

The Senate

Standing Committee for the
Scrutiny of Delegated Legislation

Annual Report 2023

May 2024

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Acknowledgement-Senator Linda White

The committee notes with profound sadness the passing of Senator Linda White who served as Chair of the committee between 3 August 2022 and 29 February 2024.

The committee pays tribute to the outstanding leadership provided by Senator White to the committee during Senator White's tenure as Chair.

Committee members, along with the committee's secretariat and legal adviser, extend their deep condolences to Senator White's family and friends.

Chapter 1

Introduction

Overview

- 1.1 The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), 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 set out in Senate standing order 23.
- 1.2 The executive branch of government makes over a thousand legislative instruments each year, known as 'delegated legislation'. Delegated legislation has the same force in law as Acts made by the Parliament and may form as much as half of the statutory law of the Commonwealth of Australia.¹
- 1.3 The committee's work may be broadly described as technical legislative scrutiny. The committee does not consider the policy merits of delegated legislation, although the policy content of an instrument may provide context for the committee's scrutiny.
- 1.4 The scope of the committee's scrutiny function is formally defined by Senate standing order 23(3) which requires the committee to scrutinise each legislative 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;

¹ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 432.

- (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.
- 1.5 In addition, standing order 23(4) empowers the committee to scrutinise instruments 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.
- 1.6 Further, standing order 23(4A) empowers the committee to consider instruments that are not subject to disallowance, including whether it is appropriate for them to be exempt from disallowance.
- 1.7 This Annual Report provides a summary of the committee's work for the period from 1 January to 31 December 2023. The annual report is divided into two chapters:
- Chapter 2 sets out statistics relating to the work of the committee in 2023; and
 - Chapter 3 highlights the most significant scrutiny issues that the committee identified in 2023 and provides a number of case-studies.

Committee membership

- 1.8 Senate standing order 23 provides for the committee to be appointed at the commencement of each Parliament. The committee shall comprise six members: three government senators and three non-government senators. The committee is to be chaired by a government senator.
- 1.9 A list of current committee members can be found at the beginning of this report.²

The committee processes

- 1.10 In undertaking its work during the reporting period, the committee was supported by a secretariat comprising a secretary, two principal research officers, two senior research officers and a legislative research officer.
- 1.11 The committee also obtains advice from an external legal adviser, who is appointed by the committee with the approval of the President of the Senate. Associate Professor Andrew Edgar and Professor Lorne Neudorf both served as the committee's legal adviser during 2023.

² This list is also available on the [Committee Membership](#) page on the committee's website.

1.12 The committee's work is also supported by the processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.

Scrutiny of instruments

1.13 Each instrument is scrutinised against the committee's scrutiny principles. The committee meets regularly, including during sitting weeks, to consider instruments that give rise to potential scrutiny issues.

1.14 Where an instrument raises a scrutiny concern, the committee's usual approach is to include the instrument in its *Delegated Legislation Monitor* (the Monitor) and write to the responsible minister or agency seeking further explanation or requesting specific action to address the relevant issue.

The committee's use of the disallowance process

1.15 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process. Working within these timeframes ensures that the committee is able, if necessary, to seek disallowance of an instrument about which it has concerns.³

1.16 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice in order to protect the Senate's ability to subsequently disallow the instrument in question.⁴ This can have the effect of extending the applicable disallowance period by a further 15 sitting days. The committee refers informally to these notices as 'protective' notices.

1.17 The committee may otherwise give a notice of motion to disallow an instrument where it considers that the instrument raises serious unresolved scrutiny concerns, and which should be drawn to the Senate's attention or disallowed.

1.18 In the vast majority of cases, these notices are withdrawn when the committee receives a satisfactory response from the relevant minister or agency which addresses the committee's concerns. For example, if the minister or agency provides information that addresses the committee's concerns or includes an undertaking to progress amendments to the instrument or its explanatory statement. Where a satisfactory response is received, the Chair will withdraw the notice of motion on behalf of the committee.

1.19 The committee stresses the importance of the disallowance process to its scrutiny role, and in facilitating a minimum level of parliamentary oversight. Accordingly, the committee maintains the view that exemptions from

³ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 437.

⁴ [*Odgers' Australian Senate Practice*](#), 14th edition (2016), p. 438.

disallowance should generally be set out in primary legislation, and only apply to instruments in exceptional circumstances.

Undertakings

1.20 Ministers or agencies may provide an undertaking to address the committee's concerns. Typically, they will undertake to progress amendments to the instrument or its explanatory statement, or to propose amendments to an instrument's enabling legislation. The acceptance of such undertakings by the committee has the benefit of securing a satisfactory outcome in relation to the committee's scrutiny concerns, without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

1.21 The committee is one of three legislative scrutiny committees. The other two committees are the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee).⁵

1.22 The work of the three committees is complementary in many respects and, where appropriate, the committee considers relevant matters raised by these committees or refers matters to them.

Committee publications

1.23 Committee publications may be accessed on the committee's website. A brief overview of these publications is provided below.

Delegated Legislation Monitor⁶

1.24 The Monitor is the regular scrutiny report on the work of the committee. It is generally published in each Senate sitting week. It identifies instruments in relation to which the committee is engaging with the relevant minister or agency, or has concluded its examination. The Monitor also lists all the instruments registered during the reporting period, which:

- specify Commonwealth government expenditure;
- the committee is otherwise raising under standing order 23(4) as a matter of interest to the Senate because they raise significant issues, or otherwise give rise to issues that are likely to be of interest to the Senate; and
- are exempt from disallowance and sunseting and whether they meet the committee's expectations under standing order 23(4A).

