

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

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## Membership of the committee

### Current members

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Senator the Hon Linda Reynolds CSC (Deputy Chair)	Western Australia, LP
Senator Catryna Bilyk	Tasmania, ALP
Senator David Pocock	Australian Capital Territory, IND
Senator Louise Pratt	Western Australia, ALP
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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).

### 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 sunset, it is appropriate for the instrument to be exempt from sunset;

- (l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and
- (m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

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

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

### **Nature of the committee's scrutiny**

#### ***Technical legislative scrutiny***

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

#### ***Resolving minor technical scrutiny concerns***

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

#### ***Resolving significant technical scrutiny concerns***

Where the committee considers that an instrument raises significant technical scrutiny concerns, it details its concerns in Part I of the Monitor for the benefit of the Senate in its oversight of delegated law-making powers. The committee generally seeks a formal response from the relevant minister in relation to concerns set out in this Part; however, in some circumstances the committee may report its scrutiny concerns to the Senate without seeking further information from the minister.

#### ***Undertakings***

As a result of raising its scrutiny concerns with the relevant minister or agency, the committee may seek an undertaking for specific action to address its scrutiny concerns. The committee summarises outstanding and implemented undertakings in



Chapter 4 of the Monitor. The committee will record relevant undertakings on the [Index of Undertakings](#) on its website.

### ***Matters of interest to the Senate***

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

### **Disallowance process<sup>1</sup>**

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

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

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

### **Publications**

#### ***Delegated Legislation Monitor***

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

#### ***Scrutiny News***

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

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

**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.

## Report snapshot

<b>Scrutiny period</b>	
Legislative instruments registered on the Federal Register of Legislation between 20 December 2023 and 17 January 2024	93
Instruments in this period exempt from disallowance	8
<b>Chapter 1: New and ongoing matters</b>	
New legislative instruments commented on in report	1
Ongoing legislative instruments commented on in report	2
<b>Chapter 2: Concluded matters</b>	
Legislative instruments of which the committee has concluded its examination following receipt of ministerial response	1
<b>Chapter 3: Agency engagement</b>	
New legislative instruments where the committee engaged with the relevant agency via its secretariat	10
Legislative instruments of which the committee has concluded its examination following receipt of agency response	2
<b>Chapter 4: Undertakings</b>	
New undertakings made by ministers or agencies to address the committee's scrutiny concerns	1
Undertakings which the committee was made aware had been implemented during this period	0
Outstanding undertakings	52
<b>Chapter 5: Scrutiny of Commonwealth expenditure</b>	
Advance to the Finance Minister determinations	0
Instruments specifying Commonwealth expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and the <i>Industry Research and Development Act 1986</i>	3
Levying of taxation in delegated legislation	0
<b>Chapter 6: Exemptions from disallowance and sunseting</b>	
Instruments that do not meet the committee's expectations regarding exemptions from disallowance under standing order 23(4A)	1
Instruments that do not meet the committee's expectations regarding exemptions from sunseting under standing order 23(3)(k)	1



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

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## Chapter 1

### New and ongoing matters

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

#### New matters

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

### Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2024L00088</a>
<b>Purpose</b>	This instrument amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) to create exemptions from the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> for the issue or sale of securities and derivatives on specified low money laundering and terrorism financing risk domestic financial markets.
<b>Authorising legislation</b>	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
<b>Portfolio</b>	Attorney-General's
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 February 2024). Notice of motion to disallow must be given by 14 May 2024.

#### Overview

1.3 Subsection 247(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) allows the Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024, *Delegated Legislation Monitor 2 of 2024*; [2024] AUSStaCSDLM 7.

rules) to specify circumstances in which the obligations in the Act do not apply to the provision of a designated service. The instrument amends the rules to exempt from the Act, the issue or sale of securities and derivatives on specified low money laundering and terrorism financing risk domestic financial markets.

1.4 The committee has identified significant technical scrutiny concerns in the instrument, detailed below.

### **Scrutiny concerns**

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

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

1.6 Subsection 247(3) of the Act enables the rules to specify circumstances where the Act does not apply to the provision of a designated service. The rules currently provide exemptions from the Act for the issuing or selling of securities or derivatives on a 'prescribed financial market' or 'specified financial market' where, due to the use of electronic buy/sell orders, the issuer or seller does not have knowledge of the identity of the buyer or person to whom the security or derivative is issued. The instrument amends the rules to add the Australian Securities Exchange Limited (ASEL) and FEX Global Limited as 'specified financial markets'.

