

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 **384** legislative instruments registered on the Federal Register of Legislation between **22 October 2022** and **31 December 2022**. This includes **315** disallowable instruments and **69** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

Committee information

Terms of reference

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

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

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

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

Undertakings

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

Matters of interest to the Senate

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

Disallowance process¹

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

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

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

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

Publications

Delegated Legislation Monitor

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

Scrutiny News

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

Guidelines

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

Other resources

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

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

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

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

Part I—Technical legislative scrutiny

Part I: Introduction

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

Chapter 1: New and ongoing matters

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

Chapter 2: Concluded matters

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

Chapter 3: Agency engagement

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

Chapter 4: Undertakings

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

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

Chapter 1

New and ongoing matters

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

New matters

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

Corporations Amendment (Litigation Funding) Regulations 2022

FRL No.	F2022L01614 ¹
Purpose	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> .
Authorising legislation	<i>Corporations Act 2001</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (not yet tabled in the Senate)

Overview

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

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

1.4 The committee notes that it raised a similar scrutiny issue with the Assistant Treasurer in relation to the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2) in 2022.²

Scrutiny issues

Compliance with authorising legislation³

1.5 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act.

1.6 Section 3 provides that the instrument is made under the Corporations Act. The explanatory statement indicates that it is made under section 1364 of the Corporations 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 the Act. However, neither the instrument nor the explanatory statement sets out a specific exemption-making power in the Corporations Act that is relied on to introduce the exemptions provided in this instrument. Provisions of legislative instruments that provide for exemptions and modifications of primary legislation must be authorised by a specific exemption or modification power in the enabling Act. Section 1364 of the Corporations Act appears to be a general enabling provision that does not authorise exemptions or modifications from the provisions of the Act.

1.7 The committee therefore requests the Assistant Treasurer's advice as to the legal authority for including the exemptions in the instrument.

Exemption from the operation of primary legislation;⁴ parliamentary oversight⁵

1.8 The instrument provides litigation funding schemes with explicit exemptions from the Corporations Act's MIS regime, AFSL requirements, product disclosure regime and anti-hawking provisions.

1.9 For example, Schedule 1, item 1 of the instrument provides for litigation funding schemes to be exempt from the definition of an MIS in section 9 of the Act. Item 13 provides an explicit exemption for litigation funding schemes from the Corporations Act's requirement to hold an AFSL, while item 20 creates an exemption

2 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2022](#) (9 February 2022) p. 15; [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 43; [Delegated Legislation Monitor 7 of 2022](#) (26 October 2022) p. 6; [Delegated Legislation Monitor 8 of 2022](#) (23 November 2022) p. 17.

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

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

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

from the Corporations Act's anti-hawking provisions. Further, Item 22 exempts litigation funding schemes from the Corporations Act's Part 7.9 disclosure obligations.

1.10 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(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.

1.11 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.

1.12 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.

1.13 In this regard, the explanatory statement indicates that the exemptions are intended to bring arrangements for litigation funding schemes in line with arrangements for other types of litigation funding schemes (i.e. insolvency litigation funding schemes) or litigation funding arrangements. Further, the exemptions reflect the status of the law following the Full Court of the Federal Court's decision in *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 (the LCM case).⁶

1.14 However, the committee is unclear why it was considered necessary and appropriate to introduce these explicit exemptions and to do so in delegated legislation, rather than primary legislation, particularly given that the LCM case appears to reflect the current status of the law.

1.15 Further, the measures in the instrument are inserted into the Corporations Regulations, which are exempt from the ordinary sunseting regime, and so appear to be in force on an ongoing basis.

6

LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103.

- 1.16 The committee therefore requests the Assistant Treasurer's advice as to:**
- why it is considered necessary and appropriate to introduce these explicit exemptions to requirements in the Corporations Act and to use delegated legislation, rather than primary legislation, to do so, given the LCM Case;**
 - 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; and**
 - whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.**

Data Availability and Transparency Code 2022

FRL No.	F2022L01719 ⁷
Purpose	Supports the operation of the <i>Data Availability and Transparency Act 2022</i> .
Authorising legislation	<i>Data Availability and Transparency Act 2022</i>
Portfolio	Finance
Disallowance	15 sitting days after tabling (not yet tabled in the Senate)

Overview

1.17 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.

1.18 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.

Scrutiny concerns

Significant matters in delegated legislation⁸

1.19 Part 2 of the Code sets out the data sharing principles for the sharing, collection or use of data authorised by the Act. This includes principles related to public interest and conflicts of interest when sharing data, as well as protections required in relation to the management of data.

1.20 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

1.21 The data sharing principles included in the Code are significant, and the committee is concerned they have been included in delegated rather than primary

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

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

legislation, and are therefore not subject to the same level of parliamentary oversight and scrutiny. In this regard, the explanatory statement does not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation.

1.22 The committee notes that the Senate Standing Committee for the Scrutiny of Bills previously reported on the Data Availability and Transparency Bill 2020. It noted that significant matters such as privacy safeguards for data sharing should be included in primary legislation unless a sound justification is provided.⁹ The committee is concerned that these principles have subsequently been included in the Code rather than the Act.

1.23 The committee requests the minister's advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for the data sharing principles set out in Part 2 of the Code, noting the significance of these principles and the comments previously made by the Senate Standing Committee for the Scrutiny of Bills in relation to this matter.

Conferral of discretionary power;¹⁰ clarity of drafting¹¹

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

1.25 The Data Availability and Transparency Code 2022 (the Code) appears to provide for high levels of discretion to entities when making decisions under the data sharing scheme.

Consent to share personal information

1.26 Subsection 21(1) provides for the consideration that the data custodian must make when deciding whether it is 'unreasonable or impractical' to seek consent for the sharing of data, including personal information. Subsection 21(2) states that it may be unreasonable or impracticable to seek consent if doing so would be excessively burdensome in all the circumstances.

1.27 It is not clear from the Code or the explanatory statement what 'excessively burdensome' means in this context. It appears that this could be interpreted

9 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 1 of 2021](#) (29 January 2021) pp. 4–27; [Scrutiny Digest 3 of 2021](#) (17 February 2021) pp. 10–27.

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

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

differently by data custodians when deciding whether consent is needed to share personal information.

1.28 Additionally, subsection 20(8) provides that consent to use personal information by a new data custodian under the Act must be 'current'. However, 'current consent' is not defined in the Code or the explanatory statement.

Dealing with conflicts of interest

1.29 Section 9 of the Code provides that data custodians may assume that any conflicts of interest in relation to the collection or use of data by the accredited user are appropriately managed if the accredited user represents that they have 'a system in place to identify and manage such conflicts' and 'the system operates effectively'. There are no further details or guidance in the Code or the explanatory statement about what an 'effective operating system' means in this context.

1.30 The committee considers that instruments that confer discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. Additionally, the explanatory statement should also address the purpose and scope of the discretion and why it is necessary.

