive and indicates that 'it is not intended that the Commissioner be restricted in relation to the types of actions they may take to deal with the outcome of an investigation'.<sup>13</sup>

2.6 The committee was concerned that the instrument confers a broad discretionary power on the Commissioner, and neither the instrument nor the explanatory statement limits the types of actions the Commissioner may take or provides factors which the Commissioner must take into account in exercising this power.

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6 Explanatory statement, p. 1.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2023](#) (8 February 2023) pp. 5–7.

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

9 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2023](#), pp. 6–9.

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

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

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

13 Explanatory statement, p. 9.

2.7 In her advice of 24 February 2023, the minister advised that defining the actions may limit the scope of the Commissioner's discretion and inhibit the Commissioner from taking the most reasonable action allowable. There are safeguards applicable on the exercise of this discretion, such as the requirement to have regard to the procedural fairness requirements under sections 63N of the Act and banning orders under section 74GE of the Act. The minister also advised what factors must be considered when dealing with the outcomes of an investigation under section 23BE.

2.8 The committee remained concerned about the conferral of a broad discretionary power that on its face appears to be unlimited. The committee further noted that the explanatory statement to the instrument does not provide that the investigative powers under section 23BE are limited by sections 63N and 74GE of the Act. These provisions establish detailed limitations on, and requirements of, the Commissioner when imposing sanctions and making banning orders. The committee also noted the similarities in the nature of the work performed by the Aged Care Commissioner and the National Disability Insurance Scheme Commissioner, and queried the reasons for differences between the National Disability Insurance Scheme (Code of Conduct) Rules 2018 and the Aged Care Quality and Safety Commission Rules 2018.

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

- whether section 23BE of the instrument could be amended to expressly state that it is limited to actions that are available under the Act and the Commission Rules;
- whether the explanatory statement could be amended to reflect those amendments; and
- the reasons for the differences in procedures under the Commission Rules and the National Disability Insurance Scheme (Code of Conduct) Rules 2018.

#### *Minister's response<sup>14</sup>*

2.10 In her response of 23 March 2023, the minister advised that section 23BE of the instrument could be amended to expressly state that it is limited to the actions that are available under the Act and the Commission Rules. The minister also advised that the explanatory statement for the new amending instrument would contain the information provided in her previous advice, including the factors to be taken into consideration prior to taking actions under section 23BE.

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

2.11 The minister also advised that there is a general alignment between the National Disability Insurance Scheme Code of Conduct and the Aged Care Code of Conduct, where it is reasonable and practicable to do so. However, the two sectors operate under different legislative frameworks and regulatory environments and the differences between the two codes reflect the nature of support provided to meet the needs of recipients in these sectors.

*Committee view*

2.12 The committee thanks the minister for her further advice and welcomes her undertaking to amend section 23BE of the instrument and prepare an explanatory statement including the information in her responses of 24 February 2023 and 23 March 2023 regarding the relevant limitations.

2.13 The committee also notes the minister's advice about the National Disability Insurance Scheme Code of Conduct and the Aged Care Code of Conduct.

**2.14 In light of the minister's further advice and undertaking to amend the instrument and prepare an explanatory statement to reflect the relevant limitations under the *Aged Care Quality and Safety Commission Act 2018* and the *Aged Care Quality and Safety Commission Rules 2018*, the committee concludes its examination of the instrument.**



## Data Availability and Transparency Code 2022

<b>FRL No.</b>	F2022L01719 <sup>15</sup>
<b>Purpose</b>	Supports the operation of the <i>Data Availability and Transparency Act 2022</i> .
<b>Authorising legislation</b>	<i>Data Availability and Transparency Act 2022</i>
<b>Portfolio</b>	Finance
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 February 2023)

### Overview

2.15 The *Data Availability and Transparency Act 2022* (the Act) commenced on 1 April 2022 and established a new data sharing scheme (the scheme) for safely sharing Australian Government data with entities accredited under the scheme. The Act authorises the National Data Commissioner to make codes of practice about the scheme.

2.16 The Data Availability and Transparency Code 2022 (the Code) provides guidance for scheme participants on best practice data sharing, including the data sharing principles that scheme participants must apply when entering into a data sharing agreement, as well as privacy protections.

2.17 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 1 of 2023*.<sup>16</sup> The Minister for Finance (the minister) responded on 9 February 2023, attaching information provided by the National Data Commissioner (the Commissioner).<sup>17</sup> The committee sought the Commissioner's further advice in *Delegated Legislation Monitor 3 of 2023*.<sup>18</sup> The committee received a response from the minister dated 16 March 2023.<sup>19</sup>

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

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023) pp. 9–11.