1.7 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. However, if such amendments or modifications are nonetheless included in delegated legislation, the committee's view is that the relevant instrument should operate no longer than strictly necessary. In most cases, this means the instrument should cease to operate no longer than three years after it commences. At the very least, such measures should be subject to sunseting, to allow a minimum level of parliamentary oversight. 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 them in delegated, rather than primary, legislation.

1.8 In this instance, the explanatory statement provides that the instrument sets out amendments to the rules to exempt from the operation of the Act, the issue or sale of securities and derivatives on two specified low money laundering and terrorism

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<sup>2</sup> Senate standing order 23(3)(l).

<sup>3</sup> Senate standing order 23(3)(m).



financing risk domestic markets.<sup>4</sup> While the explanatory statement notes that the exemptions are enabled by subsection 247(3) of the Act, it does not otherwise explain why it was considered necessary and appropriate as a matter of principle to include these exemptions in delegated, rather than primary, legislation. In addition, the instrument amends the principal rules, which are exempt from sunseting, to add the relevant exceptions which therefore appear to operate on an ongoing basis.

**1.9 In light of the above, the committee requests the Attorney-General's advice as to:**

- **whether the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* can be amended to include the relevant exemptions; and, if not,**
- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to include the exemptions from the requirements in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; and**
- **whether amendments can be made to provide that the measures are time-limited or at least subject to sunseting.**

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<sup>4</sup> Explanatory statement, p. 1.

## Ongoing matters

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

### Migration Amendment (Biosecurity Contravention) Regulations 2023<sup>5</sup>

<b>FRL No.</b>	<a href="#">F2023L01443</a>
<b>Purpose</b>	This instrument amends the Migration Regulations 1994 to expand the grounds for the cancellation of visas where the Minister reasonably believes that the visa holder has contravened provisions under the <i>Biosecurity Act 2015</i> .
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Portfolio</b>	Home Affairs
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 November 2023).  Committee gave notice of motion to disallow on 5 December 2023.

## Overview

1.11 The Migration Amendment (Biosecurity Contravention) Regulations 2023 amend the Migration Regulations 1994 (the Migration Regulations) to expand the grounds for the cancellation of certain temporary visas in paragraph 2.43(1)(s) to include where the Minister for Immigration, Citizenship and Multicultural Affairs or the minister's delegate reasonably believes a visa holder has contravened new subsection 186A(1) of the *Biosecurity Act 2015* (the Biosecurity Act).<sup>6</sup>

1.12 The committee raised concerns with the instrument in *Delegated Legislation Monitor 14 of 2023*, on 17 November 2023.<sup>7</sup> The minister responded on 19 January 2024.<sup>8</sup>

<sup>5</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Biosecurity Contravention) Regulations 2023, *Delegated Legislation Monitor 2 of 2024*; [2024] AUSStaCSDLM 8.

<sup>6</sup> Subsection 186(1) makes it an offence for a person to bring or import conditionally non-prohibited goods into Australian territory where a condition in relation to the goods specified in a determination in force has not been complied with.

<sup>7</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 14 of 2023](#) (17 November 2023) pp. 2-4.

<sup>8</sup> This correspondence was tabled with this Monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

## Scrutiny concerns

### *Adequacy of consultation*<sup>9</sup>

1.13 The instrument's explanatory statement states that consultation was undertaken with the Department of Agriculture, Fisheries and Forestry (DAFF).<sup>10</sup> Noting the significant impact this instrument could have on a range of visa-holders, including individuals holding visitor, student, working holiday and temporary work visas, the committee queried why members of the public including visa holders, relevant peak bodies or other experts were not consulted.

1.14 Accordingly, in *Delegated Legislation Monitor 14 of 2023*, the committee requested the minister's advice as to what consultation was undertaken and, if no consultation was undertaken with the public including visa holders, relevant peak bodies or other experts, the justification for this.<sup>11</sup>

### *Minister's response*<sup>12</sup>

1.15 In his response, the minister advised that DAFF had been consulted in the development of the instrument, and as the instrument does not substantially alter the operation of existing legislation, no further consultation was considered necessary. The minister also advised that DAFF engaged in separate consultation in relation to the offence created by subsection 186A(1) of the Biosecurity Act.