1.31 The committee requests the minister's advice as to:

- **when seeking consent would be 'excessively burdensome' under section 21 of the Code;**
- **what constitutes 'current consent' under the Code;**
- **what constitutes an 'effective' system to identify and manage conflicts of interest in relation to accredited data users, and how this should be represented or demonstrated to the data custodian under section 9 of the Code.**

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

FRL No.	F2022L01333 ¹²
Purpose	Amends the Telecommunications Regulations 2021 to allow for the disclosure of certain customer data to financial services entities and the Commonwealth for limited purposes.
Authorising legislation	<i>Telecommunications Act 1997</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 25 October 2022)

Overview

1.32 The Telecommunications Amendment (Disclosure of Information for the Purpose of Cyber Security) Regulations 2022 (the instrument) amends the Telecommunications Regulations 2021 (the Regulations) to prescribe two new circumstances for the purposes of section 292 of the *Telecommunications Act 1997* (the Act).

1.33 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. The committee has now resolved to raise its scrutiny concerns with the minister.

Scrutiny concerns

Adequacy of explanatory materials;¹³ parliamentary oversight¹⁴

1.34 New sections 15A and 15B inserted by the instrument prescribe the circumstances relevant to the application of section 292(1) of the Act, which has the effect of permitting carriers and carriage service providers to securely disclose government identifiers such as driver licences and passport numbers to financial services entities and government agencies. New sections 15A and 15B allow the minister, by notifiable instrument, to specify and expand the class of information that can be disclosed.

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

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

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

1.35 Specifically, new subsection 15A(5) enables the minister to specify by notifiable instrument information or documents as such, as well as to specify additional kinds of information or documents, limited to personal information about one or more individuals who were customers of the carrier or service providers. New subsection 15B(3) empowers the minister to approve, by notifiable instrument, additional kinds of information that can be disclosed, being personal information.

1.36 Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes ensuring that parliamentary scrutiny and oversight are maintained. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

1.37 The explanatory statement to the instrument sets out the safeguards that apply to the disclosure of customer information (such as that disclosure may occur only in the case of cyber security incidents, fraud, scams, instances of identity theft or malicious cyber activity and restrictions on entities that have access to disclosed information from carriers and carriage service providers). It also explains that the purpose of these disclosures is to help protect customers of the particular carrier or carriage service provider.

1.38 However, the committee is primarily concerned that the class of personal information that may be disclosed can be extended by the minister via notifiable instrument. The explanatory statement does not provide justification as to why the class of disclosable information may be expanded by notifiable instruments, which are not legislative instruments and are not subject to scrutiny by the committee or other parliamentary processes.

1.39 In light of the above, the committee requests the minister's advice as to:

- **further detail about information or documents that can be specified or disclosed by notifiable instrument; and**
- **why it is considered necessary and appropriate to include significant matters in notifiable, rather than legislative, instruments.**

Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022

FRL No.	F2022L01629 ¹⁵
Purpose	Amends the Corporations Regulations 2001 and the National Consumer Credit Protection Regulations 2010 to incorporate longstanding and accepted matters currently contained in ASIC legislative instruments into the regulations.
Authorising legislation	<i>Corporations Act 2001; National Consumer Credit Protection Act 2009</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (not yet tabled in the Senate)

Overview

1.40 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 the Australian Securities and Investments Commission (ASIC) legislative instruments into the principal regulations.

1.41 Those 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).¹⁶

Compliance with authorising legislation¹⁷

1.42 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act.

1.43 Section 3 of the instrument provides that the instrument is made under the Corporations Act and the Consumer Credit Protection Act. Further, the explanatory statement indicates that sections 1364 and 329 of those Acts, respectively, provide that the Governor-General may make regulations prescribing matters required or

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

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

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

permitted by those Acts, or necessary or convenient to be prescribed for carrying out or giving effect to those Acts.¹⁸ However, neither the instrument nor the explanatory statement sets out a specific exemption-making power in the Corporations Act that is relied upon to introduce the exemptions set out in this instrument. Provisions of legislative instruments that provide for exemptions or modifications of primary legislation must be authorised by a specific exemption or modification power in the enabling Act. Section 1364 of the Corporations Act and section 329 of the Consumer Credit Protection Act appear to be general enabling provisions that do not authorise exemptions or modifications from provisions of the Acts.

1.44 The committee therefore requests the Assistant Treasurer's advice as to the legal authority for including the exemptions from primary legislation in the instrument.

Exemption from the operation of primary legislation;¹⁹ parliamentary oversight²⁰

1.45 The instrument provides exemptions on an ongoing basis to the requirements in section 911A of the Corporations Act for a financial capability service provider, financial counselling agency, or a trustee of a superannuation entity to hold an Australian financial services licence. It also provides an exemption from the requirement in section 29 of the Consumer Credit Protection Act for a rural financial counselling service provider to hold a financial services licence.²¹

1.46 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, senate standing order 23(3)(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.

1.47 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.

18 Explanatory statement, p. 1.

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

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

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

1.48 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.

1.49 In this instance, 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.²² While the committee acknowledges the intention to simplify and improve the navigability of Treasury portfolio legislation, it notes that the explanatory statement does not indicate why it was considered appropriate to include the relevant provisions in delegated legislation. The committee's concerns are heightened by the fact that the exemptions appear to be ongoing, as both the instrument and the principal regulations are exempt from sunseting.

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

- **why it is considered necessary and appropriate to include these exemptions to the Corporations Act and Consumer Credit Protection Act in delegated legislation, rather than primary legislation; and**
- **whether there is any intention to include these exemptions in the primary legislation and if not, whether the instrument can be amended to provide that the measures cease within three years after commencement.**

22 Explanatory statement, p. 1.

Chapter 2

Concluded matters

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

Australian Capital Territory National Land (Lakes) Ordinance 2022

FRL No.	F2022L00468 ¹
Purpose	Regulates the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory, relating to lake areas located on National Land.
Authorising legislation	<i>Seat of Government (Administration) Act 1910</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 26 July 2022) Notice of motion to disallow placed on 25 October 2022

Overview

2.2 The Australian Capital Territory National Land (Lakes) Ordinance 2022 (the instrument) regulates various matters relating to the management and use of National Lakes (Lake Burley Griffin) in the Australian Capital Territory (the ACT), including the grant of permits to use Lake Burley Griffin (the Lake) for various activities, regulation of boating and the closure of the lake area for safety, maintenance and for approved events. The committee has identified several technical scrutiny concerns in the instrument, detailed below.

2.3 The committee first sought advice about potential scrutiny concerns in the instrument in *Delegated Legislation Monitor 5 of 2022*, on 7 September 2022.² The

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

2 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp. 3–15.

