

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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# Introduction

The Senate Standing Committee for the Scrutiny of Delegated Legislation, formerly the Senate Standing Committee on Regulations and Ordinances, was established in 1932. The role of the committee is to examine the technical qualities of all legislative instruments, and to decide whether they comply with the committee's non-partisan scrutiny principles or otherwise give rise to matters of interest to the Senate.

The *Delegated Legislation Monitor* (the Monitor) details the committee's views in relation to its technical scrutiny of legislative instruments registered on the Federal Register of Legislation. Part I of the Monitor details the committee's scrutiny concerns arising under the technical scrutiny principles set out in Senate standing order 23(3), extracted below. Part II of the Monitor details matters which the committee has resolved to draw to the attention of the Senate under standing order 23(4).

This Monitor details matters relating to the committee's scrutiny of **76** legislative instruments registered on the Federal Register of Legislation between **1 January 2023** and **31 January 2023**. This includes **63** disallowable instruments and **13** instruments exempt from disallowance. It also details the committee's ongoing consideration of instruments registered in previous periods.

## Committee information

### Terms of reference

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

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

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

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

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

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

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

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

#### *Resolving minor technical scrutiny concerns*

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

#### *Resolving significant technical scrutiny concerns*

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

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

### *Undertakings*

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

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

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

### **Disallowance process<sup>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.

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

## **Publications**

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

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

### ***Scrutiny News***

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

### ***Guidelines***

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

## **Other resources**

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

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

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

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

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

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## Part I: Introduction

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

### Chapter 1: New and ongoing matters

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

### Chapter 2: Concluded matters

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

### Chapter 3: Agency engagement

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

### Chapter 4: Undertakings

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

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



# Chapter 1

## New and ongoing matters

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

### New matters

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

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

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

### Overview

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

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

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

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

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

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

1.4 The Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 (the instrument) amends the Commission Rules to include a Code of Conduct which establishes minimum standards of conduct for approved aged care providers, workers, and governing persons,<sup>6</sup> and to enable the Commissioner to take action relating to compliance with the Code of Conduct.<sup>7</sup>

1.5 The committee's secretariat, on behalf of the committee, engaged with the Department of Health and Aged Care in relation to the instrument in January 2023. As the committee has retained scrutiny concerns with the instrument, it has now resolved to raise those scrutiny concerns with the minister.

## **Scrutiny concerns**

### ***Conferral of discretionary powers;<sup>8</sup> adequacy of explanatory materials<sup>9</sup>***

1.6 Section 23BE of the instrument provides that, if an investigation is undertaken in relation to compliance under section 23BD, the Commissioner may 'take any action' to deal with the outcome of an investigation that they consider appropriate. The explanatory statement provides four examples of actions the Commissioner may take following an investigation but notes that this list is not exhaustive, as section 23BE is intended to ensure that the outcome of any investigation can be dealt with appropriately and proportionately. The explanatory statement also indicates that 'it is not intended that the Commissioner be restricted in relation to the types of actions they may take to deal with the outcome of an investigation'.<sup>10</sup>

1.7 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. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.8 The committee is concerned that the instrument confers a significant broad discretionary power on the Commissioner, and neither the instrument nor the explanatory statement specifically defines the types of actions the Commissioner may take or provides factors which the Commissioner must take into account in exercising this power. The committee also expects that explanatory statements should state the

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6 Explanatory statement, p. 1.

7 Explanatory statement, p. 1.

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

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

10 Explanatory statement, p. 9.

nature and source of any relevant limitations and safeguards, including whether they are contained in law or policy.

**1.9 The committee therefore requests the minister's advice as to:**

- **whether the types of action that the Commissioner may take under section 23BE can be specifically defined and included in the instrument;**
- **what factors the Commissioner must take into account when exercising their discretion under section 23BE of the instrument;**
- **whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy; and**
- **how the Commissioner's investigative powers relate to the complaints mechanism under the *Aged Care Quality and Safety Commission Act 2018*.**



## **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).

2.2 In this Monitor, the committee is not concluding its examination of any instruments raising significant technical scrutiny issues.