1.16 The minister further advised that Australia's biosecurity requirements and the potential for visa cancellation at the border for biosecurity breaches are well understood by international travellers, industry stakeholders and relevant peak bodies. Nevertheless, the minister advised that because the potential impact of the amendments are focused on international travellers holding temporary visas, the Department of Home Affairs and DAFF are working to create public messaging about the potential for visa cancellation and communication materials for incoming passengers, including pre-departure information.

### *Committee view*

1.17 The committee thanks the minister for his advice that DAFF was consulted prior to the making of the instrument and that public messaging and communication materials are being developed for international travellers holding temporary visas.

1.18 However, while the minister advised that this instrument does not substantially alter the operation of existing legislation, it is not apparent to the committee how this

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<sup>9</sup> Senate standing order 23(3)(d).

<sup>10</sup> Explanatory Statement, p. 2.

<sup>11</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 14 of 2023](#) (17 November 2023) pp. 2-4.

<sup>12</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

is the case. The instrument creates an additional ground on which the minister, or the minister's delegate, may cancel a temporary visa, a decision which will have a significant impact on a temporary visa holder's right.

1.19 Further, while international travellers, industry stakeholders and peak bodies may be generally aware of Australia's biosecurity requirements, and acknowledging the gravity of biosecurity breaches, the committee considers that because of the serious implications of the measure introduced by this instrument, all affected parties should have been given an opportunity for consultation. The committee notes that it is a Senate requirement pursuant to standing order 23(3)(d), as described in the committee's guidelines, that the committee consider the extent to which persons likely affected by an instrument were consulted prior to the making of the instrument.

1.20 The committee notes that it is also a statutory requirement under section 17 of the *Legislation Act 2003* that the rule-maker is satisfied that appropriate consultation was undertaken. In considering whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content. The committee reiterates its expectation that consultation with affected persons before an instrument is made is crucial to ensure that it is fit-for-purpose and best suited to achieve the relevant rule-maker's objectives.

1.21 Further, ensuring that adequate consultation has occurred is particularly significant when the relevant legislative instrument has the potential to impact individuals' legal rights and liberties, as is the case with this instrument. In this instance, the committee understands that the instrument has the potential to adversely affect a large group of persons, not all of whom are necessarily regular international travellers. Under paragraph 2.43(1)(s) of the Migration Regulations, student, graduate and temporary work visas may be cancelled for a breach of subsection 186A(1) of the Biosecurity Act.

1.22 While the committee appreciates the advice that the Department of Home Affairs and DAFF are currently developing public messaging and communication materials, it does not consider that making individuals aware of their legal obligations amounts to adequate consultation on changes to the law made through a particular instrument. It also remains unclear to the committee how the rule-maker was satisfied in this instance that the consultation undertaken was appropriate, or how 'Australia's biosecurity requirements and the potential for visa cancellation at the border for biosecurity breaches' are well understood by international travellers when affected persons were not consulted prior to the instrument being made.

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

- **whether public consultation can now be undertaken with members of the public, peak bodies and industry stakeholders likely to be affected by this**

instrument, noting that such consultation should in the ordinary course take place prior to the making of an instrument; and

- whether, following this consultation, the minister will consider if it is appropriate for this additional ground for visa cancellation to remain in force, or if further amendments are required to the Migration Regulations 1994 to address the feedback provided through the consultation process.

**1.24** Noting the various stakeholders likely to be impacted by the instrument, the committee requests the minister's advice as to what is the expected impact of the instrument on each class of visa mentioned in paragraph 2.43(1)(s) of the Migration Regulations, taking into account an assessment of the biosecurity risk and risk profile of international travellers under each visa class.

***Delegation of discretionary powers;<sup>13</sup> availability of independent merits review<sup>14</sup>***

1.25 As noted above, the instrument expands the grounds for the cancellation of certain temporary visas where the minister or a delegate reasonably believes that the visa holder has contravened provisions under the Biosecurity Act. However, neither the instrument nor the explanatory statement describes the delegates that may exercise this power or whether they will be required to possess particular skills, qualifications and experience.

1.26 Accordingly, in *Delegated Legislation Monitor 14 of 2023*, the committee requested the minister's advice as to:

- why it is necessary and appropriate to delegate the powers or functions in the instrument;
- who the power or function will be delegated to, including whether that person will be required to have the appropriate skills, qualifications and experience to exercise the powers or functions; and
- whether any safeguards or limitations apply to the exercise of these powers or functions, including whether merits review is available.<sup>15</sup>

***Minister's response<sup>16</sup>***

1.27 In his response, the minister advised that Australian Border Force (ABF) officers have been delegated the minister's power to cancel visas under section 116 of the Migration Act. Visa cancellation will only be undertaken by ABF officers who have

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<sup>13</sup> Senate standing order 23(3)(c).

<sup>14</sup> Senate standing order 23(3)(i).

<sup>15</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 14 of 2023](#) (17 November 2023) p. 4.

<sup>16</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

completed comprehensive training in visa cancellations and have been assessed as competent to undertake this work.

1.28 In relation to the committee's query about applicable safeguards, the minister advised that a decision to cancel a visa will not be subject to merits review because of section 338 of the Migration Act. That section sets out the circumstances in which merits review is available, and paragraph 338(3)(b) provides that a decision to cancel a visa in immigration clearance, which applies to the measure introduced by the instrument, is not subject to merits review. The minister further advised that the minister or delegate, as the case may be, is required to provide natural justice to the individual before making a decision to cancel their visa on biosecurity-related grounds.

#### *Committee view*

1.29 The committee thanks the minister for his advice that ABF officers, who will be appropriately trained and qualified to assess biosecurity breaches, are delegated the power to make visa cancellation decisions, and that the decision to cancel a visa under paragraph 2.43(1)(s) of the Migration Regulations is not reviewable due to the operation of paragraph 338(3)(b) of the Migration Act.

1.30 However, the committee does not consider that a requirement to provide natural justice is an appropriate justification for why this decision is not subject to merits review.

1.31 As reflected in Senate standing order 23(3)(i), the committee's expectation is that where an instrument empowers a decision maker to make a discretionary decision that may affect rights, liberties, obligations or interests, the decision should ordinarily be subject to independent merits review. Where such a decision is excluded from merits review, the relevant explanatory statement should explain what characteristics of the decision that justifies its exclusion by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (the ARC guide).<sup>17</sup>

1.32 Accordingly, where independent merits review of a decision that may affect an individual's rights, liberties, obligations or interests is not available, the committee considers that a justification should be provided by reference to the ARC guide.

**1.33 In light of the above, the committee requests the minister's further justification as to why it is not considered appropriate to provide for independent merits review in relation to this decision with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*<sup>18</sup>**

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<sup>17</sup> Administrative Review Council, [What Decisions Should be Subject to Merits Review?](#) (1999).

<sup>18</sup> Administrative Review Council, [What Decisions Should be Subject to Merits Review?](#) (1999) .

## Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023<sup>19</sup>

<b>FRL No.</b>	<a href="#">F2023L01551</a>
<b>Purpose</b>	This instrument deals with a number of matters to facilitate and regulate safe and sustainable greenhouse gas injection and storage operations in offshore areas. It remakes the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011 in substantially the same form, with minor amendments to provide consistency with current drafting practices, simplify language, restructure provisions to provide for ease of navigation, and remove duplicative processes.
<b>Authorising legislation</b>	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
<b>Portfolio</b>	Industry, Science and Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 28 November 2023). Notice of motion to disallow must be given by 19 March 2024.

### Overview

1.34 This instrument is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act). It remakes the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011, which are due to sunset on 1 April 2024. The measures in the instrument facilitate and regulate safe and sustainable greenhouse gas injection and storage operations in offshore areas.

1.35 The committee raised scrutiny concerns with the instrument on 7 February 2024 in *Delegated Legislation Monitor 1 of 2024*<sup>20</sup> and the minister provided a response dated 14 February 2024.<sup>21</sup>

<sup>19</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023, *Delegated Legislation Monitor 2 of 2024*; [2024] AUSStaCSDLM 9.

<sup>20</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024) pp. 16-22.

<sup>21</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

## Scrutiny concerns

### ***Availability of independent merits review***<sup>22</sup>

1.36 In *Delegated Legislation Monitor 1 of 2024*, the committee raised concerns about the justifications cited in the explanatory statement for excluding independent merits review of two decisions under the instrument.

1.37 Subsection 25(1) requires the minister to approve or refuse to approve a draft site plan,<sup>23</sup> and subsection 25(2) provides that they may do so if satisfied that it meets the criteria in Division 2. The explanatory statement explains that merits review is inappropriate as such a decision is a preliminary step in the substantive decision under the Act to grant a licence. The committee noted that the Administrative Review Council's Guide, *What decisions should be subject to merits review?* (the ARC guide) acknowledges that it is appropriate to exclude preliminary decisions where they do not have substantive consequences.<sup>24</sup> However, it appeared to the committee that approval of a site plan was not merely a step in the substantive decision under the Act to grant a greenhouse gas injection licence but rather a precondition to such a decision. Further, the committee noted that there are strict liability and civil penalties for carrying on operations in relation to a greenhouse gas storage formation identified in a licence without an approved site plan being in force, as well as the potential significant environmental consequences relating to site plans.

1.38 The committee also raised concerns about subsection 32(2) of the instrument which enables the minister to withdraw approval of a site plan where the licensee has failed to meet the conditions in paragraph 32(1)(b) of the instrument. The explanatory statement justifies the exclusion of these decisions because they are of a law enforcement nature. Although the ARC guide acknowledges that it is appropriate to exclude law enforcement decisions from merits review because they could jeopardise investigation and enforcement of the law, the committee was unclear as to how decisions under subsection 32(2) were analogous to the kinds of decisions contemplated by the ARC guide.

1.39 Accordingly, the committee sought the minister's advice as to whether further justification could be provided for exclusion of merits review of decisions under subsections 25(1) and 32(2) with reference to the ARC guide, and whether examples could be provided of other decisions that would be considered to fall within law enforcement decisions in the ARC guide.

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<sup>22</sup> Senate standing order 23(3)(i).

<sup>23</sup> For operations to be carried on in relation to an identified greenhouse gas storage formation specified in a greenhouse gas injection licence, an approved site plan must be in force in relation to the formation, and the licensee must comply with the plan.

<sup>24</sup> Administrative Review Council [What decisions should be subject to merits review?](#) (1999) p.12, paragraphs [4.3]-[4.7].



*Minister's response*<sup>25</sup>

1.40 In her response, the minister advised that, given the purpose of merits review, it is important to give adequate and detailed consideration to this matter. The Australian Government has announced a policy review of the offshore environmental management framework, inclusive of the carbon capture and storage regulatory regime. This review will examine opportunities for regulatory and administrative certainty and efficiency for carbon capture and storage projects. Noting the committee's comments, the minister stated that the availability of independent merits review of the discretionary decisions above will be considered further as part of that review.

1.41 The minister also advised that, in the meantime, it is important that the regulations continue in force to ensure regulatory certainty and provide a robust framework for offshore greenhouse gas injection and storage operations. The instrument remakes, in substantially the same form, the previous regulations which also did not provide for merits review. In this regard, the minister stated in her letter: 'While acknowledging that this does not justify the exclusion of merits review in the longer-term, it is considered that the forthcoming review is the appropriate forum in which to consider the application of merits review.'

*Committee view*

1.42 The committee welcomes the minister's advice that the government would at least consider the application of merits review as part of an upcoming policy review of the carbon capture and storage regulatory regime, noting the importance of merits review, due to the significant impact that discretionary decisions can have on rights and obligations. However, the minister did not provide any detail about the expected timeframe for undertaking and implementing such a review. Additionally, it is unclear to the committee why the appropriateness of excluding merits review could not have been considered when making the instrument, in the context of considering whether the sunseting regulations remained fit-for-purpose.

1.43 However, this does not address the committee's immediate concerns in relation to merits review. Prior to undertaking and implementing the findings of such a review, decisions to approve, refuse or withdraw a site plan under subsections 25(1) and 32(2) remain excluded from merits review. Discretionary decisions such as these have the capacity to affect individuals' rights, liberties or obligations – for example, in the case of a decision to refuse a draft site plan, the committee notes that an approved site plan is a precondition to the granting of a licence under the Act and there are penalty provisions for carrying on operations without an approved site plan.

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<sup>25</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

1.44 For this reason, the committee reiterates its expectation that review – ordinarily in the form of independent merits review – should be available, unless there is a sound justification for exclusion, with reference to the ARC guide. In this regard, while the committee acknowledges in some cases that it may be appropriate to exclude decisions on the basis of the justifications noted above relating to preliminary and law enforcement decisions, the minister’s response does not address the committee’s queries whether subsections 25(1) and 32(2) of the instrument are properly characterised as such decisions or inappropriate for merits review based on any other grounds contemplated in the ARC guide.

1.45 Further, the committee is unclear how the minister’s advice that it is important for the regulations to continue in force to ensure regulatory certainty and provide a robust framework justifies the exclusion of merits review, noting the distinction between the measures in the instrument and the right to seek review of decisions under it. Finally, the committee does not consider the fact that the sunseting regulations do not provide for merits review to be a sufficient justification. Neither justification appears to relate to any ground for excluding merits review contemplated in the ARC guide.

**1.46 In light of the above the committee requests the minister’s advice as to:**

- **whether further justification can be provided for the exclusion of merits review of decisions under subsections 25(1) or 32(2) of the instrument with reference to the grounds cited in the explanatory statement or any other grounds in the Administrative Review Council Guide, *What decisions should be subject to merits review?***
- **if independent merits review is not available, whether any other mechanisms for review such as internal review are available; and**
- **the expected timeframes for the upcoming review of the carbon capture and storage regulatory regime.**

**1.47 The committee has resolved to place a protective notice of motion to disallow the instrument, to provide the committee with additional time to consider these matters.**

***Conferral of discretionary powers;<sup>26</sup>adequacy of explanatory materials<sup>27</sup>***

1.48 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 broad discretionary powers on a person. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to

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<sup>26</sup> Senate standing order 23(3)(c).

<sup>27</sup> Senate standing order 23(3)(g).

whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.49 In *Delegated Legislation Monitor 1 of 2024*, the committee raised concerns about two provisions which confer broad discretionary powers on the minister. Subsections 25(3) and 42(3) enable the minister, in deciding whether to approve a draft site plan or a variation to a site plan, to have regard to ‘any other matters’ they consider relevant. The committee sought the minister’s advice regarding ‘other matters’ that may be considered relevant under those provisions, and whether there are any safeguards or limitations on the discretionary powers.

#### *Minister’s response*<sup>28</sup>

1.50 In her response, the minister advised that subsections 25(3) and 42(3) make it clear that, in exercising this discretion, the minister can consider other relevant matters. Further, site plans will likely be complex documents and, while other criteria in the instrument specify key matters the minister must take into account, it may not be possible to cover all matters that may be relevant on a case-by-case basis, particularly given that each greenhouse gas injection and storage operation will differ in relation to matters including location, the nature of the identified greenhouse gas storage formation, potential behaviour of an injected greenhouse gas substance and infrastructure and equipment to be used for operations. The minister further noted that the relevant provisions of the instrument have not yet been applied as there have been no applications for a licence to date.

1.51 However, if it becomes evident in practice that particular matters are frequently taken into account as ‘other relevant matters’, to increase regulatory and clarity, the minister indicated that the instrument could be amended in future to prescribe such matters as criteria to be taken into account for decisions generally.

1.52 Finally, the minister noted that the responsible minister can only take into account matters relevant to the decision and could not take into account irrelevant considerations. In addition, their decision would need to be consistent with other administrative law principles, such as procedural fairness, but judicial review would be available under the *Administrative Decisions (Judicial Review) Act 1977* or the *Judiciary Act 1903* if an applicant considered that the minister took into account an irrelevant consideration, or they are not satisfied that adequate procedural fairness was provided before the decision was made.

#### *Committee view*

1.53 The committee thanks the minister for her response. The committee appreciates the minister’s advice that it may not be possible to cover all matters that may be relevant on a case-by-case basis, noting that each greenhouse gas injection

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<sup>28</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee’s website.

and storage operation will differ, and that the relevant provisions of the instrument are yet to be applied, as there have been no applications for a licence to date.

1.54 However, the committee considers that, due to the potential impact that discretionary decisions may have on rights and the need for legal certainty in terms of the rights and obligations of those affected by legislation, it would be helpful to provide in the explanatory statement an example of the kinds of other matters that it was envisaged might be taken into account under these provisions when drafting the instrument.

1.55 Finally, while the minister advised as to safeguards in that general administrative law principles such as the requirement to only take into account relevant considerations and the availability of judicial review would apply, these are simply general principles of administrative law. There do not appear to be any safeguards applying specifically to the relevant provisions. In particular, the committee notes that merits review is not available for decisions under either subsection 25(1) or 42(1) and therefore, its concerns about the breadth of these discretionary provisions are heightened.

**1.56 In light of the above, the committee requests the minister's further advice as to whether further detail can be provided about the kinds of 'other matters' that may be relevant under subsections 25(3) and 42(3) of the instrument, and whether this could be specified in the instrument's explanatory statement.**

## 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).

### **Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023<sup>1</sup>**

<b>FRL No.</b>	<a href="#">F2023L01417</a>
<b>Purpose</b>	This instrument amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for government spending on an activity administered by the Attorney-General's Department.
<b>Authorising legislation</b>	<i>Financial Framework (Supplementary Powers) Act 1997</i>
<b>Portfolio</b>	Attorney-General's
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 November 2023). Committee gave notice of motion to disallow on 5 December 2023.

#### **Overview**

2.2 The *Financial Framework (Supplementary Powers) Act 1997* (the Act) authorises the Commonwealth to spend public money on grants and programs specified in legislative instruments made under the Act. The Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations) are made under the Act for this purpose. Specifically, this instrument amends the FF(SP) Regulations, to establish legislative authority for government spending on a financial assistance scheme for respondents to applications brought under the Family Law (Child Abduction Convention) Regulations 1986.

2.3 The committee's secretariat, on behalf of the committee, engaged with the Department of Finance, who provided a response in consultation with the Attorney-General's Department in November 2023. As the committee retained scrutiny

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023; [2024] AUSStaCSDLM 10.

concerns following that response, it sought advice from the Minister for Finance on 29 November 2023 in *Delegated Legislation Monitor 15 of 2023*.<sup>2</sup> The Minister for Finance provided a response dated 12 December 2023 on behalf of the Attorney-General.<sup>3</sup> However, the committee continued to retain scrutiny concerns about the adequacy of explanatory materials in relation to independent merits review, and accordingly sought the minister's further advice about this matter.<sup>4</sup> The minister provided a further response on 19 February 2024.<sup>5</sup>

## Scrutiny concerns

### ***Availability of independent merits review;<sup>6</sup> adequacy of explanatory materials<sup>7</sup>***

2.4 The committee initially raised concerns with the minister about the justification provided in the explanatory statement for the exclusion of independent merits review of funding decisions under the instrument for respondents to applications under the Family Law (Child Abduction Convention) Regulations 1986.

2.5 The explanatory statement provides that such decisions are excluded because they involve the allocation of a finite amount of funding, referring to the Administrative Review Council guidance document, *What decisions should be subject to merits review?* (ARC guide) (which is in line with the committee's usual expectations).<sup>8</sup> However, the committee was unclear how that justification applied to decisions under the instrument, as that justification requires that there is a finite amount of resources available and that an allocation already made to another party would be directly affected if a decision were overturned. Accordingly, the committee sought the minister's advice as to whether further justification for excluding merits review could be provided.<sup>9</sup>

2.6 In the response provided by the minister on 12 December 2023, the Attorney-General's advice included that merits review was not appropriate because each financial year, a fixed amount of funding is allocated to the program through the

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<sup>2</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 15 of 2023](#) (29 November 2023) pp. 2-4.

<sup>3</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (12 December 2023).

<sup>4</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024) pp. 23-26.

<sup>5</sup> This correspondence was tabled with this Monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>6</sup> Senate standing order 23(3)(i).

<sup>7</sup> Senate standing order 23(3)(g).

<sup>8</sup> Administrative Review Council, [What decisions should be subject to independent merits review?](#) (1999) pp. 13-14, paragraphs [4.11]-[4.15].

<sup>9</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 15 of 2023](#) (29 November 2023) pp. 2-4.

Budget. In the absence of a decision by Government to provide additional funding, which could not be guaranteed, any increase to a funding decision would likely require the revisiting of existing grant arrangements with other applicants and reducing, terminating or overturning allocations to fit within the funding envelope.

2.7 The committee welcomed the additional advice as to how overturning a grant decision would impact an allocation that had already been made. As the committee considered that this would be helpful information for inclusion in the instrument's explanatory statement, it requested the minister's advice as to whether the explanatory statement could be amended to include that additional justification.

*Minister's response*<sup>10</sup>

2.8 In response to the committee's further request, the minister undertook to issue a replacement explanatory statement including the additional justification provided for excluding independent merits review of the relevant decisions, with reference to the ARC guide. The committee further notes that this undertaking was implemented on 21 February 2024.

*Committee view*

2.9 The committee thanks the minister and Attorney-General for their engagement and welcomes the now implemented undertaking to amend the explanatory statement to include the detailed advice provided about the justifications for excluding merits review, in line with the ARC guide.

**2.10 In light of the implemented undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this issue.**

**2.11 In addition, the committee has resolved to withdraw the notice of motion to disallow the instrument.**

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<sup>10</sup> This correspondence was tabled with this Monitor and will be accessible via the [Delegated Legislation Monitors](#) 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 The committee commenced engaging with the relevant agency via its secretariat about the following instruments.<sup>1</sup>

#### Instrument

Australian Apprenticeship Support Loans Rules 2023 [F2023L01729]

Australian Broadcasting Corporation (Election of Staff-elected Director) Regulations 2023 [F2023L01736]

Australian National Audit Office Auditing Standards 2024 [F2024L00057]

Cape du Couedic Lighthouse Heritage Management Plan 2023 [F2024L00072]

Cape St Albans Lighthouse Heritage Management Plan 2023 [F2024L00073]

Goods Island Lighthouse Heritage Management Plan 2023 [F2024L00074]

Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Repeal Instrument (LIN 24/003) 2024 [F2024L00100]

Part 131 (Balloons and Hot Air Airships) Manual of Standards 2024 [F2024L00056]

Road Vehicle Standards Amendment (2023 Measures No. 1) Rules 2023 [F2024L00086]

Vehicle Standard (Australian Design Rule 113/00 – Acoustic Vehicle Alerting Systems for Quiet Road Transport Vehicles) 2024 [F2024L00089]

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

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## Concluded matters

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

### Instrument

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Customs Legislation Amendment (Vaping Goods) Regulations 2023 [F2023L01666]

Vehicle Standard (Australian Design Rule 113/00 – Acoustic Vehicle Alerting Systems for Quiet Road Transport Vehicles) 2024 [F2024L00089]

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

## Chapter 4

### Undertakings

4.1 This Chapter identifies the new undertakings that have been made in this reporting period and those that the committee is aware have been implemented since the last Monitor.

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

#### New undertakings

4.3 During this period, the following undertakings were made to address the committee's scrutiny concerns.

Instrument	Undertaking	Date made
<b>Industry Research and Development (Australian Centre for Quantum Growth Program and Critical Technologies Challenge Program) Instrument 2023</b>	The department undertook to progress amendments to the explanatory statement in response to the committee's concerns	21 December 2023

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

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



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

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## Chapter 5

### Expenditure and taxation in delegated legislation

5.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) in the interest of promoting appropriate parliamentary scrutiny of Commonwealth expenditure in delegated legislation.<sup>1</sup> This includes expenditure-related instruments and instruments that levy taxation.

#### Commonwealth expenditure

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

5.2 Instruments made under 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. The committee has resolved to draw these instruments to the Senate's attention under Senate standing order 23(4).<sup>2</sup>

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

Instrument	Amount	Grant/Program
<b>Financial Framework (Supplementary Powers) Amendment (Education Measures No. 3) Regulations 2023 [F2024L00002]</b>	\$35,000 in 2023-24	Grant to The Seed Library Incorporated
<b>Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 4) Regulations 2023 [F2024L00003]</b>	\$6.0 million over four years from 2023-24	Southeast Asia placements and internships pilot program
<b>Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 7) Regulations 2023 [F2024L00004]</b>	\$12.3 million over two years from 2023-24	Immigration Advice and Application Assistance Scheme

<sup>1</sup> 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](#).

<sup>2</sup> Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).





## Chapter 6

### Exemptions from disallowance and sunseting

6.1 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

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

6.3 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.

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

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

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<sup>1</sup> 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](#).

<sup>2</sup> 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.

<sup>3</sup> 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.

- 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.

6.5 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.

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

### ***Instruments which do not meet the committee's expectations***

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

<b>Instrument</b>	<b>Source of exemption</b>
Biosecurity (2024 Infringement Notices) Determination 2023 [F2023L01734]	Subsection 524A(4) of the <i>Biosecurity Act 2015</i>

### **Exemptions from sunseting**

6.8 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.

6.9 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

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

and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

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

6.11 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.

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

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>6</sup>
- is exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003*;<sup>7</sup>
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or

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<sup>5</sup> 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](#).

<sup>6</sup> 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.

<sup>7</sup> 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.

- otherwise contains a matter requiring parliamentary oversight.

6.13 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.

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>8</sup>

### ***Instruments which do not meet the committee's expectations***

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

Instrument	Source of exemption
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 7) Determination 2024 [F2024L00008]	Subsection 54(1) of the <i>Legislation Act 2003</i>

**Senator Louise Pratt**  
**Acting Chair**

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