Minister for Regional Development, Local Government and Territories (the minister) responded on 8 November 2022.³

2.4 The committee then sought further advice about potential scrutiny concerns in *Delegated Legislation Monitor 9 of 2022*, on 30 November 2022.⁴ The minister responded on 15 December 2022.⁵

Scrutiny concerns

Coercive powers;⁶ significant penalties;⁷ significant matters in delegated legislation⁸

2.5 Several provisions in the instrument contain search and seizure powers.⁹ Specifically, part 8 division 2 confers coercive entry, search and seizure powers on inspectors to enter boats and seize evidence. Additionally, section 140 authorises the seizure of a boat if an inspector believes it is or has been involved in an offence under the instrument.

2.6 Further, subsection 150(1) of the instrument provides that the minister may appoint the Chief Executive of the National Capital Authority or a member of the staff of the National Capital Authority as an inspector for the purposes of the instrument. Subsection 150(3) provides that the Delegate for Lakes and police officers are also inspectors for the purposes of the instrument.

2.7 The instrument also contains several offences which impose custodial penalties ranging from three to twelve months (sections 47, 48, 102, 104 and 105). For example, section 47 provides that a person who operates an unsafe boat on the lake may incur a penalty of imprisonment for six months or 38 penalty units (\$8 436), or both.

3 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 8 November 2022, pp. 1–27.

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2022](#) (30 November 2022) pp. 5-20.

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

6 Senate standing order 23(3)(c) (conferral of coercive powers) and Senate standing order 23(3)(h) (coercive powers).

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

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

9 See, for example, part 8 division 2.

2.8 The committee therefore requested the minister's advice as to why such significant matters are considered necessary and appropriate to be included in delegated legislation.

2.9 In her response of 8 November 2022, the minister advised that the entry, search and seizure powers conferred by the instrument are necessary for the effective and safe operation of the Lake. In relation to custodial penalties, the minister advised that the legal and administrative arrangements governing the Lake are under the *Seat of Government (Administration) Act 1910* (the 1910 Seat of Government Act).

2.10 The inclusion of such detailed matters in the primary legislation, the 1910 Seat of Government Act, would change the basic framework of the legislative scheme, which is fundamental to the administration of Commonwealth laws in the ACT, and unintentionally limit the scope of the ordinance-making power. The minister also noted that the Governor-General's plenary power authorises the making of ordinances and does not limit the size or nature of the penalties that can be imposed with respect to National Land.

2.11 However, the committee remained unclear about the nature of the relevant legislative framework and how amendments to the Act could detrimentally change the framework of the legislative scheme. Accordingly, the committee requested the minister's further advice as to the limitations preventing the 1910 Seat of Government Act from being amended to include the above coercive powers.

Minister's response¹⁰

2.12 In her response of 15 December 2022, the minister advised that the 1910 Seat of Government Act was intended by Parliament to primarily be used to make laws for the ACT through ordinances. These include laws that deal with 'state-type' matters such as those relating to the protection of life, which are not normally dealt with in other types of Commonwealth legislation.

2.13 Further, under subsection 12(1)(d) of the 1910 Seat of Government Act, the Governor-General may make ordinances for the 'peace, order and good government of the Territory with respect to ... National Land'. The minister's advice noted that this phrasing is used by Parliament to indicate that, within the relevant subject matter, there are few constraints on what can be provided under relevant ordinances and that, although some limits apply to such a power, a grant of power on these terms includes powers to prescribe coercive powers and offences that are punishable by imprisonment. The inclusion of coercive powers in the 1910 Seat of

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

Government Act itself would therefore be inconsistent with the intention of Parliament when it enacted section 12.

2.14 Finally, the minister advised that to balance the Governor-General's broad powers, the 1910 Seat of Government Act requires ordinances to be presented to Parliament and be subject to disallowance. Further, it contains a number of 'anti-avoidance' provisions, such as section 12AC, which prevents the remaking of an ordinance that has been disallowed. The minister advised that, in this way, Parliament has direct scrutiny and control over ordinances, giving it adequate opportunity to supervise the terms of ordinances, particularly where they may involve serious criminal offences and significant penalties.

Committee view

2.15 The committee thanks the minister for her more detailed advice, including that the 1910 Seat of Government Act was intended by Parliament to be used for making ordinances that include 'state-type' matters and could also include coercive powers. Further, the committee notes the minister's advice that including coercive powers in the 1910 Seat of Government Act would be contrary to parliamentary intention and limit the Act's ordinance-making power.

2.16 Though the committee remains concerned over the inclusion of these significant matters in delegated legislation rather than primary legislation and the need to ensure appropriate parliamentary oversight of these matters, it thanks the minister for her advice that the 1910 Seat of Government Act allows for the continuation of parliamentary scrutiny and control.

2.17 In light of the more detailed advice provided by the minister, the committee concludes its examination of the instrument in relation to these issues.

Conferral of discretionary powers¹¹

2.18 The instrument contains several provisions which confer broad discretionary powers on specified decision-makers, including the minister and Delegate for Lakes.¹²

2.19 Specifically, sections 10, 16, 18 and 27 confer broad discretionary powers on the minister to approve certain applications and conduct. Additionally, subsection 42(1) of the instrument provides that the minister may authorise the Delegate for Lakes to charge for admission to a lake area or a part of a lake area during a period and specify the amount of the admission charged.

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

12 Sections 10, 16, 18, 27 and 42.

2.20 The committee requested the minister's advice as to the factors to be taken into account in the exercise of discretion in relation to the above powers, whether appropriate safeguards exist in law and/or policy, and whether the delegates are required to have appropriate skills, qualifications and experience to exercise these powers.

2.21 In her response of 8 November 2022, the minister advised that decision makers must refer to criteria set out in internal operating procedures and policies, so that decisions are made in a consistent manner with reference to evidence, based on merit and subject to internal review mechanisms. The minister also advised that delegation of these powers to non-SES officials is appropriate, given their specific expertise and qualifications in water management, asset maintenance and planning, which will allow for the Lake to be administered efficiently for public benefit.

2.22 Accordingly, the committee requested the minister's advice as to whether the explanatory statement could be amended to include the further advice provided about this matter.

Minister's response¹³

2.23 In her response of 15 December 2022, the minister undertook to amend the explanatory statement to include this additional information about the exercise of broad discretionary powers under the instrument.

Committee view

2.24 The committee thanks the minister for her undertaking to amend the explanatory statement to include the additional information, as requested.

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

Compliance with Legislation Act 2003—incorporation;¹⁴ incorporated materials freely accessible¹⁵

2.26 Section 49 of the instrument makes it an offence of strict liability to operate a boat where that boat is powered by a motor that exceeds the 'appropriate power rating'. Subsection 49(2) defines the 'appropriate power rating' by reference to the *Australian Standard AS 1799.1-2021, Small craft, Part 1: General requirements for*

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

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

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

power boats (the Australian Standard), as in force at the commencement of the instrument.

2.27 The committee requested the minister's advice as to whether the Australian Standard is incorporated by reference and, if so, how it may be freely obtained.

2.28 In her response of 8 November 2022, the minister advised that the Australian Standard is incorporated by reference and can be accessed at the National Capital Authority office during business hours upon request.

2.29 The committee noted that this would be useful information to be included in the explanatory statement and requested the minister's advice as to whether the explanatory statement could be amended to include this information.