17 This correspondence is accessible on the committee's [website](#).

18 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 3 of 2023](#) (8 March 2023) pp. 16–20.

19 This correspondence was tabled with this Monitor and will be accessible on the committee's [website](#).

## Scrutiny concerns

### *Conferral of discretionary power;<sup>20</sup> clarity of drafting<sup>21</sup>*

2.18 In *Delegated Legislation Monitor 1 of 2023*, the committee sought the minister's advice about the meaning of several discretionary terms in the Code, including what constitutes 'excessively burdensome' and the meaning of 'current consent'.

2.19 On 9 February 2023, the Commissioner provided detailed information about the meaning of the terms queried by the committee. In light of this, the committee requested that the explanatory statement to the instrument be updated to include the additional information provided.

### *Minister's response<sup>22</sup>*

2.20 The minister advised that she had sought the Commissioner's advice about the committee's request and that a replacement explanatory statement with the additional information would be published shortly.

### *Committee view*

2.21 The committee welcomes the minister's undertaking, and notes that a replacement explanatory statement with detail about the discretionary terms queried by the committee has been published.<sup>23</sup>

**2.22 In light of the recent publication of a replacement explanatory statement, the committee has concluded its examination of the instrument.**

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

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

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

23 A replacement explanatory statement for this instrument was registered on 20 March 2023.

## Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022

<b>FRL No.</b>	F2022L01333 <sup>24</sup>
<b>Purpose</b>	Amends the Telecommunications Regulations 2021 to allow for the disclosure of certain customer data to financial services entities and the Commonwealth for limited purposes.
<b>Authorising legislation</b>	<i>Telecommunications Act 1997</i>
<b>Portfolio</b>	Infrastructure, Transport, Regional Development, Communications and the Arts
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 25 October 2022)  Notice of motion to disallow given on 8 February 2023

### Overview

2.23 The Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022 (the instrument) amends the Telecommunications Regulations 2021 to prescribe two new circumstances for the purposes of section 292 of the *Telecommunications Act 1997* (the Act). This has the effect of permitting carriers and carriage service providers to securely disclose government identifiers to financial services entities and government agencies, and of enabling the minister to expand, by notifiable instrument, the class of personal information that can be disclosed.

2.24 The committee's secretariat, on behalf of the committee, engaged with the Department of Infrastructure, Transport, Regional Development, Communications and the Arts about this instrument in December 2022. Following this engagement, the committee retained scrutiny concerns and sought advice from the Minister for Communications (the minister) in *Delegated Legislation Monitor 1 of 2023*.<sup>25</sup> The minister responded on 28 February 2023.<sup>26</sup> As the committee retained scrutiny

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

25 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023) pp. 12–13.

26 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 28 February 2023, pp. 13–15.

concerns, it sought the minister's further advice in *Delegated Legislation Monitor 3 of 2023*.<sup>27</sup> The minister responded on 21 March 2023.<sup>28</sup>

## Scrutiny concerns

### *Parliamentary oversight*<sup>29</sup>

2.25 New sections 15A and 15B prescribe the circumstances for section 292(1) of the Act, which has the effect of permitting carriers and carriage service providers to securely disclose government identifiers, such as drivers licences and passport numbers, to financial services entities and government agencies. Prescribing those circumstances also allows the minister, by notifiable instrument, to specify and expand the classes of information that can be disclosed, including personal information.

2.26 The explanatory statement to the instrument sets out some safeguards applying to the disclosure of personal information and explains that the purpose of these disclosures is to help protect customers. However, the committee was concerned that the classes of personal information that can be disclosed can be extended by the minister via notifiable instruments, which unlike legislative instruments are not subject to scrutiny by the committee or other parliamentary processes. Further, the explanatory statement does not provide a justification for this.

2.27 Accordingly, the committee asked the minister for further detail about information or documents that can be specified or disclosed by notifiable instrument and advice as to why it is considered necessary and appropriate to include such matters in notifiable, rather than legislative, instruments.

2.28 In her response of 28 February 2023, the minister advised why she considered the use of notifiable instruments to be appropriate, including that it went to a matter of detail relating to the scope of disclosable information. Further, notifiable instruments provide more certainty than legislative instruments.<sup>30</sup>

2.29 The committee retained scrutiny concerns about the use of notifiable instruments, as this has the effect of limiting parliamentary oversight over a significant matter. Accordingly, the committee requested the minister's further

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27 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 3 of 2023* (8 March 2023) pp. 21–25.

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

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

30 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 28 February 2023, pp. 13–15.

advice as to whether new sections 15A and 15B could be amended to enable the minister to specify and expand the class of disclosable information by legislative, rather than notifiable, instrument.