# Chapter 3

## Agency engagement

3.1 As part of its technical scrutiny of legislative instruments, the committee may engage with relevant agencies via its secretariat to gather information or seek clarification to resolve minor technical scrutiny concerns. While this correspondence is confidential, the committee lists the relevant instruments on its website and provides a statistical overview of the relevant scrutiny issues raised in its *Annual Reports*. The committee reports on matters which cannot be satisfactorily resolved via engagement with the relevant agency in Chapter 1 of the Monitor.

3.2 Some instruments may be listed as both 'new' and 'concluded', where the committee via its secretariat has both raised and resolved concerns with the relevant agency in the period covered by the Monitor.

### New matters

3.3 Of the instruments registered on the Federal Register of Legislation between 1 January and 31 January 2023, the committee commenced engaging with the relevant agency via its secretariat about the following **three** instruments.<sup>1</sup>

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#### Instrument

Statement of Principles concerning epicondylitis (Reasonable Hypothesis) (No. 5 of 2023) [F2023L00019]

Telecommunications (Interception and Access) (Staff Members of Victoria Police) Declaration 2023 [F2023L00061]

Therapeutic Goods (Poisons Standard—February 2023) Instrument 2023 [F2023L00067]

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### Ongoing matters

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

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#### Instrument

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

Telecommunications (Infringement Notice Penalties) Determination 2022 [F2022L01741]

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

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

## Concluded matters

3.5 The committee has concluded its consideration of the following **ten** instruments after engagement with relevant agencies via its secretariat.<sup>3</sup>

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### Instrument

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

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

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

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

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

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

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

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

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

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

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

## Chapter 4

### Undertakings

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

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

#### Implemented undertakings

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

#### Outstanding undertakings

4.4 During this period, five new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. No new undertakings were made to amend an Act or legislative instrument or to conduct a review in the relevant period.

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

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



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

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## Part II: Introduction

Part II of the *Delegated Legislation Monitor* (the Monitor) identifies the instruments which the committee has resolved to draw to the attention of the Senate under Senate standing order 23(4) because they:

- contain significant issues;
- specify, prescribe or otherwise provide for Commonwealth expenditure or taxation; and
- do not meet the committee's expectations in relation to the source and appropriateness of exemptions from disallowance and sunseting, following scrutiny under standing orders 23(4A) and 23(3)(k).

### Chapter 5: Instruments raising significant issues

This Chapter details the instruments which the committee considers raise significant issues under standing order 23(4). In practice, this may include instruments which:

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

### Chapter 6: Expenditure and taxation in delegated legislation

This Chapter identifies the instruments registered in the relevant period which specify, prescribe or otherwise provide for Commonwealth expenditure or the levying of taxation, noting the importance of parliamentary oversight of these matters.

### Chapter 7: Exemptions from disallowance and sunseting

This Chapter identifies the instruments registered in the relevant period which are exempt from disallowance and sunseting, and which do not satisfy the committee's expectations in relation to the source and appropriateness of those exemptions under standing order 23(4A) and 23(3)(k).<sup>1</sup>

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



# Chapter 5

## Instruments raising significant issues

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

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

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

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



# Chapter 6

## Expenditure and taxation in delegated legislation

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

### Commonwealth expenditure

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

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

### ***Advance to the Finance Minister determinations***

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

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

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

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

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

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

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

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

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

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

Instrument	Amount	Grant/Program
Industry Research and Development (Central Coast Food Manufacturing Innovation Hub Program) Instrument 2022 [F2023L00013]	\$17.2 million	Central Coast Food Manufacturing Innovation Hub Program

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

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

6.9 The Annual Appropriation Acts set a debit limit on the total amounts that can be provided in general revenue assistance and specific purpose payments under sections 9 and 16 of the Federal Financial Relations Act. The *Appropriation Act (No. 2) 2021-2022* sets these limits at \$5 billion and \$25 billion, respectively. Noting the significant amount of expenditure which the relevant minister may determine subject to these limits, together with the non-disallowable status of the determinations, the committee has resolved to draw these instruments to the attention of the Senate under standing order 23(4).