*Minister's response*¹⁶

2.30 In her response of 15 December 2022, the minister undertook to amend the explanatory statement to include this additional information about the incorporation of the Australian Standard and where it can be accessed.

Committee view

2.31 The committee thanks the minister for her undertaking to amend the explanatory statement with the additional information.

2.32 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.

*Legal certainty*¹⁷

2.33 Section 106 of the instrument is an application provision, which states that certain provisions of the *Road Transport (Alcohol and Drugs) Act 1977* (the Road Transport Act) and 'any relevant regulation', as in force at the commencement of the instrument, apply to a person who operates a boat on a lake. The committee asked the minister which regulations are referred to in this section, and sought clarification regarding the relationship between the instrument and ACT law.¹⁸

2.34 In her response of 8 November 2022, the minister advised that there is one regulation in force, the Road Transport (Alcohol and Drugs) Regulation 2000 (ACT), as well as several notifiable instruments. Further, the minister advised that the penalty

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

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

18 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) p. 15.

units set under ACT laws are applicable in this instance. The minister also advised that specific provisions of the Road Transport Act, which are based on Part 6 of the *Lakes Act 1976* (ACT), are incorporated to ensure a consistent framework for the enforcement of drug and alcohol offences.

2.35 The committee requested that this information be included in the instrument.

*Minister's response*¹⁹

2.36 In her response of 15 December 2022, the minister undertook to amend the explanatory statement with the additional information about the applicable regulations and penalty units.

Committee view

2.37 The committee thanks the minister for her undertaking to amend the explanatory statement with the additional information.

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

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

Competition and Consumer Amendment (Consumer Data Right) Regulations 2021

FRL No.	F2021L01617 ²⁰
Purpose	Amends the Competition and Consumer Regulations 2010 to exempt the Australian Energy Market Operator (AEMO) from four privacy safeguard obligations, and in circumstances where AEMO provides Consumer Data Right data to a retailer.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Treasury
Disallowance	15 sitting days after the first sitting day of the new Parliament (26 July 2022) ²¹ Notice of motion to disallow given on 25 October 2022

Overview

2.39 The Competition and Consumer Amendment (Consumer Data Right) Regulations 2021 (the instrument) amends the Competition and Consumer Regulations 2010 (the principal regulations) to exempt the Australian Energy Market Operator (AEMO) from four privacy safeguard obligations, and in circumstances where AEMO provides Consumer Data Right data to a retailer.

2.40 The committee first wrote to the former Treasurer on 10 February 2022 about this instrument, seeking further information about its technical scrutiny concerns. The former Minister for Superannuation, Financial Services and the Digital Economy (the former minister) responded to the committee on 28 March 2022.²² The committee retained scrutiny concerns and sought advice from the new Assistant Treasurer in *Delegated Legislation Monitor 5 of 2022*.²³ The Assistant Treasurer responded on 10 October 2022.²⁴ The committee reiterated its concerns in

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

21 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.

22 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 28 March 2022, pp. 8–10.

23 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#) (7 September 2022) pp.46–49.

24 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 26 October 2022, pp. 32–33.

Delegated Legislation Monitor 8 of 2022.²⁵ The Assistant Treasurer responded on 12 December 2022.²⁶

Scrutiny concerns

Exemption from the operation of primary legislation;²⁷ exemption from sunseting²⁸

2.41 The committee initially raised concerns that the instrument exempts the AEMO from four privacy safeguard obligations in the *Competition and Consumer Act 2010* (the Act) on an ongoing basis, due to the exemption of the principal regulations from sunseting.

2.42 The former minister and Assistant Treasurer advised the committee that the exemption is necessary on an ongoing basis because the circumstances requiring it are unlikely to change in a material way.²⁹ Further, repeal of the instrument within a shorter timeframe would cause uncertainty for AEMO, retailers and consumers.

2.43 Additionally, they advised that the exemption is appropriate for inclusion in delegated legislation because the principal regulations exist within a broader framework, structured around a hierarchy of legislative instruments enabling or engaging with the application of the Consumer Data Right regime. However, the committee retained its longstanding view that if provisions which exempt persons or entities from the operation of primary legislation are to be included in delegated legislation, they should operate no longer than strictly necessary. At the very least the committee considered the exemption should be subject to the usual ten-year sunseting process to allow a minimum degree of parliamentary oversight. Accordingly, the committee requested the Assistant Treasurer's further advice as to whether the instrument could be amended to allow, at a minimum, the usual sunseting regime to apply in relation to the instrument.

25 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 8 of 2022* (25 November 2022) pp. 9–11.

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

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

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

29 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 28 March 2022, pp. 8–10 and on [26 October 2022](#), pp. 32–33.

*Assistant Treasurer's response*³⁰

2.44 In his correspondence of 12 December 2022, the Assistant Treasurer reiterated that the exemption on an ongoing basis was necessary, as the circumstances necessitating the exemption were ongoing and not likely to change in a material way in the future. He further advised that the principal regulations are exempt from sunseting because they are integral to the operation of various intergovernmental schemes that establish the Australian Consumer Law and are integral to the ongoing operation of the Consumer Data Right scheme in the energy sector. The Assistant Treasurer advised that sunseting the exemptions would create uncertainty for the AEMO and confusion for consumers.

2.45 However, in acknowledgement of the committee's concerns, the Assistant Treasurer undertook to seek to amend the principal regulations to require a review of the instrument within ten years, enabling the government to revisit the ongoing need for the instrument in a timeframe consistent with the usual sunseting period.

Committee view

2.46 The committee notes the Assistant Treasurer's further advice as to why the circumstances make it appropriate to include this exemption in delegated legislation on an ongoing basis. However, the committee reiterates its longstanding view that, to ensure a regular degree of parliamentary oversight, exemptions to primary legislation in delegated legislation should be time-limited which, in this case, should be at a minimum the usual ten-year sunseting period.

2.47 While the committee welcomes the Assistant Treasurer's undertaking to amend the instrument to require a review within ten years of it being made, it notes that this provides for executive rather than parliamentary oversight, which is the basis of the committee's scrutiny concern in relation to this matter. While the committee has decided to conclude its consideration of this instrument, it seeks to draw to the Senate's attention the importance of parliamentary oversight over measures in delegated legislation which modify or create exemptions from the primary law.

2.48 In light of the Assistant Treasurer's advice and undertaking to amend the instrument to require a review of the instrument in a timeframe consistent with the usual ten-year sunseting period, the committee concludes its examination of the instrument, but draws its concerns about the inclusion of longstanding exemptions to primary legislation in delegated legislation and the consequent impact on parliamentary oversight to the attention of the Senate.

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

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

FRL No.	F2022L00471 ³¹
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

2.49 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.