*Minister's response*<sup>31</sup>

2.30 In her response of 21 March 2023, the minister noted that the class of information and documents within the scope of section 15A is limited to government-related identifiers and a form of 'personal information' (as defined in the *Privacy Act 1988*), as specified in the notifiable instrument and reiterated that several safeguards apply.

2.31 Specifically, the minister advised that information can only be disclosed if the specific conditions in subsection 15A(2) are satisfied. She highlighted the conditions contained in paragraphs 15A(2)(b) and 15A(2)(c). Paragraph 15A(2)(b) provides that the carrier or carriage service provider must have received a written request from an officer of the relevant financial services entity for the particular information or document. Paragraph 15A(2)(c) requires the entity to be seeking that information or document for the sole purpose of enabling it to take steps to:

- prevent a cyber security incident, fraud, scam activity or identity theft;
- respond to a cyber security incident, fraud, scam activity or identity theft;
- respond to the consequences of a cyber security incident, fraud, scam activity or identity theft; or
- address malicious cyber security.

2.32 Additionally, the minister advised that disclosure relies on a written commitment by a financial services entity that the information is required to protect compromised personal information from incidents such as identity theft or fraud. Further, any expansion of disclosable information by notifiable instrument would only occur where it would help protect that same information being misused for criminal purposes. In this regard, failure by a financial services entity to fulfil any such commitments given to the Australian Competition and Consumer Commission (ACCC) may constitute misleading and deceptive conduct under the *Australian Consumer Law*, which would enable the ACCC to take enforcement action.

2.33 However, notwithstanding this information about relevant safeguards, the minister acknowledged that notifiable instruments may limit effective parliamentary scrutiny. In this regard, she noted that, importantly, new sections 15A and 15B will sunset on 13 October 2023. Further, if at that point the provisions need to be

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

remade, these measures will be included in primary legislation, where possible, and with regard to the findings of the Attorney-General's Privacy Act Review 2023.

#### *Committee view*

2.34 The committee thanks the minister for her detailed response. While the committee reiterates its longstanding concern that, as a matter of principle, classifying instruments as notifiable rather than legislative significantly limits Parliament's scrutiny function, it welcomes the minister's detailed advice about safeguards applying to disclosure, including that disclosure is constrained to very limited circumstances, and that, importantly, the new provisions will sunset on 13 October 2023.<sup>32</sup> Further, the committee welcomes the minister's advice that provisions in the future will be included in primary legislation where possible, with regard to the Privacy Act Review.

**2.35 In light of the limited duration of sections 15A and 15B and the minister's undertaking to include any future measures to improve information security in primary legislation, the committee concludes its examination of the instrument in relation to this issue.**

#### ***Adequacy of explanatory materials***<sup>33</sup>

2.36 In addition, the committee was concerned that, while it included some information about safeguards, the explanatory statement did not provide a justification for the use of notifiable rather than legislative instruments.

2.37 As noted above, the minister's response of 28 February 2022 advised why it was appropriate to use a notifiable instrument. She also detailed a range of safeguards that apply to the disclosure of the relevant information by notifiable instrument, including that there must be a clear and justifiable reason for the collection of information and data, limits on its use and requirements for written commitments regarding compliance with privacy and security requirements.<sup>34</sup>

2.38 The committee considered this would be helpful information for inclusion in the explanatory statement and so requested the minister's advice as to whether the explanatory statement could be amended accordingly.

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32 See Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022, schedule 1, clause 1, which inserts new sections 15A(8) and 15B(6).

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

34 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 28 February 2023, pp. 13–15.

*Minister's response*<sup>35</sup>

2.39 In her response of 21 March 2023, the minister declined to amend the explanatory statement to outline these additional safeguards. This was on the basis that the safeguards are currently drafted as conditions under section 15A(2) of the instrument, which must be satisfied for the exemption against the disclosure offence to apply. Additionally, the minister advised that information about these safeguards is already contained in the explanatory materials.

*Committee view*

2.40 The committee thanks the minister for her response. While the committee considers that a more detailed explanation could be useful to include in the explanatory statement, it notes the minister's advice that these safeguards are contained in the instrument and accompanied by some explanation in the explanatory statement.

**2.41 Given that the relevant safeguards are included on the face of the instrument and there is some explanation included in the explanatory materials, the committee has resolved to conclude its examination of the instrument on this issue.**

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35 This correspondence was tabled with this Monitor and will be accessible 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 21 February 2023 and 15 March 2023, the committee commenced engaging with the relevant agency via its secretariat about the following **three** instruments.<sup>1</sup>

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#### Instrument

Biosecurity (First Point of Entry—Norfolk Island International Airport) Determination 2023 [F2023L00194]

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]

Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023 [F2023L00192]

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#### 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 3 of 2022*. These instruments are listed below as concluded agency matters.

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

## Concluded matters

3.5 The committee has concluded its consideration of the following **five** instruments after engagement with relevant agencies via its secretariat.<sup>2</sup>

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### Instrument

**Biosecurity (First Point of Entry—Norfolk Island International Airport) Determination 2023 [F2023L00194]**

**Emergency Response Fund Investment Mandate Amendment (Disaster Ready Fund) Direction 2023 [F2023L00128]**

**Industry Research and Development (Community Batteries for Household Solar Program) Instrument 2023 [F2023L00094]**

**Norfolk Island Applied Laws and Service Delivery (Queensland) Amendment (Education) Ordinance 2023 [F2023L00081]**

**Norfolk Island Continued Laws Amendment (Fire Control) Ordinance 2023 [F2023L00091]**

**Public Governance, Performance and Accountability Amendment (2023 Measures No. 1) Rules 2023 [F2023L00124]**

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

## 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.<sup>1</sup> 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.<sup>2</sup>

#### Implemented undertakings

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

#### Outstanding undertakings

4.4 During this period, **three** 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 or legislative instrument or to conduct a review in the relevant period that remain outstanding. The committee draws these undertakings to the attention of the Senate.

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Instrument	Undertaking	Date of undertaking
<b>Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022</b>	The Minister for Aged Care undertook to amend the instrument in response to the committee's scrutiny concerns.	23/03/2023

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

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



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## **Part II—Matters of interest to the Senate**

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## 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 order 23(4A) and 23(3)(k).<sup>1</sup>

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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.<sup>1</sup> 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.

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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.<sup>1</sup> 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 two broad categories of expenditure-related instruments:

- instruments specifying Commonwealth expenditure under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986*; and
- instruments providing grants to the states and territories under the *Federal Financial Relations Act 2009*.

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

6.3 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.<sup>2</sup> 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).<sup>3</sup>

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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 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](#).

3 Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

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

Instrument	Amount	Grant/Program
<b>Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 1) Regulations 2023 [F2023L00196]</b>	\$9.5 million over two years from 2022-23	Referendum civics education and awareness program
<b>Industry Research and Development (Flinders University Factory of the Future Program) Instrument 2023 [F2023L00198]</b>	\$10 million over three years from 2022-25	Flinders University Factory of the Future Program

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

6.5 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.<sup>4</sup>

6.6 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).

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

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

*Specific purpose payments – section 16, Federal Financial Relations Act*

Instrument	Amount	Description
<b>Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 9) Determination 2023 [F2023L00185]</b>	\$743 518 416.00	Determines amounts of financial assistance to be paid to the states, the Australian Capital Territory or to 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.



# 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.<sup>1</sup>

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;<sup>2</sup>
- 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*;<sup>3</sup>

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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.<sup>4</sup>

### ***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):

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#### **Instrument**

**Biosecurity (First Point of Entry—Norfolk Island International Airport) Determination 2023 [F2023L00194]**

**Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 9) Determination 2023 [F2023L00185]**

**Food Standards (Application A1220 – Beta-amylase from GM *Bacillus licheniformis* as a processing aid) Variation [F2023L00186]**

**Food Standards (Application A1221 – Phospholipase A1 from GM *Aspergillus niger* as a processing aid) Variation [F2023L00143]**

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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](#), 2<sup>nd</sup> 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.



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## Instrument

Food Standards (Application A1224 – Glucose oxidase from *Penicillium rubens* as a processing aid) Variation [F2023L00147]

Food Standards (Application A1251 – 2'-FL combined with galacto-oligosaccharides and/or inulin-type fructans in infant formula products) Variation [F2023L00145]

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## 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.<sup>5</sup>

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:

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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](#).

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>6</sup>
- 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*;<sup>7</sup>
- 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.<sup>8</sup>

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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](#), 2<sup>nd</sup> 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).

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**Instrument**

**Food Standards (Application A1220 – Beta-amylase from GM *Bacillus licheniformis* as a processing aid) Variation [F2023L00186]**

**Food Standards (Application A1221 – Phospholipase A1 from GM *Aspergillus niger* as a processing aid) Variation [F2023L00143]**

**Food Standards (Application A1224 – Glucose oxidase from *Penicillium rubens* as a processing aid) Variation [F2023L00147]**

**Food Standards (Application A1251 – 2'-FL combined with galacto-oligosaccharides and/or inulin-type fructans in infant formula products) Variation [F2023L00145]**

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**Senator Linda White**

**Chair**

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