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

6.10 The following table lists instruments providing for Commonwealth grants pursuant to the Federal Financial Relations Act framework registered in the relevant period.

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

Instrument	Amount	Description
Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 7) Determination 2023 [F2023L00002]	\$1 150 750 274.47	Determines amounts of financial assistance to be paid to the states, the Australian Capital Territory and the Northern Territory to: support the delivery of agreed outputs or projects; facilitate state and territory reforms; and reward states and territories for nationally significant reforms.

***Instruments providing for expenditure pursuant to special accounts***

6.11 In addition to instruments made under the Federal Financial Relations Act, the Commonwealth may make other instruments providing for or relating to payments to states, territories and other entities. The *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) empowers the Finance Minister to establish special accounts by legislative instrument (section 78) or enactment (section 80). Special accounts are a mechanism by which an amount of money in the consolidated revenue fund can be identified for a specific purpose and may only be expended subject to any conditions imposed on the account.

6.12 Where special accounts are established by primary legislation under section 80 of the PGPA Act, legislative instruments relating to the expenditure under the special account may be made. Such instruments may, for example, relate to investment of the expenditure or caps on the amount of expenditure under the special account.

6.13 As instruments that provide for or relate to special accounts can involve significant expenditure and may be exempt from disallowance, the committee has resolved to draw these instruments to the attention of the Senate.

6.14 The committee did not identify any instruments providing for or related to expenditure pursuant to special accounts in this period.

**Levying of taxation in delegated legislation**

6.15 The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. In this regard, the committee's longstanding view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate

of tax. The committee's concerns are heightened where the tax is not limited by a cap in the relevant enabling Act.

6.16 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary legislation rather than delegated legislation). This includes where an instrument imposes, or sets the rate of, a tax or levy. The committee has not identified any such instruments in this period.



# Chapter 7

## Exemptions from disallowance and sunseting

7.1 This Chapter lists the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) because they are exempt from disallowance and sunseting and do not satisfy the committee's expectations in relation to the source and appropriateness of the exemptions following the committee's scrutiny under standing orders 23(4A) and 23(3)(k).

### Exemptions from disallowance

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

7.3 Senate standing order 23(4A) provides that the committee may consider instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance. Noting the Senate's concern about the exemption of delegated legislation from disallowance, this section identifies the instruments which do not satisfy the committee's expectations regarding the circumstances of their exemption from disallowance.

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

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

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1 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

2 Items 1 to 4 of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from disallowance: instruments requiring the approval of either or both Houses of Parliament; instruments that are directions by a minister to any person or body; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money, including Advance to the Finance Minister determinations; or
- otherwise contains a matter requiring parliamentary oversight.

7.5 To assess whether an instrument is appropriately exempt from disallowance, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from disallowance.

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

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

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

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#### **Instrument**

**Biosecurity (Entry Requirements—Human Coronavirus with Pandemic Potential) Determination 2023 [F2023L00009]**

**Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 7) Determination 2023 [F2023L00002]**

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### **Exemptions from sunseting**

7.8 Senate standing order 23(3)(k) requires the committee to scrutinise instruments which are exempt from the sunseting provisions of the *Legislation*

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3 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

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

*Act 2003* (the Legislation Act), including whether it is appropriate for these instruments to be exempt from sunseting.

7.9 The sunseting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. Sunseting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

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

7.11 Where an instrument is exempt from sunseting, Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether the exemption is appropriate. Noting the Senate's concern about the exemption of delegated legislation from sunseting, this section identifies instruments which do not satisfy the committee's expectations regarding the appropriateness of their exemption from sunseting.

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

- 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>

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5 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

6 Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunseting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

7.13 To assess whether an instrument is appropriately exempt from sunseting, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from sunseting.

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

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

7.15 The committee has not identified any instruments registered in this period that do not meet the committee's expectations under standing order 23(3)(k).

**Senator Linda White**

**Chair**

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

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7 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

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