2.50 The committee raised initial scrutiny concerns about this instrument with the Treasurer in *Delegated Legislation Monitor 5 of 2022*.³² The Minister for Small Business (the minister) responded on 5 October 2022.³³ The committee sought the minister's further advice in *Delegated Legislation Monitor 7 of 2022*.³⁴ The minister responded on 15 November 2022.³⁵ The committee retained scrutiny concerns and

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

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

33 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 5 October 2022, pp. 4–7.

34 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 7 of 2022](#) (26 October 2022) pp. 10–12.

35 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 15 November 2022, pp. 1–27.

again sought the minister's further advice in *Delegated Legislation Monitor 8 of 2022*.³⁶ The minister responded on 15 December 2022.³⁷

Scrutiny concerns

Parliamentary oversight – tabling documents³⁸

2.51 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 to be provided to the minister before 30 June 2024. However, the instrument does not require that report to be tabled in Parliament. The explanatory statement states that the report will be published online to promote transparency and accountability.

2.52 In *Delegated Legislation Monitor 5 of 2022*,³⁹ the committee raised its concern that instruments providing for the review of significant matters should require the report relating to that review to be tabled in Parliament to enable sufficient parliamentary oversight.

2.53 While the minister advised in her correspondence that the report would be presented to her once complete and published online,⁴⁰ there will be no tabling requirement. This is because:

- the review and report have an operational focus on the relevant part of the Franchising Code, therefore are not significant such as to require parliamentary scrutiny;
- there will be opportunity for Parliamentary scrutiny through the sunseting of the Franchising Code on 1 April 2025; and
- the current review arrangements of the code are consistent with the broader legislative framework for industry codes.

2.54 However, the committee retained its concerns regarding parliamentary oversight, noting that this instrument was made following recommendations by another parliamentary committee, which indicates Parliament's interest in this

36 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 8 of 2022](#) (23 November 2022) pp. 12–15.

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

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

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

40 See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 5 October 2022, pp. 4–7 and [15 November 2022](#), pp. 1–27.

matter. Accordingly, the committee reiterated its request that the instrument be amended to include a requirement that the report be tabled in Parliament.⁴¹

*Minister's response*⁴²

2.55 In her response of 15 December 2022, the minister advised that, while there was no intention to amend the instrument to require tabling of the report, she would arrange for this report to be tabled in acknowledgement of the committee's view that the report is a significant issue of interest to the Parliament, particularly as the instrument responds to recommendations following a parliamentary inquiry.

Committee view

2.56 The committee welcomes the minister's undertakings to table the report in Parliament, in acknowledgement of the committee's view that the report is of significant interest to the Parliament.

2.57 In light of the minister's undertaking to table the report in Parliament, the committee has concluded its examination of the instrument.

41 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 8 of 2022](#) (23 November 2022) pp. 12–15.

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

Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No. 2)

FRL No.	F2022L01321 ⁴³
Purpose	Specifies certain positions in the Department of Home Affairs and the Attorney-General's Department as 'Communications Access Co-ordinators' under subsection 6R(2) of the <i>Telecommunications (Interception and Access) Act 1979</i> .
Authorising legislation	<i>Telecommunications (Interception and Access) Act 1979</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 25 October 2022)

Overview

2.58 The *Telecommunications (Interception and Access) Act 1979* (the Act) establishes the position of 'Communications Access Co-ordinator' as the primary point of liaison for interception agencies and telecommunications and carriage service providers in relation to telecommunications interception and data retention issues. The Act also empowers the Attorney-General to specify, by legislative instrument, a person or body as a Communications Access Co-ordinator.⁴⁴

2.59 The Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No.2) (the instrument) specifies certain positions in the Department of Home Affairs and the Attorney-General's Department as Communications Access Co-ordinators under the Act. It also repeals and remakes the *Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022* (the original 2022 instrument) to take into account a restructure of the Attorney-General's Department.⁴⁵

2.60 The committee's secretariat, on behalf of the committee, engaged with the Attorney-General's Department in relation to the original 2022 instrument in October and November 2022. As the committee has identified similar scrutiny concerns with the current instrument, it resolved to raise those scrutiny concerns

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

44 *Telecommunications (Interception and Access) Act 1979*, ss 6R(1) and 6R(2).

45 Explanatory statement p. 1.

with the Attorney-General. The Attorney-General provided a response on 13 December 2022.⁴⁶

Scrutiny concerns

Delegation of administrative powers and functions;⁴⁷ adequacy of explanatory materials⁴⁸

2.61 Under the Act, the Communications Access Co-ordinator is defined as the Secretary of the Department or a person or body that the Attorney-General specifies in a legislative instrument.⁴⁹ Section 5 of the instrument specifies certain persons as Communications Access Co-ordinators for this purpose. These are persons classified at Executive Level (EL) 1, EL2 or Senior Executive Service (SES) Band 1,⁵⁰ in certain work areas of the Attorney-General's Department and the Department of Home Affairs, as well as SES Band 2 or Group Manager in a specified work area of the Department of Home Affairs. Communications Access Co-ordinators are empowered to perform certain functions under the Act.

2.62 The committee raised concerns that neither the instrument nor its explanatory statement stated which delegates will exercise the different powers specified in section 5 of the instrument, which includes powers under sections 187B(2), 187K, 192 and 203 of the Act. In addition, while the explanatory statement explained who will exercise some of powers under the Act, it was not clear to the committee which delegates would exercise the remaining powers.

2.63 Accordingly, the committee sought the Attorney-General's advice as to who the powers under sections 187B, 187K, 192 and 203 of the Act will be delegated to, and whether the instrument can be amended to require exercise of these powers to be limited to SES level officers.

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

47 Senate Standing Order 23(3)(c).

48 Senate Standing Order 23(3)(g).

49 *Telecommunications (Interception and Access) Act 1979*, subsections 6R(1), 6R(2).

50 These classification levels are determined by the Australian Public Service Commission and set out the responsibilities and duties expected at each level. More information is available at the [commission's website](#). Information about Senior Executive Service is available on the [APS website](#).

*Attorney-General's response*⁵¹

2.64 In his response of 13 December 2022, the Attorney-General advised that the delegations made by the instrument with regard to powers under sections 187B(2), 187K and 203 of the Act will only be to SES-level officers and advised that a new instrument will be made to reflect this.

2.65 However, the Attorney-General further advised that the powers exercised under section 192 of the Act are not limited to SES-level officers. Section 192 enables Communications Access Co-ordinators to exempt carriage providers from their obligation to intercept communications of their network. In exercising these powers, the officer is required to consult with law enforcement and national security agencies to take their interests into account as well as accounting for the objects of the Act. For these reasons, and noting the high number of these decisions under section 192 that need to be made, the Attorney-General advised that it is appropriate that these powers be exercised by EL1 officers, in consultation with EL2 or higher-level officers as required.

Committee view

2.66 The committee thanks the Attorney-General for his advice and his undertaking to address the committee's concerns by registering a new instrument specifying that the powers under sections 187B(2), 187K and 203 of the Act will only be limited to SES-level officers.

2.67 In light of the advice and undertaking received from the Attorney-General about this matter, the committee concludes its examination of this issue.