⁵ More information about these committees can be found at the web pages for the [Parliamentary Joint Committee on Human Rights](#) and the [Senate Standing Committee for the Scrutiny of Bills](#).

⁶ Monitors for 2023 and for previous years may be accessed via the [committee's webpage](#).

- 1.25 It also records undertakings that have been made or implemented to address the committee's scrutiny concerns.

*Scrutiny News*⁷

- 1.26 The committee secretariat prepares *Scrutiny News* each sitting week. This is a brief publication which is sent to all senators and their staff, committee office staff, and interested external individuals and organisations that have subscribed to the scrutiny mailing list. *Scrutiny News* highlights recent comments drawn from material in the committee's Monitor and the Scrutiny of Bills Committee's *Scrutiny Digest*, with a particular focus on complex issues. *Scrutiny News* is also used to raise awareness of the committees and their functions.

*Guidelines*⁸

- 1.27 The committee's guidelines provide detail on the committee's work practices and its technical scrutiny principles, as well as its scrutiny of Commonwealth expenditure and matters of interest to the Senate.

*Index of Instruments*⁹

- 1.28 The *Index of Instruments* is an alphabetical list of all instruments about which the committee has raised a scrutiny concern in a particular year.

*Index of Undertakings*¹⁰

- 1.29 The *Index of Undertakings* is an alphabetical list of all instruments in a particular year regarding which the committee has accepted an undertaking from a minister or agency to address its scrutiny concerns.

Other resources

- 1.30 A number of other resources relevant to the committee can be accessed on the Senate website. A brief overview of these resources is provided below.

*Disallowance Alert*¹¹

- 1.31 The *Disallowance Alert* is a webpage listing all instruments for which a notice of motion for disallowance has been given in either House (whether by the committee or by an individual senator or member). The progress and outcome of all disallowance notices are also recorded here.

⁷ Past editions of *Scrutiny News*, as well as information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's [website](#).

⁸ [Guidelines](#) relating to the committee's scrutiny principles are published on the committee's website.

⁹ The [Index of Instruments](#) can be accessed on the committee's website.

¹⁰ The [Index of Undertakings](#) can be accessed on the committee's website.

¹¹ The [Disallowance Alert](#) can be accessed via Parliament's website.

*Senate Disallowable Instruments List*¹²

1.32 The Senate Disallowable Instruments List is a list of all disallowable instruments tabled in the Senate.¹³ This online resource may be used to ascertain whether and, if so, when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given. The list is updated after each sitting day.

*Guides to Senate Procedure*¹⁴

1.33 The *Guides to Senate Procedure* are a series of guidance notes designed to provide a practical understanding of the procedures governing the work of the Senate. Of particular relevance to the work of the committee is Brief No. 19 on disallowance.

*Odgers' Australian Senate Practice*¹⁵

1.34 *Odgers' Australian Senate Practice* is an authoritative reference work on all aspects of the Senate's powers, procedures and practices.

Acknowledgements

1.35 The committee greatly appreciated the assistance of its former and current legal advisers, Associate Professor Andrew Edgar and Professor Lorne Neudorf, as well as the committee secretariat, during 2023.

1.36 The committee also wishes to acknowledge the ongoing assistance of ministers and agencies. The responsiveness of ministers and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

¹² The [Senate Disallowable Instruments List](#) can be accessed via Parliament's website.

¹³ As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a [House of Representatives Disallowable Instruments List](#).

¹⁴ The [Guides to Senate Procedure](#) can be accessed via Parliament's website.

¹⁵ [Odgers' Australian Senate Practice](#) can be accessed via Parliament's website.

Chapter 2

Scrutiny work of the committee in 2023

Overview

2.1 This chapter provides information about the work of the committee in 2023, including relevant statistics relating to the instruments it considered during this reporting period.

Meetings and Delegated Legislation Monitors

2.2 In 2023, the committee held 20 private meetings. Of these, 16 private meetings related to the regular scrutiny of instruments included in the committee's 15 *Delegated Legislation Monitors* tabled in 2023.

2.3 The remaining four meetings were private briefings held by the committee. Such briefings are informal meetings with ministers or senior departmental officials, which enable the committee to obtain further information about certain legislative instruments that raise scrutiny concerns or to discuss and seek to resolve ongoing systemic scrutiny concerns.

2.4 Specifically, the committee met with the Assistant Treasurer and officials from the Department of the Treasury on 10 March 2023 to discuss the ongoing approach around exemptions to primary legislation through delegated legislation. On 22 March 2023, the committee met with officials from the Department of Agriculture, Fisheries and Forestry and the Department of Health and Aged Care to discuss the committee's ongoing concerns around exemptions from disallowance under the *Biosecurity Act 2015*. On 20 April 2023, the committee met with the Australian Law Reform Commission to receive a briefing about its *Financial Services Legislation: Interim Report B* which details a new proposed model for corporations and financial services law including to make recommendations in relation to the structure of the *Corporations Act 2001*. Finally, on 22 June 2023, the committee met with representatives of the Attorney-General's Department to seek an update on the Commonwealth Government's response to the *Review of the Legislation Act 2003*.

2.5 Across the 15 Monitors tabled in 2023, the committee considered 1885 legislative instruments, registered between 22 October 2022 and 16 November 2023. The Chair gave six tabling statements in tabling the Monitors, to draw the Senate's attention to particular instruments or systemic issues raising significant scrutiny concerns.¹

¹ The Chair made tabling statements for Monitors 3, 4, 7, 8, 12 and 13 of 2023. These can be viewed on the [committee's website](#).

- 2.6 The statistics in this chapter relate to the scrutiny of these 1885 legislative instruments. This includes the scrutiny of 1607 disallowable instruments, and 278 instruments exempt from disallowance. This is a slightly greater number of instruments scrutinised compared to the 1811 legislative instruments scrutinised in 2022 (comprising 1487 disallowable instruments and 324 instruments exempt from disallowance).

Scrutiny of instruments

- 2.7 Of the 1885 legislative instruments that the committee examined in the 2023 reporting period, it identified 363 instruments raising one or more scrutiny concerns which required a response from the relevant agency or minister, or which were drawn to the attention of the Senate or relevant minister.² This is a slightly lower ratio to instruments raising concerns in 2022.³
- 2.8 The 363 instruments raising scrutiny concerns during the 2023 reporting period included: ⁴
- 262 instruments which raised substantive technical scrutiny concerns under the committee's technical scrutiny principles, against which the committee is empowered to examine instruments under standing order 23(3);
 - 108 instruments exempt from disallowance that did not meet the committee's expectations as set out in its guidelines;⁵
 - 103 instruments exempt from sunseting that did not meet the committee's expectations as set out in its guidelines;⁶

² Details of these instruments may be found on the [Index of Instruments](#) page on the committee's website.

³ In 2022, of the instruments the committee scrutinised, 25 per cent were identified as raising one or more scrutiny concerns or were drawn to the attention of the Senate. In 2023 this percentage was 19.3 per cent.

⁴ This breakdown of numbers at [2.8] shows a total of 572 instruments raised. However, some instruments were raised simultaneously due to scrutiny concerns under both standing order 23(4) and standing order 23(4A), and other scrutiny concerns. 363 is the total number of unique instruments raised by the committee.

⁵ The committee's expectations with respect to exemptions from disallowance are contained in Senate standing order 23(4A); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p.47. See also Chapter 2 for further discussion of the scrutiny of instruments exempt from disallowance.

⁶ The committee's expectations with respect to exemptions from sunseting are contained in Senate standing order 23(3)(k); Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022) p.34.

- 99 instruments drawn to the attention of the Senate because they raised significant issues or were otherwise likely to be of interest to the Senate.⁷ All 99 instruments related to Commonwealth expenditure.

2.9 The committee also concluded its examination of 166 instruments in the 2023 reporting period.⁸

Scrutiny principles engaged

2.10 The following table provides an analysis of the instruments raising scrutiny issues in the 2023 reporting period.

Table 2.1 Issues identified by the committee in 2023

Type of correspondence	Issues raised against scrutiny principles under Senate standing order 23(3) ⁹												Total	
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)		(m)
Ministerial	3	0	21	2	4	0	12	17	23	7	0	6	6	101
Agency	59	1	11	4	7	11	103	14	5	2	41	1	3	262
Total	62	1	32	6	11	11	115	31	28	9	41	7	9	363

2.11 As shown in the Table 2.1, the committee raised more than twice as many scrutiny issues at agency than at ministerial level in 2023. This is a slightly lower number than was apparent in 2022.

Scrutiny concerns raised at the ministerial level

2.12 Where the committee is unable to resolve its scrutiny concerns by informal engagement with agencies via its secretariat, it will engage directly with the responsible minister.

2.13 In 2023, the committee raised 101 matters at ministerial level. This is significantly higher than the 65 issues raised at ministerial level in 2022.

2.14 As indicated by Table 2.1, the committee most frequently raised scrutiny concerns at the ministerial level in 2023 related to the inclusion in delegated legislation of availability of independent merits review.¹⁰ This principle

⁷ Senate standing order 23(4).

⁸ The discrepancy between the number of responses and the number of concluded entries arises partly because some instruments were initially commented on in the previous reporting period, while others will have been concluded in the next reporting period. This discrepancy also arises due to the committee's dialogue nature of communication, which mostly results in back and forth correspondence with a minister or agency to resolve an issue.

⁹ As individual instruments often raise more than one scrutiny principle, the number of issues raised is greater than the 294 instruments raising concerns in this period.

¹⁰ Senate standing order 23(3)(i).

accounted for approximately 23 per cent of concerns raised by the committee, as compared to approximately three per cent in 2022.

- 2.15 Concerns raised under principle (c) relating to the scope of administrative powers accounted for approximately 21 per cent of concerns raised by the committee at ministerial level in 2023 reporting period, compared to approximately eight per cent in 2022.
- 2.16 The committee often raised this principle (c) together with the principle (i) concerning the availability of independent review.¹¹ Principle (c) requires the committee to scrutinise instruments as to whether instruments make rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments broadly delegate powers and functions or confer broad powers. Principle (i) is underpinned by the committee's concern that where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect a person's rights, liberties, obligations or interests, those decisions should ordinarily be subject to independent merits review.
- 2.17 The number of times instruments raised the principles concerning availability of independent review,¹² and the scope of administrative powers,¹³ at the ministerial level appears to have significantly increased in 2023.
- 2.18 Principle (h), under which the committee considers instruments which may unduly trespass on personal rights and liberties, was the third most frequent issue raised by the committee in 2023, accounting for 17 per cent of issues raised.
- 2.19 The remaining scrutiny principles made up approximately 40 per cent of all scrutiny concerns raised at the ministerial level. The committee raised concerns about the adequacy of explanatory materials,¹⁴ at the ministerial level at a slightly higher rate in 2023 than in 2022, while it raised no concerns at the ministerial level about constitutional validity,¹⁵ access and use,¹⁶ and exemption and deferral from sunseting.¹⁷ The principles concerning compliance with legislative requirements,¹⁸ adequacy of consultation¹⁹ and the modification of

¹¹ Senate standing order 23(3)(i).

¹² Senate standing order 23(3)(i).

¹³ Senate standing order 23(3)(c).

¹⁴ Senate standing order 23(3)(g).

¹⁵ Senate standing order 23(3)(b).

¹⁶ Senate standing order 23(3)(f).

¹⁷ Senate standing order 23(3)(k).

¹⁸ Senate standing order 23(3)(a).

¹⁹ Senate standing order 23(3)(d).

primary legislation²⁰ were raised at the ministerial level a similar rate in 2023 compared to 2022. Concerns regarding matters more appropriate for parliamentary enactment,²¹ and other technical grounds,²² were raised at the ministerial level less frequently in 2023 compared to 2022.

Scrutiny concerns raised at the agency level

- 2.20 Table 2.1 shows that the committee raised a total of 262 issues at agency level in 2023. This is a significant decrease when compared to 2022, where the committee raised 310 issues at agency level.
- 2.21 The committee raised concerns around the adequacy of explanatory material a total of 103 times in 2023,²³ which is a significant increase compared to 55 times in 2022. This represented 39 per cent of all issues raised, making the issue the most frequently raised of the committee's scrutiny principles in 2023. This issue is typically raised in conjunction with a number of other scrutiny principles, where the committee's usual expectations include an explanation in the explanatory materials. For example, in 2023, the committee often raised this issue in conjunction with principle (a), concerning the compliance with legislative requirements,²⁴ which was raised 59 times in 2023, a small increase on the 49 times it was raised in 2022. This principle requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements, including those set out in the *Legislation Act 2003*.
- 2.22 Principle (k), regarding exemption from sunseting, was raised a total of 41 times in 2023, only a slight decrease from 49 times in 2022, reflecting that this continues to be an ongoing scrutiny concern for the committee. Further information about the committee's engagement with agencies regarding exemptions from sunseting can be found in Chapter 2.
- 2.23 In the 2023 reporting period, the committee raised concerns at agency level under principles (c) and (f) regarding the scope of administrative powers and access and use a total of 11 times each, slightly less often than in 2022.²⁵ Where these issues were raised at agency level, the secretariat typically requested the inclusion of further information in the explanatory statement.

²⁰ Senate standing order 23(3)(l).

²¹ Senate standing order 23(3)(j).

²² Senate standing order 23(3)(m).

²³ Senate standing order 23(3)(g).

²⁴ Senate standing order 23(3)(a).

²⁵ Senate standing order 23(3)(c).

- 2.24 In the 2023 reporting period, the committee raised concerns under principle (d) regarding the adequacy of consultation four times, slightly more than in 2022.²⁶ This principle requires the committee to consider:
- whether consultation occurred in relation to the specific instrument;
 - whether persons likely to be affected by the instrument were consulted; and
 - whether persons with expertise were consulted.²⁷
- 2.25 As noted previously, the secretariat's ability to seek information directly from agencies in the first instance has enabled the committee to focus its attention on raising only the most significant scrutiny issues at this level. For example, the committee was able to raise the more significant scrutiny issues concerns in relation to the availability of independent review and the scope of discretionary powers at the ministerial rather than agency level via its secretariat.

Ministerial and agency responses

- 2.26 In the 2023 reporting period, the committee received 101 responses from ministers (compared to 51 in 2022). Ministerial correspondence is published alongside the relevant Monitor on the committee's website.²⁸
- 2.27 In addition, the committee received 262 responses from agencies (compared to 236 in 2023). The committee does not publish the content of any correspondence with agencies. However, it does publish a concise record of the instruments in relation to which it is engaging at agency level in the Monitor.

Disallowance notices

- 2.28 The Chair, on behalf of the committee, gave 14 'protective' notices of motion to disallow an instrument in the 2023 reporting period. This is lower than the 23 notices given in 2022 and significantly fewer than the 71 notices given in 2021.
- 2.29 The committee generally gives a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of a disallowable instrument before the original 15 sitting day disallowance period expires. This protects the Senate's ability to subsequently disallow the instrument in question.²⁹
- 2.30 The committee may otherwise give notice of a motion to disallow an instrument where it considers that the instrument raises serious and/or unresolved scrutiny concerns and should be drawn to the Senate's attention or disallowed.

²⁶ Senate standing order 23(3)(d).

²⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2nd edition (February 2022), p.16.

²⁸ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitors](#).

²⁹ [Odgers' Australian Senate Practice](#), 14th edition (2016), p. 438.

- 2.31 All but two of the 14 notices given by the Chair in 2023 were withdrawn, generally following the receipt of a satisfactory ministerial or agency response or an undertaking that addressed the committee's concerns. The remaining two notices were subsequently withdrawn in 2024.
- 2.32 Details of all disallowance motions given during the reporting period are available on the Disallowance Alert webpage for 2023.³⁰

Undertakings

- 2.33 The committee generally requests three types of undertakings from ministers and agencies. These include undertakings to make amendments to an explanatory statement, amend or revoke an instrument, or amend an Act. Occasionally the committee may accept an undertaking in relation to an additional matter, for example, to undertake a review into the legislation or to table a report.
- 2.34 The committee expects that such undertakings will be implemented in a timely manner. Accordingly, the committee records all ministerial and agency undertakings in an index available on the committee's web page.³¹
- 2.35 Table 2.2 below outlines the number of undertakings that were implemented in 2023, as well as those that remained outstanding at the end of this reporting period. There were 123 undertakings made and/or implemented in the 2023 reporting period (compared to 192 in 2022). The committee notes that approximately 53 per cent of undertakings made in 2023 remained outstanding at the end of the year. The committee will closely monitor the implementation of these undertakings in 2024 and will routinely request progress updates from the relevant agency or minister.

Table 2.2 Undertakings addressing the committee's concerns (as at 31 December 2023)

Status	Type of undertaking				Total
	Amend ES	Amend/revoke instrument	Amend Act or enabling legislation	Other	
Implemented	53	4	1	0	58
Outstanding	55	9	0	1 ³²	65
TOTAL	108	13	1	1	123

³⁰ Parliament of Australia, [Disallowance Alert 2023](#).

³¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Index of undertakings](#).

³² This undertaking recorded in [Delegated Legislation Monitor 1](#) was to table the report into the review of the Franchise Disclosure Register provisions.

2.36 A total of 108 replacement explanatory statements were tabled in response to the committee's scrutiny concerns, which is a slightly lower number than the number of explanatory statements tabled in 2022 (115).

Instruments exempt from disallowance

2.37 Senate standing order 23(4A) empowers the committee to consider instruments that are exempt from disallowance and determine whether such exemptions are appropriate. As part of this scrutiny, the committee tracks the total number of instruments exempt from disallowance in each calendar year.

2.38 Table 2.3 below sets out the total number of instruments registered in 2022 and 2023, including the proportion of instruments exempt from disallowance. The committee notes a lower percentage of instruments exempt from disallowance in 2023.

Table 2.3 Instruments exempt from disallowance 2022-2023

Year	Exempt	Disallowable	Total	Percentage exempt
2023	255	1852	2107	12.1%
2022	340	1425	1765	19.3%

2.39 Of the 255 instruments exempt from disallowance in 2023, the committee considered that 108 instruments, representing 42 percent of exempt instruments, did not meet the committee's expectations in relation to appropriate exemptions from the disallowance process. This is only a slight decrease from 45 percent of exempt instruments in 2022, reflecting that this continues to be an ongoing scrutiny concern for the committee.

Chapter 3

Significant scrutiny issues

Overview

- 3.1 This chapter outlines the most significant scrutiny issues that the committee identified in 2023. It includes case studies related to the committee's role in promoting compliance with its scrutiny principles, and significant ongoing scrutiny concerns that the committee will continue to monitor in future.
- 3.2 These ongoing concerns include:
- the use of delegated legislation to create exemptions to, or modify the operation of, primary legislation; and
 - the impact on parliamentary oversight of the exemption of instruments from disallowance under the *Biosecurity Act 2015*.

Significant case studies and implemented undertakings

- 3.3 The following section outlines the most significant undertakings made and implemented during 2023 to address the committee's scrutiny concerns. The examples below illustrate the committee's approach to its scrutiny role and identify significant issues as assessed against the scrutiny principles outlined in Senate standing order 23(3).

Public Service Regulations 2023 [F2023L00368]

Principle (c) delegation of administrative powers

Principles (a) and (d) adequacy of consultation

Principle (i) availability of independent merits review

Principle (l) exemption from primary legislation

Principle (g) adequacy of explanatory materials

- 3.4 The Public Service Regulations 2023 remake the Public Service Regulations 1999, which sunset on 1 April 2023, including to introduce 'streamlining, clarification, and technical amendments' to the 1999 regulations. The committee engaged in ongoing correspondence with the Minister for the Public Service, raising scrutiny concerns under several of its principles.
- 3.5 The committee raised concerns that, although the instrument sets out matters directly relevant to the employment and promotion of Australian Public Service (APS) employees and review of APS actions, those affected by the instrument – for example, APS employees and the Community and Public Sector Union (CPSU) – were not consulted, and only the Merit Protection Commission (the Commission) and Department of Defence had been consulted.

- 3.6 Additionally, section 37 of the instrument provided for circumstances where actions relating to APS non-SES employees were not reviewable. The committee's concerns in relation to this matter included that these exclusions were broadly drafted and neither the instrument nor explanatory statement provided an explanation of the kinds of decisions covered by these exemptions or why their inclusion in delegated legislation was necessary and appropriate. In addition, the committee sought advice as to the characteristics of the relevant actions that justified exclusion from merits review by reference to the established grounds in the Administrative Review Council's guidance document, *What decisions should be subject to independent merits review?*¹
- 3.7 Regarding consultation, the minister undertook to more broadly consult with stakeholders including the CPSU on proposed further amendments. In subsequent correspondence, she advised the committee that implementation of this undertaking had already begun and that the CPSU had been notified and provided with a copy of the instrument prior to publication. Additionally, in remaking the 1999 regulations, a review of their provisions was undertaken, including consideration of feedback from APS agencies through the Commission's inquiry lines. The minister also provided further detail about the nature and scope of each exclusion from merits review and how each contributes to the instrument's broader objectives. The minister noted that these exclusions were designed to ensure effective allocation of government resources involving decisions where there is no appropriate remedy, those involving extensive inquiry processes and where they have such a limited impact that the costs of review cannot be justified, in line with the Administrative Review Council's guidance.
- 3.8 The committee welcomed the minister's engagement and, in light of her undertaking regarding consultation and advice in relation to the exclusion of merits review, was able to conclude its examination of the instrument.

Competition and Consumer (Gas Market Code) Regulations 2023 [F2023L00994]

Principle (c) scope of administrative powers

Principle (g) adequacy of explanatory materials

Principle (h) personal rights and liberties

Principle (i) availability of independent review and judicial review

Principle (j) matters more appropriate for parliamentary enactment

- 3.9 The Competition and Consumer (Gas Market Code) Regulations 2023 establish a mandatory code of conduct for the domestic wholesale gas market, pursuant to sections 53L and 172 of the *Competition and Consumer Act 2010* (the Act). The committee engaged in ongoing correspondence with the

¹ Administrative Review Council, [What decisions should be subject to merits review?](#) (1999).

Minister for Climate Change and Energy, including to raise concerns about the availability of independent merits review.

3.10 In response to the committee's initial request for advice, the minister confirmed that discretionary decisions under the instrument – including to grant, vary or impose conditions on ministerial exemptions from gas penalty provisions in the instrument – were excluded from independent merits review because they were policy decisions of a high political content. While the Administrative Review Council guidance acknowledges that such decisions are appropriate for exclusion from merits review (in line with the committee's expectations) the committee was unclear, and sought the minister's advice as to, how such decisions met the threshold for exclusion on this ground. In response, the minister advised that:

- such decisions are economically consequential to the east coast gas market and the cost of energy for consumers, who range from household to industrial gas users;
- a key objective of the exemptions is to incentivise suppliers to commit more gas supply to the east coast to address forecasted supply shortfalls;
- the scale and market impact of decisions under the instrument are of high political content, based on the considerations involved in making such decisions, which also contribute to the objective of incentivising adequate supply and long-term investment of reasonably priced gas in the domestic market; and
- the exemptions framework allows Australia to deliver on energy-supply commitments to trading partners, reduce the risk of triggering the Australian Domestic Gas Security Mechanism and, as a result, maintain its investments and reputation as a trusted trading partner.

3.11 The committee had also sought the minister's advice as to the necessity and appropriateness of two 'no invalidity' clauses, which limit the availability of judicial review, and whether they were subject to any safeguards. These provisions provide that the failure to comply with consultation requirements prior to granting a conditional ministerial exemption or undertaking a review of the instrument's operation do not affect the validity of the exemption or the review. The minister clarified in response that the clauses apply only in relation to a failure to consult and do not affect a right to seek judicial review in other matters. The minister further advised that this was considered appropriate as the instrument already effectively requires two ministers to agree prior to granting an exemption or commencing a review.

3.12 In subsequent correspondence, the minister undertook to amend the instrument's explanatory statement to include the above explanation about these matters.

- 3.13 The committee also raised concerns that the instrument contains a number of significant penalty provisions for both individuals and bodies corporate. The minister's advice included that, under section 76 of the Act, if the penalties are not prescribed in the instrument, a higher default maximum penalty in the enabling Act will apply. Further, the explanatory memorandum to the Bill which inserted those provisions into the Act indicates that these instruments are the key mechanism through which the gas market is regulated and the welfare of Australians protected and that a maximum penalty would only be made available if appropriate, otherwise a lower penalty will be prescribed through a gas market instrument.
- 3.14 In relation to the committee's privacy concerns, the minister advised that, although this will generally not be the case, where personal information is collected, used and disclosed under the instrument, the *Privacy Act 1988* will apply. He also advised as to the factors to be taken into account in determining what is 'contrary to the public interest' under subsection 43(3) of the instrument and undertook to amend the explanatory statement to include this information. Subsection 43(3) requires the Australian Competition and Consumer Commission to publish certain information, except where it would prejudice a supplier's commercial interests or is contrary to the public interest.
- 3.15 Additionally, the instrument sets out a mandatory code of conduct for the domestic gas market. While this is authorised by the enabling legislation, the committee noted that it generally considers such significant matters more appropriate for primary legislation due to the greater level of parliamentary oversight. Accordingly, the committee drew this matter to the Senate's attention under Standing order 23(4).
- 3.16 The committee thanks the minister for his engagement on the scrutiny concerns raised in relation to this instrument. The committee was pleased to conclude its examination of the instrument, in light of the minister's advice about the above scrutiny issues and undertaking to amend the instrument's explanatory statement.

Significant ongoing scrutiny concerns

Exemptions or modifications to primary legislation in Treasury portfolio instruments

- 3.17 In 2023, the committee again continued to raise longstanding, systemic scrutiny concerns about the modification or exemption of persons or entities from the operation of primary legislation, in relation to instruments made under the Treasury portfolio.
- 3.18 The committee remained particularly concerned about the duration of the exemptions and modifications, as the instruments about which it raised concerns were exempt from the sunset regime under the *Legislation Act 2003*

(Legislation Act) and were not otherwise time limited, such that they would remain in force on an ongoing basis. The committee continued to engage with the Assistant Treasurer and his department in relation to these instruments, including to hold a private briefing on 10 March 2023.

- 3.19 The committee also held a private briefing with the Australian Law Reform Commission (ALRC) on 20 April 2023, in light of its *Inquiry into Financial Services Legislation: Interim Report B*, which was tabled in Parliament on 30 September 2022 and which details a proposed model for corporations and financial services law.² This proposed model includes to recommend a single scoping order containing class exemptions to the primary legislation, and thematic rulebooks detailing specific areas of the law, both of which would be subject to sunseting.
- 3.20 The committee notes that the ALRC has since tabled its *Final Report on Reforming Corporations and Financial Services Legislation* on 18 January 2024,³ which is consistent with the recommendations of interim report B.

Corporations Amendment (Design and Distribution Obligations— Income Management Regimes) Regulations 2023 [F2023L00193]
Corporations Amendment (Litigation Funding) Regulations 2022 [F2022L01614]
Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 [F2022L01629]

Principle (l) exemption from primary legislation

- 3.21 In 2023, the committee engaged in extensive correspondence with the Assistant Treasurer about three particular instruments that introduce a number of ongoing exemptions to primary legislation via amendments to the Corporations Regulations 2001 (the ‘Corporations Regulations’), which are exempt from sunseting.
- 3.22 The Corporations Amendment (Design and Distribution Obligations— Income Management Regimes) Regulations 2023 amend the Corporations Regulations to exempt issuers of income management accounts from the obligation to make a target market determination under the *Corporations Act 2001* (the ‘Corporations Act’). The Corporations Amendment (Litigation Funding) Regulations 2022 (the ‘Litigation Funding Regulations’) amend the Corporations Regulations to exempt litigation funding schemes from the managed investment scheme regime, Australian Financial Services Licence requirements, product disclosure regime and anti-hawking provisions of the Corporations Act. The Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 (the ‘Rationalising ASIC Regulations’) amend the Corporations Regulations and the *National Consumer Credit Protection Regulations*

² Australian Law Reform Commission, [Interim Report B: Financial Services Legislation](#) (September 2022)

³ Australian Law Reform Commission, [Final Report: Confronting Complexity: Reforming Corporations and Financial Services Legislation](#) (November 2023).

2010 to incorporate longstanding and accepted matters currently contained in Australian Securities and Investments Commission (ASIC) legislative instruments into the regulations.

- 3.23 Instruments that modify, or exempt persons or entities from, the operation of primary legislation may limit parliamentary oversight and may subvert the appropriate relationship between Parliament and the Executive. Accordingly, the committee's longstanding view is that such measures should ordinarily be included in primary legislation unless a sound justification is provided for the use of delegated legislation. However, if such provisions are nonetheless in delegated legislation, the committee's view is that they should operate no longer than is strictly necessary, to ensure a minimum degree of regular parliamentary oversight.
- 3.24 Accordingly, the committee sought the Assistant Treasurer's advice, including as to why it was necessary and appropriate to use delegated, rather than primary, legislation to introduce the exemptions to the Corporations Act and the *National Consumer Credit Protection Act 2009*, whether there was any intention to move those exemptions into primary legislation, and whether the exemptions in the instruments could be time limited. The Assistant Treasurer advised that the use of delegated legislation was necessary for reasons including the important role of delegated legislation in removing prescriptive detail from the primary law, because changes should fit within existing legal hierarchies, and to ensure the exemptions are co-located with existing exemptions in the Corporations Regulations relating to the same subject matter to simplify and improve navigability of the law for stakeholders. The Assistant Treasurer also advised that the amendments formed part of Treasury's program of legislative amendments to simplify and improve navigability of portfolio legislation, including to ensure that Treasury portfolio laws remain current, fit-for-purpose and transparent.
- 3.25 After several rounds of correspondence with the committee which are detailed in its *Delegated Legislation Monitors*,⁴ the Assistant Treasurer undertook to seek amendments so that the measures in each of the three instruments cease after 10 years. However, he advised that the Corporations Regulations are exempt from sunseting (under the *Legislation (Exemption and Other Matters) Regulation 2015* which is administered by the Attorney-General's portfolio) because they are part of an intergovernmental scheme, sunseting would undermine commercial certainty, and they are subject to regular review and amendment. As these criteria continue to apply to the Corporations Regulations, they

⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2023](#) (25 January 2023), pp. 5-8, 13-16; [Delegated Legislation Monitor 3 of 2023](#) (8 March 2023), pp.10-15, 26-31; [Delegated Legislation Monitor 4 of 2023](#) (29 March 2023), pp. 5-7, 13-18; [Delegated Legislation Monitor 6 of 2023](#) (2 June 2023), pp 4-12; , [Delegated Legislation Monitor 8 of 2023](#) (2 August 2023), pp. 5-8.

necessitate an ongoing exemption from sunseting and therefore, he advised that there was no intention to recommend to the Attorney-General remove the exemption from sunseting.

- 3.26 Following this extensive engagement with the Assistant Treasurer and his undertaking, the committee was able to conclude its examination of the instruments and withdraw the protective notices of motion it had placed on them as the Assistant Treasurer's advice addressed its immediate scrutiny concerns.

Insurance Exemption Determination No. 1 of 2023 [F2023L000971]

Principle (l) exemption from primary legislation

- 3.27 Similarly, the Insurance Exemption Determination No. 1 of 2023 creates an exemption for a class of persons from certain provisions in sections 49J and 49L of the *Insurance Act 1973* (the 'Insurance Act'), as authorised by section 7(1) of that Act. This includes exempting the Appointed Auditor from auditing the information required by certain reporting standards. However, the committee was pleased to note that this instrument is subject to a 10-year sunseting period, in order to promote a minimum level of parliamentary oversight.
- 3.28 In addition, in response to the committee's request for advice, the Assistant Treasurer advised that, while there was no intention to instigate a specific review of the provisions in this instrument, regulators within the Treasury portfolio routinely assess the application and ongoing relevance of instruments. Further, the committee considers that assessment by regulators within the Treasury portfolio, of the application and relevance of such instruments will provide a level of additional oversight.
- 3.29 However, the committee re-iterates its concerns about the impact of ongoing exemptions from primary legislation on parliamentary oversight and, accordingly, will continue to monitor this issue going forward. The committee considers that at a minimum, a 10-year sunseting period ensures that Executive-made law remains fit for purpose and up-to-date, and facilitates a minimum degree of parliamentary scrutiny. The committee also considers this approach is consistent with the recommendations of the ALRC's *Financial Services Legislation: Interim Report B*.

Instruments exempt from disallowance

- 3.30 Standing order 23(4A) provides that the committee may scrutinise instruments that are not subject to disallowance, and whether it is appropriate for these instruments to be exempt from disallowance. Of the 1885 legislative instruments registered in 2023, 278 were exempt from disallowance. This equates to 14.7 per cent of exempt instruments, which is lower than the 19.3 per cent in 2022.
- 3.31 The committee considers that delegated legislation should be subject to disallowance unless there are exceptional circumstances. In 2023, the committee

continued to focus on scrutinising the justification provided for the exemption. In this reporting period, the committee continued to focus on raising this issue directly with relevant departments and agencies, via its secretariat, to ensure that where an instrument is exempt from disallowance, its explanatory statement identifies the legislative source and a justification for the exemption.

3.32 The committee also continued to list in its *Delegated Legislation Monitors* instruments registered in the relevant reporting period which did not meet its expectations in relation to an exemption from sunseting. In this section of the monitor, the committee includes a comprehensive list of all the instruments registered in the reporting period which did not meet its expectations in relation to an exemption from disallowance. This includes instruments that:

- are exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM Regulation);
- are exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in subsection 44(1) of the Legislation Act;
- override or modify primary legislation;
- trigger, or are a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restrict 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.

3.33 The committee will continue to monitor and report on this scrutiny issue going forward.

Instruments exempt from disallowance under the Biosecurity Act 2015

3.34 In 2023, the committee continued to raise its longstanding concerns about legislative instruments made exempt from disallowance under the *Biosecurity Act 2015* (Biosecurity Act) and the subsequent impact on parliamentary oversight.

3.35 Many such instruments relate to emergency measures, such as COVID-related measures or emergency agriculture measures. It has remained the committee's view that emergency delegated legislation should be subject to appropriate parliamentary oversight, with limited exemptions from disallowance. Where an instrument is exempt from disallowance, the committee expects that a detailed justification will be included in the explanatory statement. This approach upholds the Parliament's constitutional role as the primary institution responsible for making law and scrutinising possible encroachments on personal rights and liberties.

- 3.36 The committee has not accepted the argument that measures in delegated legislation are so scientific or technical that Parliament should not have oversight over the measures being introduced. In particular, it is not clear why parliamentarians would not be able to take into account scientific or technical evidence in their deliberations over an instrument. Lastly, the instances where an instrument has been disallowed by the Senate are rare, but nevertheless remain a crucial check on executive power.
- 3.37 The committee is also of the view that instruments which impact on personal rights and liberties should be enacted by Parliament, rather than by the Executive in delegated legislation, let alone in delegated legislation that is exempt from basic parliamentary oversight. In this regard, many of the determinations such as the COVID-19 travel bans have such an impact.
- 3.38 The committee also considers that the disallowance process is an opportunity to work in a constructive manner with the Executive to enhance delegated legislation to ensure that it operates and functions within the boundaries placed upon it by the Parliament. In relation to instruments which impose significant requirements on the Australian public, as many of the instruments made under the Biosecurity Act do, the committee considers that the disallowance process is necessary to facilitate appropriate debate and scrutiny of the use of emergency powers and would operate to ensure that such powers are not misused.
- 3.39 Therefore, in addition to raising this issue in its *Delegated Legislation Monitors*, the committee has continued to correspond with the Ministers for Agriculture, Fisheries and Forestry and Health and Aged Care and officials from their departments. Most recently, the committee held a private briefing with both ministers and senior officials from their departments on 22 March 2023.
- 3.40 The committee intends to continue pursuing its scrutiny concerns regarding this matter.

Instruments exempt from sunseting

Principle (k) exemption from sunseting

- 3.41 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. This process is called 'sunseting'.
- 3.42 The committee considers that the sunseting framework provides an important opportunity for the Executive to ensure that delegated legislation remains current and appropriate and allows Parliament to maintain effective and regular.
- 3.43 The committee considers that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances. It is the committee's view that where an

instrument is exempt from sunseting, or contain measures that will remain in force within another instrument that is exempt from sunseting, the explanatory statement should, at a minimum, provide a thorough justification for the exemption, noting the effect of exemptions from sunseting on parliamentary oversight.

- 3.44 In 2023, the committee focused on raising this issue directly with the relevant departments and agencies, via its secretariat, to ensure that where an instrument is exempt from sunseting, the explanatory identifies the legislative source of the exemption and provides a justification for the exemption.
- 3.45 While the committee remains concerned about the number of instruments that were made in 2023 that are exempt from sunseting, the committee is pleased to report that many of the departments and agencies with which it has engaged on this issue have made undertakings to include the source and justification in future explanatory statements.
- 3.46 Further, the committee continued to include a section in its monitor drawing the Senate's attention to a comprehensive list of all the instruments registered in the reporting period which did not meet its expectations in relation to an exemption from sunseting. This includes instruments that:
- (a) are exempt from sunseting under one of the broad classes of exemptions in section 11 of the LEOM Regulation;
 - (b) are exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in subsection 54(1) of the Legislation Act;
 - (c) override or modify primary legislation;
 - (d) trigger, or are a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
 - (e) restrict personal rights and liberties;
 - (f) facilitate the expenditure of public money on an ongoing basis; or
 - (g) otherwise contain a matter requiring parliamentary oversight.
- 3.47 The committee has become increasingly concerned about the continuing increase it has noticed in the instruments exempt from sunseting and will continue to monitor and report on this scrutiny issue going forward.

Senator Deborah O'Neill
Chair