51 This correspondence was presented 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 22 October and 31 December 2022, the committee commenced engaging with the relevant agency via its secretariat about the following **44** instruments.¹

Instrument

Accounting Standard AASB 2022-5 Amendments to Australian Accounting Standards – Lease Liability in a Sale and Leaseback [F2022L01500]

Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457]

Banking (prudential standard) determination No. 4 of 2022 [F2022L01599]

Banking (prudential standard) determination No. 5 of 2022 [F2022L01562]

Banking (prudential standard) determination No. 6 of 2022 [F2022L01602]

Banking (prudential standard) determination No. 7 of 2022 [F2022L01603]

Banking (prudential standard) determination No. 8 of 2022 [F2022L01563]

Banking (prudential standard) determination No. 9 of 2022 [F2022L01564]

Banking (prudential standard) determination No. 10 of 2022 [F2022L01600]

Banking (prudential standard) determination No. 11 of 2022 [F2022L01566]

Banking (prudential standard) determination No. 12 of 2022 [F2022L01630]

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

Instrument

Banking (prudential standard) determination No. 13 of 2022 [F2022L01620]

Banking (prudential standard) determination No. 14 of 2022 [F2022L01576]

Banking (prudential standard) determination No. 15 of 2022 [F2022L01577]

Banking (prudential standard) determination No. 16 of 2022 [F2022L01572]

Banking, Insurance, Life Insurance and Health Insurance (prudential standard) determination No. 1 of 2022 [F2022L01493]

CASA ADCX 005/22 - Repeal of Airworthiness Directive AD/MAKILA/11 [F2022L01556]

CASA EX100/22 – Amendment of CASA EX85/21 (Miscellaneous Revisions) – Instrument 2022 [F2022L01652]

CASA EX101/22 – Amendment of CASA EX86/21 (Miscellaneous Revisions) – Instrument 2022 [F2022L01660]

CASA OAR 168/22 – Declarations and Directions in relation to Prohibited, Restricted and Danger Areas etc. – Permanent Instrument 2022 (No. 1) [F2022L01533]

CASA OAR 210/22 – Temporary Restricted Areas Etc. – Declaration, Direction and Determination (Southern Launch VS02 and VS03 Campaigns) Instrument 2022 [F2022L01631]

Civil Aviation Safety Amendment (Flight Operations—Parts 119 and 138) Regulations 2022 [F2022L01612]

Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Bhutan) Determination 2022 [F2022L01462]

Customs (Indian Rules of Origin) Regulations 2022 [F2022L01504]

Customs (International Obligations) Amendment (Australia United Kingdom Free Trade Agreement Implementation) Regulations 2022 [F2022L01513]

Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022 [F2022L01514]

Customs (United Kingdom Rules of Origin) Regulations 2022 [F2022L01512]

Customs Tariff Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022 [F2022L01511]

Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Bhutan) Determination 2022 [F2022L01467]

Fair Work Amendment (Transitional Arrangements—Western Australian Local Government Employers and Employees) Regulations 2022 [F2022L01696]

Financial Framework (Supplementary Powers) Amendment (Education Measures No. 2) Regulations 2022 [F2022L01455]

Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 3) 2022 [F2022L01738]

Higher Education Support Provider (AIE Institute Limited) Approval 2022 [F2022L01621]

Instrument

Industry Research and Development (Small Business Programs) Amendment Instrument 2022 [F2022L01521]

Linkage Program Grant Guidelines (2023 edition): Linkage Projects [F2022L01694]

List of CITES Species Amendment (2022/073) Instrument 2022 [F2022L01762]

Marine Order 52 (Yachts and training vessels) 2022 [F2022L01683]

Marine Order 97 (Marine pollution prevention — air pollution) 2022 [F2022L01550]

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2022 Measures No. 1) Regulations 2022 [F2022L01691]

Renewable Energy (Electricity) Amendment (Native Forest 333Wood Waste) Regulations 2022 [F2022L01670]

Student Identifiers (Higher Education Exemptions) Amendment (Education Minister Exemptions) 2022 [F2022L01536]

Superannuation (prudential standard) determination No. 3 of 2022 [F2022L01491]

Telecommunications (Infringement Notice Penalties) Determination 2022 [F2022L01741]

Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022 [F2022L01689]

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

Concluded matters

3.5 The committee has concluded its consideration of the following 36 instruments after engagement with relevant agencies via its secretariat.²

Instrument

Accounting Standard AASB 2022-5 Amendments to Australian Accounting Standards – Lease Liability in a Sale and Leaseback [F2022L01500]

Banking (prudential standard) determination No. 4 of 2022 [F2022L01599]

Banking (prudential standard) determination No. 5 of 2022 [F2022L01562]

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

Instrument

Banking (prudential standard) determination No. 6 of 2022 [F2022L01602]

Banking (prudential standard) determination No. 7 of 2022 [F2022L01603]

Banking (prudential standard) determination No. 8 of 2022 [F2022L01563]

Banking (prudential standard) determination No. 9 of 2022 [F2022L01564]

Banking (prudential standard) determination No. 10 of 2022 [F2022L01600]

Banking (prudential standard) determination No. 11 of 2022 [F2022L01566]

Banking (prudential standard) determination No. 12 of 2022 [F2022L01630]

Banking (prudential standard) determination No. 13 of 2022 [F2022L01620]

Banking (prudential standard) determination No. 14 of 2022 [F2022L01576]

Banking (prudential standard) determination No. 15 of 2022 [F2022L01577]

Banking (prudential standard) determination No. 16 of 2022 [F2022L01572]

Banking, Insurance, Life Insurance and Health Insurance (prudential standard) determination No. 1 of 2022 [F2022L01493]

Customs (Indian Rules of Origin) Regulations 2022 [F2022L01504]

Customs (International Obligations) Amendment (Australia United Kingdom Free Trade Agreement Implementation) Regulations 2022 [F2022L01513]

Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022 [F2022L01514]

Customs (United Kingdom Rules of Origin) Regulations 2022 [F2022L01512]

Customs Tariff Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022 [F2022L01511]

Fair Work Amendment (Transitional Arrangements—Western Australian Local Government Employers and Employees) Regulations 2022 [F2022L01696]

Higher Education Support Provider (AIE Institute Limited) Approval 2022 [F2022L01621]

Linkage Program Grant Guidelines (2023 edition): Linkage Projects [F2022L01694]

List of CITES Species Amendment (2022/073) Instrument 2022 [F2022L01762]

Marine Order 52 (Yachts and training vessels) 2022 [F2022L01683]

Marine Order 97 (Marine pollution prevention — air pollution) 2022 [F2022L01550]

Military Rehabilitation and Compensation (Defence, Veterans' and Families' Acute Support Package) Instrument 2022 [F2022L01341]

Nuclear Non-Proliferation (Safeguards) Amendment Regulations 2022 [F2022L01340]

Instrument

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2022 Measures No. 1) Regulations 2022 [F2022L01691]

Renewable Energy (Electricity) Amendment (Native Forest 333Wood Waste) Regulations 2022 [F2022L01670]

Safety, Rehabilitation and Compensation (Defence-related Claims) (Defence, Veterans' and Families' Acute Support Package) Instrument 2022 [F2022L01343]

Student Identifiers (Higher Education Exemptions) Amendment (Education Minister Exemptions) 2022 [F2022L01536]

Superannuation (prudential standard) determination No. 3 of 2022 [F2022L01491]

Treasury Laws Amendment (Modernising Business Communications and Other Measures) Regulations 2022 [F2022L01689]

Veterans' Entitlements (Defence, Veterans' and Families' Acute Support Package) Instrument 2022 [F2022L01342]

Work Health and Safety (Managing the Risks of Respirable Crystalline Silica from Engineered Stone in the Workplace) Code of Practice 2022 [F2022L01368]

Chapter 4

Undertakings

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

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

Implemented undertakings

4.3 Since the last Monitor was tabled, amendments were made to six explanatory statements in response to the committee's scrutiny concerns. The following table records undertakings to amend an Act, legislative instrument or conduct a review that the committee is aware have been implemented since the tabling of the committee's last Monitor.

Instrument	Undertaking	Date implemented
Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations (No. 2) 2020 [F2020L01620]	The Department of Agriculture, Water Resources and the Environment undertook to revoke the instrument in response to the committee's scrutiny concerns.	15/12/2022

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

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

Outstanding undertakings

4.4 During this period, five 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
Competition and Consumer Amendment (Consumer Data Right) Regulations 2021 [F2021L01617]	The Assistant Treasurer undertook to amend the primary regulations in response to the committee's scrutiny concerns.	12/12/2022
Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No. 2) [F2022L01321]	The Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	13/12/2022
Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022 [F2022L00471]	The Minister for Small Business undertook to table the report into the review of the Franchise Disclosure Register provisions.	14/12/2022

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 raises 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).¹

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

Chapter 5

Instruments raising significant issues

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

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

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

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

Chapter 6

Expenditure and taxation in delegated legislation

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

Commonwealth expenditure

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

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

Advance to the Finance Minister determinations

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

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

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

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

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

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

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

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

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

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

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Agriculture, Fisheries and Forestry Measures No. 1) Regulations 2022 [F2022L01608]	\$20 million in 2022-23	Improve the Long-term Sustainability of the South East Trawl Fishery and Support Fishers
	\$61.6 million over two years from 2022-23	Bolstering Australia's Biosecurity System—Protecting Australia from escalating exotic animal disease risks
	\$108.6 million over five years from 2022-23	National Forest Products Innovation
	\$12.3 million over three years from 2022-23	Support Regional Trade Events
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2022 [F2022L01610]	\$6.7 million over five years from 2022-23	Justice Services—education and training for the justice sector on family, domestic and sexual violence
	\$81.5 million over four years from 2022-23	Justice Services—justice reinvestment
Financial Framework (Supplementary Powers) Amendment (Education Measures No. 1) Regulations 2022 [F2022L01418]	\$32 million over three years from 2022-23, \$0.6 million for administrative transition	Grant to Australian Indigenous Education Foundation
	\$10.8 million over four years from 2022-23	Promoting quality in the existing teacher workforce program
Financial Framework (Supplementary Powers) Amendment (Education Measures No. 2) Regulations 2022 [F2022L01455]	\$32.4 million over two years from 2022-23, no new funding provided	Grant to Clontarf Foundation
	\$68.3 million over four years from 2022-23	High Achieving Teachers Program
	\$56.2 million over four years from 2022-23	Bursaries to attract students into teaching
	\$14 million over four years from 2022-23	First Nations Educators in primary schools program
Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 1) Regulations 2022 [F2022L01420]	Up to \$6.9 million over three years from 2022-23	Co-operative and Mutual Enterprises Support Program

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 2) Regulations 2022 [F2022L01607]	\$6 million over three years from 2023-24	Grant to The Alannah and Madeline Foundation Limited
	Unspecified amount	National Messaging System
	\$20 million over three years from 2022-23	Broadcasting Resilience Program
	\$50 million over three years from 2022-23	Telecommunications and Resilience Disaster and Innovation Program
	\$35.8 million over three years from 2022-23	On Farm Connectivity Program
	\$2 million over three years from 2022-23	Terrestrial Television Transmission for Shortland, NSW
	\$349.9 million over five years from 2022-23	Investing in Our Communities Program
\$1 billion over five years from 2022-23	Priority Community Infrastructure Program	
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) Regulations 2022 [F2022L01666]	\$55 million over two years from 2022-23	Grant to Newcastle Airport Pty Limited
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 5) Regulations 2022 [F2022L01605]	\$6.5 million over two years from 2022-23	Referendum Engagement Group
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 3) Regulations 2022 [F2022L01449]	\$120.3 million over four years from 2021-22	Australia's Disability Strategy 2021-2031
	\$2.5 million over three years from 2022-23	
	\$151.9 million from 2025-26 to 2031-32	
Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 4) Regulations 2022 [F2022L01456]	\$1.5 million in 2022-23	Legacy House Brisbane
	\$0.4 million over four years from 2022-23	Recognising the service of First World War Veterans whose graves are unmarked
	\$3.3 million over two years from 2022-23	Scott Palmer Services Centre

Instrument	Amount	Grant/Program
Industry Research and Development (Accelerate Adoption of Wood Processing Innovation Program) Instrument 2022 [F2022L01579]	\$112.9 million over six years from 2021-22	Acceleration Adoption of Wood Processing Innovation Program
Industry Research and Development (Australia-India Critical Minerals Investment Partnership Program) Instrument 2022 [F2022L01441]	\$5.8 million	Australia-India Critical Minerals Investment Partnership Program
Industry Research and Development (Critical Minerals Development Program) Instrument 2022 [F2022L01414]	Up to \$50 million in 2022-23	Critical Minerals Development Program
Industry Research and Development (Diesel Exhaust Fluid Emergency Stockpile Program) Instrument 2022 [F2022L01479]	Part of a package of measures providing \$49.5 million	Diesel Exhaust Fluid Emergency Stockpile Program
Industry Research and Development (Enhancing Transparency Around Natural Disaster Fundraising Program) Instrument 2022 [F2022L01487]	Up to \$53 348	Enhancing Transparency Around Natural Disaster Fundraising Program
Industry Research and Development (National Electric Vehicle Charging Network Grant Program) Instrument 2022 [F2022L01659]	\$39.3 million	National Electric Vehicle Charging Network Grant Program
Industry Research and Development (Small Business Programs) Amendment Instrument 2022 [F2022L01521]	\$4 million over two years from 2023 \$10.9 million over two years from 2023	Small Business Debt Helpline NewAccess for Small Business Owners Program

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

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

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

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. 5) Determination 2022 [F2022L01466]	\$162 859 673.06	Determines amounts of general purpose financial assistance to be paid to Western Australia and the
Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 6) Determination 2022 [F2022L01707]	\$207 818 096.45	Australian Capital Territory.

Specific purpose payments – section 16, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (National Health Reform Payments for 2021-22) Determination 2022 [F2022L01636]	\$30 175 628 968.60	Determines amounts of National Health Reform funding to be paid to each state, the Australian Capital Territory and the Northern Territory for the 2021-22 financial year.
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 5) Determination 2022 [F2022L01427]	\$914 038 417.32	Determines amounts of financial assistance to be paid to the states, the Australian Capital Territory and the
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 6) Determination 2022 [F2022L01561]	\$729 567 039.88	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.

Instrument	Amount	Description
Federal Financial Relations (National Specific Purpose Payments for 2021-22) Determination 2022 [F2022L01742]	\$1 577 500 029.39	Determines amounts of financial assistance to be paid to the states, the Australian Capital Territory and the Northern Territory to support the delivery of programs, services and reforms for skills and workforce development.

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. The committee has not identified any such instruments in this period.

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

Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation Instrument No. APVMA 5, 2022 [F2022L01442]

Australia New Zealand Food Standards Code – Standard 3.2.2A – Food Safety Management Tools [F2022L01589]

Biosecurity (2023 Infringement Notices) Determination 2022 [F2022L01676]

Biosecurity (First Point of Entry—Cocos (Keeling) Islands Port) Determination 2022 [F2022L01551]

Biosecurity (First Point of Entry—Sydney Kingsford Smith Airport) Determination 2022 [F2022L01503]

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

Competition and Consumer (Price Inquiry—Child Care) Direction 2022 [F2022L01421]

Competition and Consumer (Price Monitoring—Petroleum Fuels) Direction 2022 [F2022L01646]

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 5) Determination 2022 [F2022L01466]

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 6) Determination 2022 [F2022L01707]

Federal Financial Relations (National Health Reform Payments for 2021-22) Determination 2022 [F2022L01636]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 5) Determination 2022 [F2022L01427]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 6) Determination 2022 [F2022L01561]

Federal Financial Relations (National Specific Purpose Payments for 2021-22) Determination 2022 [F2022L01742]

Food Standards (Application A1238 – Serine endopeptidase enzyme from GM *Trichoderma reesei*) Variation [F2022L01385]

Food Standards (Application A1239 – Food derived from EPA and DHA producing and herbicide-tolerant canola line LBFLFK) Variation [F2022L01591]

Food Standards (Application A1240 – Polygalacturonase from GM *Aspergillus oryzae* as a processing aid) Variation [F2022L01590]

Food Standards (Application A1241 – Pectinesterase from GM *Aspergillus oryzae* as a processing aid) Variation [F2022L01593]

Food Standards (Application A1244 – Chymosin from GM *Trichoderma reesei* as a processing aid (enzyme)) Variation [F2022L01400]

Food Standards (Application A1246 – Phospholipase A1 from GM *Aspergillus oryzae*) Variation [F2022L01592]

Food Standards (Application A1248 – Glucoamylase from GM *Aspergillus niger* (gene donor: *Gloeophyllum trabeum*) as a processing aid) Variation [F2022L01588]

Food Standards (Proposal P1053 – Food Safety Management Tools – Consequential Amendments) Variation [F2022L01586]

Industrial Chemicals Environmental Management (Register) Instrument 2022 [F2022L01658]

Industrial Chemicals Environmental Management (Register) Principles 2022 [F2022L01436]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022 [F2022L01501]

Superannuation (prudential standard) determination No. 2 of 2022 [F2022L01492]

Instrument

Superannuation (prudential standard) determination No. 3 of 2022 [F2022L01491]

Superannuation (prudential standard) determination No. 4 of 2022 [F2022L01568]

Water (Accredited Water Resource Plan— NSW Murray–Darling Basin Fractured Rock) Instrument 2022 [F2022L01485]

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.

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

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;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

Agricultural and Veterinary Chemicals Code Amendment (Cost Recovery and Other Measures) Regulations 2022 [F2022L01617]

Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation Instrument No. APVMA 5, 2022 [F2022L01442]

Australia New Zealand Food Standards Code – Standard 3.2.2A – Food Safety Management Tools [F2022L01589]

Charter of the United Nations (Listed Persons and Entities) Amendment (No. 3) Instrument 2022 [F2022L01426]

Charter of the United Nations (Listed Persons and Entities) Amendment (No. 4) Instrument 2022 [F2022L01429]

Competition and Consumer (Price Inquiry—Child Care) Direction 2022 [F2022L01421]

Competition and Consumer (Price Monitoring—Petroleum Fuels) Direction 2022 [F2022L01646]

Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Bhutan) Determination 2022 [F2022L01462]

Customs (Indian Rules of Origin) Regulations 2022 [F2022L01504]

Customs (International Obligations) Amendment (Australia United Kingdom Free Trade Agreement Implementation) Regulations 2022 [F2022L01513]

Customs (International Obligations) Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022 [F2022L01514]

Customs (United Kingdom Rules of Origin) Regulations 2022 [F2022L01512]

Customs Tariff Amendment (India-Australia Economic Cooperation and Trade Agreement Implementation) Regulations 2022 [F2022L01511]

Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Bhutan) Determination 2022 [F2022L01467]

Food Standards (Application A1238 – Serine endopeptidase enzyme from GM *Trichoderma reesei*) Variation [F2022L01385]

Food Standards (Application A1239 – Food derived from EPA and DHA producing and herbicide-tolerant canola line LBFLFK) Variation [F2022L01591]

Food Standards (Application A1240 – Polygalacturonase from GM *Aspergillus oryzae* as a processing aid) Variation [F2022L01590]

Food Standards (Application A1241 – Pectinesterase from GM *Aspergillus oryzae* as a processing aid) Variation [F2022L01593]

Instrument

Food Standards (Application A1244 – Chymosin from GM *Trichoderma reesei* as a processing aid (enzyme)) Variation [F2022L01400]

Food Standards (Application A1246 – Phospholipase A1 from GM *Aspergillus oryzae*) Variation [F2022L01592]

Food Standards (Application A1248 – Glucoamylase from GM *Aspergillus niger* (gene donor: *Gloeophyllum trabeum*) as a processing aid) Variation [F2022L01588]

Food Standards (Proposal P1053 – Food Safety Management Tools – Consequential Amendments) Variation [F2022L01586]

Industrial Chemicals Environmental Management (Register) Instrument 2022 [F2022L01658]

Industrial Chemicals Environmental Management (Register) Principles 2022 [F2022L01436]

Marine Order 52 (Yachts and training vessels) 2022 [F2022L01683]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Social and Affordable Housing) Direction 2022 [F2022L01501]

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2022 Measures No. 1) Regulations 2022 [F2022L01691]

Superannuation (prudential standard) determination No. 2 of 2022 [F2022L01492]

Superannuation (prudential standard) determination No. 3 of 2022 [F2022L01491]

Superannuation (prudential standard) determination No. 4 of 2022 [F2022L01568]

Senator Linda White

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation