

The Senate

---

Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

---

Delegated Legislation Monitor

Monitor 10 of 2023

13 September 2023

© Commonwealth of Australia 2023

ISSN: 2652-4139 (print)

ISSN: 2652-4147 (online)

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3066  
Email: [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

This report can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 10 of 2023*; [2023] AUSStaCSDLM 105.

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

---

## Membership of the committee

### Current members

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

### Secretariat

Fattimah Imtoul, Secretary (A/g)  
Anika Khwaja, Principal Research Officer  
Nicole Maslaris, Principal Research Officer  
Anneka Atley, Senior Research Officer  
Parabhjot Saini, Legislative Research Officer

### Committee legal adviser

Professor Lorne Neudorf



## Contents

Membership of the committee .....	iii
Introduction.....	vii
<b>Part I—Technical legislative scrutiny .....</b>	<b>1</b>
<b>Chapter 1 : New and ongoing matters .....</b>	<b>3</b>
<b><i>New matters</i> .....</b>	<b>3</b>
Australian Education Regulations 2023 .....	3
Competition and Consumer (Gas Market Code) Regulations 2023 .....	8
Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 .....	14
<b>Chapter 2 : Concluded matters .....</b>	<b>21</b>
<b>Chapter 3 : Agency engagement.....</b>	<b>23</b>
<b><i>New matters</i> .....</b>	<b>23</b>
<b><i>Concluded matters</i> .....</b>	<b>23</b>
<b>Chapter 4 : Undertakings .....</b>	<b>25</b>
<b><i>New undertakings</i> .....</b>	<b>25</b>
<b><i>Implemented undertakings</i> .....</b>	<b>27</b>
<b>Part II—Matters of interest to the Senate .....</b>	<b>29</b>
<b>Chapter 5 : Expenditure and taxation in delegated legislation .....</b>	<b>31</b>
<b><i>Commonwealth expenditure</i> .....</b>	<b>31</b>
<b>Chapter 6 : Exemptions from disallowance and sunseting .....</b>	<b>33</b>
<b><i>Exemptions from disallowance</i> .....</b>	<b>33</b>
<b><i>Exemptions from sunseting</i> .....</b>	<b>35</b>



## 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 **132** legislative instruments registered on the Federal Register of Legislation between **7 July 2023** and **29 August 2023**. This includes **104** disallowable instruments and **28** instruments exempt from disallowance.

## 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.

## **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

---

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

of Bills. Past editions, and information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.

### **Guidelines**

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

### **Other resources**

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

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

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

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

---

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

---



## Chapter 1

### New and ongoing matters

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

#### New matters

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

### Australian Education Regulations 2023<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2023L01020</a>
<b>Purpose</b>	Repeals and remakes the Australian Education Regulations 2013 before the sunset date of 1 October 2023 to ensure current arrangements for Commonwealth financial assistance to schools may continue in substantially the same form. It also makes a small number of minor updates, clarifications and technical amendments.
<b>Authorising legislation</b>	<i>Australian Education Act 2013</i>
<b>Portfolio</b>	Education
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 31 July 2023).  Committee agreed to give notice of motion to disallow on 14 September 2023.

#### Overview

1.3 The Australian Education Regulations 2023 (the instrument) repeal and remake the Australian Education Regulations 2013, which are due to sunset on 1 October 2023, by operation of section 50(1) of the Legislation Act 2003.

1.4 The instrument's explanatory statement explains that the matters prescribed by the instrument are substantially the same as the Australian Education Regulations

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian Education Regulations 2023, *Delegated Legislation Monitor 10 of 2023*; [2023] AUSStaCSDL M 106.

2013, with some minor exceptions, including minor updates, clarifications and technical amendments.<sup>2</sup>

### Scrutiny concerns

#### ***Broad discretionary powers;<sup>3</sup> Coercive powers<sup>4</sup>***

1.1 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes provisions that broadly delegate administrative powers and functions, as well as those that confer coercive powers. Further, Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. Under this principle, the committee is also concerned with provisions in instruments that contain coercive powers.

1.2 Section 33 of the instrument contains broad discretionary powers, which are also coercive in nature, as they appear to allow entry and access to school premises and records. Specifically, section 33 authorises the minister to appoint an 'authorised person' if satisfied that they have 'suitable qualifications or experience', and once appointed, section 39 provides that a relevant authority or body must allow that person 'full and free access' to:

- (a) 'any record' relating to compliance with the enabling Act or the instrument, and financial administration of schools or the relevant body (in the case of a non-government school);<sup>5</sup>
- (b) premises occupied by the authority or body, including non-government schools, including to inspect the school and count students;<sup>6</sup> and
- (c) premises occupied by an authority or body to provide any help that is required in exercising these powers.<sup>7</sup>

1.3 Section 39A also requires an authority or body to provide information or records requested by either the minister or the 'authorised person', in relation to compliance with the legislative regime and financial administration of schools.

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

---

<sup>2</sup> Explanatory statement, p.2.

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

<sup>4</sup> Senate standing order 23(3)(h).

<sup>5</sup> See subsections 39(2)(3).

<sup>6</sup> See subsection 39(4).

<sup>7</sup> See subsection 39(5).

the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to outline the nature and source of any relevant limitations on the exercise of the powers.

1.5 Further, the committee considers that provisions which contain coercive powers have the potential to seriously trespass on personal rights and liberties and should not ordinarily be included in delegated legislation. Where an instrument nevertheless contains such provisions, the committee expects the explanatory statement to describe the nature and scope of the provisions and the circumstances in which the powers will be exercised. The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, and whether independent review is available of decisions made.

1.6 In this regard, the instrument defines 'authorised person' only by reference to section 33, and neither the instrument nor the explanatory statement provides the factors that must be taken into account in determining whether an authorised person has 'suitable qualifications or experience'. The explanatory statement provides only that the nature of qualifications that may be considered suitable by the minister 'will vary depending on the nature of the inquiries or compliance activities to be undertaken by the person'. The instrument and explanatory statement also do not define what is meant by 'any record'.

1.7 The explanatory statement provides that the powers under section 39 enable the department to perform its regulatory role and collect evidence to support eligibility requirements under the enabling Act. It also includes some limitations and safeguards in subsections 39(6)(7) in relation to reasonable notice requirements. However, there do not appear to be any review mechanisms available in relation to decisions made under any of these sections.

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

- **what factors the minister may take into account in determining whether an 'authorised person' has suitable qualifications or experience or whether this phrase can be defined in the instrument or the explanatory statement; and**
  - **any further detail about the nature and scope of the powers in sections 39 and 39A including how these powers have been or are intended to be exercised; and**
  - **whether any additional safeguards or limitations apply to the exercise of the powers or functions in sections 33, 39 and 39A, including the availability of any review mechanisms.**
-

**Privacy<sup>8</sup>**

1.9 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy.

1.10 The instrument appears to provide for the collection, use and/or disclosure of information, including personal information.

1.11 The committee considers that provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary, rather than delegated, legislation. Where an instrument nevertheless contains such provisions, the explanatory statement should explain the nature and scope of the provisions (including the nature and extent of the information that may be disclosed and the persons and/or entities to whom disclosure is permitted). The explanatory statement should also address why the provisions are considered necessary and appropriate, what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* (the Privacy Act) applies).

1.12 Section 39(a) requires 'full and free access' to any record relating to compliance with the enabling Act or the instrument, and financial administration. Section 39A also requires the provision of information or records requested by either the minister or the 'authorised person', in relation to compliance with the legislative regime and financial administration of schools.

1.13 The explanatory statement explains that section 39 enables the department to perform its regulatory role effectively to investigate and collect evidence from approved authorities to ensure they meet the eligibility requirements for funding under the Act. However, while the explanatory statement indicates that the safeguards in the Privacy Act apply in relation to the minister's disclosure of 'school education information', it is unclear to the committee whether these safeguards extend to authorised persons collecting information under sections 39 and 39A.

**1.14 In light of the above the committee requests the minister's advice as to whether:**

- **the information that may be collected, used and/or disclosed under sections 39 and 39A includes personal information; and**
- **if so, whether any statutory safeguards apply to protect the personal information that may be collected, used and/or disclosed under these provisions, including whether the *Privacy Act 1988* applies.**

---

<sup>8</sup> Senate standing order 23(3)(h).

**Availability of independent merits review<sup>9</sup>**

1.15 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits, or fails to provide for the independent review of decisions affecting rights, obligations, or interests. Where an instrument empowers a decision-maker to make discretionary decisions, the committee expects those decisions will be subject to merits review.

1.16 The instrument contains a number of discretionary provisions (including in sections 5, 9B, 11, 12, 21, 23, 25, 25B, 26, 27, 28, 29, 30, 30(1), 31, 33, 36, 39A, 43, 46, 52, 58, 58A, 58B, 59, 63, 65 and Schedule 1. The instrument provides that a decision made under section 9B(3) is a reviewable decision).<sup>10</sup> However, although decisions under section 9B(3) are reviewable, it is unclear whether any other decisions in the instrument are subject to independent review.

1.17 Where a decision under an instrument is excluded from merits review, the committee expects the explanatory statement to explain what characteristics of the decision justify the exclusion by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*<sup>11</sup>

1.18 In this case, the explanatory statement to this instrument does not explain whether the decisions are subject to independent review.

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

- **decisions (apart from decisions under section 9B(3)) made under the instrument are exempt from merits review; and**
- **if so, what characteristics of these decisions justify the exclusion of merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?***

---

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

<sup>10</sup> Section 9B(3) enables the minister to determine that a person who does not meet the specified requirements is to be included in a non-government school's census day enrolment if satisfied that special circumstances justify the determination, is a reviewable decision.

<sup>11</sup> Administrative Review Council (1999), [\*What decisions should be subject to merits review?\*](#)

## Competition and Consumer (Gas Market Code) Regulations 2023<sup>12</sup>

<b>FRL No.</b>	<a href="#">F2023L00994</a>
<b>Purpose</b>	Establishes a mandatory code of conduct for the domestic wholesale gas market.
<b>Authorising legislation</b>	<i>Competition and Consumer Act 2010</i>
<b>Portfolio</b>	Climate Change, Energy, the Environment and Water
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee agreed to give notice of motion to disallow on 14 September 2023.

### Overview

1.20 The Competition and Consumer (Gas Market Code) Regulations 2023 (the instrument) are made under the *Competition and Consumer Act 2010* (the Act) and establish a mandatory code of conduct for the domestic wholesale gas market, pursuant to sections 53L and 172 of the Act.

### Scrutiny concerns

#### ***Significant penalties in delegated legislation***<sup>13</sup>

1.21 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument imposes significant penalties. The instrument contains several significant penalty provisions that include penalties of up to 1,200 penalty units (currently \$375,600)<sup>14</sup> for individuals and 6,000 (currently \$1,878,000)<sup>15</sup> for bodies corporate.<sup>16</sup>

1.22 In the committee's view, significant penalties should ordinarily be included in primary, rather than delegated, legislation, to ensure appropriate parliamentary

<sup>12</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Competition and Consumer (Gas Market Code) Regulations 2023, *Delegated Legislation Monitor 10 of 2023*; [2023] AUSStaCSDL M 107.

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

<sup>14</sup> See the Crimes (Amount of Penalty Unit) Instrument 2023.

<sup>15</sup> See the Crimes (Amount of Penalty Unit) Instrument 2023.

<sup>16</sup> Sections 10(1), 11, 12, 13, 14(1), 16(1), 17, 18(1), 20(1), 21(1), 24(1), 25(1), 33(1), 34(1), 35(1), 36(1), 36(2), 37(1), 38(1), 39(1), 40(5), 41(1), 41(6), 41(7) and 74(1).

oversight of the scope of the offence and penalty. However, where an instrument nonetheless imposes significant penalties, the committee expects the explanatory statement to explain the nature and scope of the offence, and what penalties apply. The committee also expects the explanatory statement to justify why the penalty is appropriate to the relevant offence and why it is necessary and appropriate to include such significant penalties in delegated legislation.

1.23 In this instance, the explanatory statement provides that the penalties are authorised by the Act, and that they will provide an effective deterrent and address imbalances in bargaining power in the market. However, the explanatory statement does not appear to adequately explain why it is appropriate as a matter of principle to include such significant penalties in delegated legislation, noting these penalties vastly exceed the committee's usual expectations of 50 penalty units (for individuals) and 250 penalty units (for bodies corporate).

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

- **why the above significant penalties are necessary and appropriate for inclusion in delegated legislation; and**
- **further justification for the inclusion of such significant penalties, with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.**

---

***Availability of independent merits review;<sup>17</sup> availability of judicial review;<sup>18</sup> no-invalidity clause<sup>19</sup>***

1.25 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits, or fails to provide for the independent review of decisions affecting rights, obligations, or interests. This includes whether an instrument excludes or limits judicial review of administrative decisions.

1.26 Where an instrument empowers a decision-maker to make discretionary decisions, the committee expects those decisions should be subject to independent review. Where an instrument provides that certain decisions are excluded from merits review, the committee considers that the explanatory statement should comprehensively justify the nature and scope of the relevant exclusions. Further, in instances where a decision is excluded from merits review, the relevant explanatory statement should explain what characteristics of the decisions justify the exclusion by

---

<sup>17</sup> Senate standing order 23(3)(i).

<sup>18</sup> Senate standing order 23(3)(i).

<sup>19</sup> Senate standing order 23(3)(i).

reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*<sup>20</sup>

1.27 The instrument contains a number of discretionary decisions. However, the explanatory statement does not confirm whether these decisions are subject to independent merits review. In addition, the instrument appears to contain two 'no invalidity clauses' that exclude or limit the availability of judicial review. Subsections 61(6) and 76(2) provide that failure to comply with consultation requirements prior to granting a conditional ministerial exemption<sup>21</sup> and undertaking a review of the instrument's operation,<sup>22</sup> respectively, do not affect the validity of the exemption or the review.

1.28 The committee considers that limiting judicial review by a no-invalidity clause is a serious matter, because such clauses can restrict an applicant's capacity to seek independent review of relevant acts or decisions. Where an instrument contains a no-invalidity clause, the committee expects its explanatory statement to explain the nature and scope of the clause. Further, the explanatory statement should justify why it is necessary and appropriate to potentially restrict a person's access to independent review through the inclusion of the no-invalidity clause.

1.29 In this regard, the explanatory statement does not explain why the provisions are considered necessary and appropriate or whether there are any safeguards in place.

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

- **whether independent merits review is available in relation to discretionary decisions under the instrument and, if not, the circumstances of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*; and**
- **why the no invalidity clauses are considered necessary and appropriate and whether there are any safeguards in place in relation to decisions under those provisions.**

---

<sup>20</sup> Administrative Review Council (1999), [What decisions should be subject to merits review?](#)

<sup>21</sup> Subsection 61(6).

<sup>22</sup> Subsection 76(2).

**Strict liability offences<sup>23</sup>**

1.31 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This includes whether the instrument provides for offences of strict or absolute liability, as well as the right to be presumed innocent.

1.32 The requirement for the prosecution to prove fault on the part of a defendant is an important element of the common law right to be presumed innocent. The application of strict liability undermines this right by removing the requirement to prove fault in relation to one or more elements of an offence. Accordingly, where an instrument provides for strict liability offences, the committee expects the explanatory statement to justify why it is necessary and appropriate to apply strict liability to the offence with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.<sup>24</sup>

1.33 In this regard, it is unclear whether the offence provisions in the instrument are strict liability offences, as they do not appear to include a fault element and the explanatory statement does not confirm whether these offences are strict liability and, if so, whether they are necessary and appropriate.

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

- **whether the offence provisions in the instrument are intended to be offences of strict liability; and**
- **if so, why the strict liability offences are necessary and appropriate with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.**

---

**Privacy;<sup>25</sup> conferral of discretionary powers;<sup>26</sup> adequacy of explanatory materials<sup>27</sup>**

1.35 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material contains enough information to gain a clear understanding of the instrument.

1.36 The committee's view is that provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and

---

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

<sup>24</sup> Attorney General's Department, [A Guide to Framing Commonwealth Offences](#).

<sup>25</sup> Senate standing order 23(3)(h).

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

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

therefore should generally be included in primary, rather than delegated, legislation. However, where an instrument nevertheless contains such provisions, the committee expects that the explanatory statement should explain the nature and scope of the provisions. The explanatory statement should also address the nature and extent of the information that may be disclosed and the persons or entities to whom disclosure is permitted.

1.37 Further, the committee expects the explanatory statement to justify why the provisions are necessary and appropriate, and what safeguards are in place to protect this personal information, and whether these safeguards are in law or policy. This includes an indication of whether the safeguards in the *Privacy Act 1988* (the Privacy Act) apply.

1.38 Part 6 contains several provisions which provide for the collection, use and/or disclosure of information, but it is unclear to the committee whether this includes personal information and, if so, whether any safeguards apply to this collection, use and/or disclosure. For example, sections 37 and 38 create an offence<sup>28</sup> where a covered supplier fails to provide the Commission with certain details regarding a gas offer or agreement to supply regulated gas, as well as to provide the offers or agreements themselves.<sup>29</sup> In addition, section 75 empowers the Energy Minister to request the provision of certain information relating to a conditional ministerial exemption, but it appears unclear from both the instrument and explanatory statement whether a person is required to comply with such a request.

1.39 Further, section 43 requires the Commission to publish certain information specified in subsection (2) 'in a manner that the Commission considers appropriate' which may include the supplier's name, and details regarding any conditional ministerial exemptions that have been granted. The only limitation on the face of the instrument is whether doing so would prejudice the supplier's commercial interests or be 'contrary to the public interest'.

1.40 In addition, Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer broad discretionary powers on a person, which are subject to few limitations.

1.41 In this regard, neither the instrument nor explanatory statement defines or specifies the factors to be considered in determining what the Commission 'considers appropriate' or is 'in the public interest' under section 43.

---

<sup>28</sup> Punishable by 600 penalty units for individuals and 3,000 for a body corporate: see paragraphs (1)(a) and (b).

<sup>29</sup> See also sections 35 and 42.

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

- whether the information that may be collected, used and/or disclosed under the instrument includes personal information; and
  - whether any statutory safeguards apply to protect personal information that may be collected under Part 6, including whether the *Privacy Act 1988* applies; and
  - whether a person is required to comply with a request from the Energy Minister under section 75; and
  - what factors are required to be considered in determining what is 'contrary to the public interest' under subsection 43(3).
- 

***Matters more appropriate for parliamentary enactment***<sup>30</sup>

1.43 Finally, Senate standing order 23(3)(j) requires the committee to scrutinise each instrument as to whether it contains matters more appropriate for parliamentary enactment. This principle is underpinned by the concern that significant matters should be included in primary legislation, which is subject to a greater level of parliamentary oversight than delegated legislation.

1.44 The instrument establishes a mandatory code of conduct for the domestic wholesale gas market and, as noted above, establishes offence provisions with significant penalties. The explanatory statement indicates that the purpose of the instrument is to facilitate a 'well-functioning domestic wholesale gas market with adequate gas supply at reasonable prices and on reasonable terms'.

1.45 While the committee acknowledges the inclusion of such matters in the instrument is authorised by the enabling Act, it generally considers such significant matters to be more appropriate for inclusion in primary legislation.

**1.46 Accordingly, the committee draws this issue to the attention of the Senate under Senate standing order 23(4) on the basis that it considers the instrument contains matters ordinarily more appropriate for parliamentary enactment.**

---

<sup>30</sup> Senate standing order 23(3)(j).

## Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023<sup>31</sup>

<b>FRL No.</b>	<a href="#">F2023L00998</a>
<b>Purpose</b>	Remakes the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 and provides for the regulation of environmental management of petroleum and greenhouse gas activities in offshore areas.
<b>Authorising legislation</b>	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
<b>Portfolio</b>	Industry, Science and Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee agreed to give notice of motion to disallow on 14 September 2023.

### Overview

1.47 This Instrument is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) and remakes the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009. It provides for the regulation of environmental management of petroleum and greenhouse gas activities in offshore areas.

### Scrutiny concerns

#### ***Availability of independent merits review***<sup>32</sup>

1.48 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests.

1.49 Where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect rights, obligations or interests, the committee generally expects that those decisions will be subject to independent merits review. Accordingly, the explanatory statement to any instrument including such powers should explain:

- a) whether independent merits review is available; and

<sup>31</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023, *Delegated Legislation Monitor 10 of 2023*; [2023] AUSStaCSDLML 108.

<sup>32</sup> Senate standing order 23(3)(i).

- b) if merits review is not available, the characteristics of the relevant decisions which justify their exclusion from merits review. This should be done by applying the factors in the Administrative Review Council's guide: *What decisions should be subject to merits review?*.

1.50 This instrument confers a number of discretionary decisions on the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), including:

- a) whether to approve an offshore project proposal (s13)
- b) whether a proposal is suitable for publication (s9 and s13)
- c) whether to accept a submitted environment plan (s 33)
- d) whether to request a revision of an environment plan (s40)
- e) whether to withdraw acceptance of an environment plan (s43)

1.51 However, the instrument does not appear to provide for merits review of these decisions.

1.52 While the explanatory statement appears to justify why merits review is excluded in relation to some of the decisions in the instrument, it does not do so for the majority of the discretionary decisions provided for in the instrument.

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

- **whether the discretionary decisions that can be made under this instrument are subject to independent merits review, and if so, a list of these decisions; and**
- **a list of the discretionary decisions that are not subject to merits review under the instrument, and what characteristics of each of these decisions justify the exclusion of review, by reference to the grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?***

---

### ***Availability of judicial review***<sup>33</sup>

1.54 Senate standing order 23(3)(i) requires the committee to consider whether an instrument excludes or limits judicial review of administrative decisions. This includes limiting judicial review by no-invalidity clauses, as such clauses potentially restrict an applicant's capacity to seek independent review of the relevant act or decision.

1.55 Where an instrument contains a no-invalidity clause, the committee expects the explanatory statement to explain the nature and scope of the clause. Further, the explanatory statement should justify why it is necessary and appropriate to potentially

---

<sup>33</sup> Senate standing order 23(3)(i).

restrict a person's access to independent review through the inclusion of the no-invalidity clause.

1.56 The instrument appears to contain four no-invalidity clauses, in subsections 9(3), 13(3), 33(3) and 33(9). These clauses relate to the requirement for NOPSEMA to make specified decisions within a 30-day time period, or if it is unable to meet this timeframe, no later than the date it advises the titleholder that a decision will be made.

1.57 The explanatory statement provides that 'this ensures the validity of all decisions is maintained and provides NOPSEMA with the flexibility to make thorough and informed decisions in any circumstances'. However, there is no detail about the circumstances in which this may occur, noting that the timeframes may be set by NOPSEMA itself.

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

- **why the no-invalidity clauses in sections 9, 13 and 33 of the instruments are necessary and appropriate and whether there are any safeguards in place in relation to decisions under these provisions; and**
- **the circumstances, and likelihood, that NOPSEMA might exceed the specified time limits for making a decision, particularly as the instrument appears to allow NOPSEMA to determine the time period for making decisions, if the 30-day period cannot be met.**

---

***Strict liability;<sup>34</sup> significant penalties<sup>35</sup>***

1.59 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument provides for offences of strict liability. Additionally, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument imposes significant penalties.

1.60 The committee considers that the requirement for the prosecution to prove fault on the part of a defendant is an important aspect of the common law right to be presumed innocent. The application of strict liability undermines this right by removing the requirement to prove fault in relation to one or more physical elements of an offence. Accordingly, where an instrument includes offences of strict liability, the committee expects the explanatory statement to explain:

- the nature and scope of each offence, including what penalty attaches to each offence; and

---

<sup>34</sup> Senate standing order 23(3)(h)

<sup>35</sup> Senate standing order 23(3)(j).

- why it is considered necessary and appropriate to apply strict liability to the offence, by reference to the principles set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.<sup>36</sup>

1.61 Additionally, the committee considers that significant penalties should ordinarily be included in primary, rather than delegated, legislation. This is to ensure appropriate parliamentary oversight of the scope of the offence and penalty. Generally, the committee's view is that delegated legislation should not contain custodial penalties, or penalties exceeding a maximum penalty of 50 penalty units for individuals and 250 penalty units for corporations. Where an instrument imposes significant penalties, the committee expects the explanatory statement to explain the nature and scope of the offence and what penalties apply. The committee also expects a justification of why the penalty is appropriate to the relevant offence, and why it is necessary and appropriate to include such penalties in delegated legislation.

1.62 This instrument appears to contain a number of strict liability offences, for example, in sections 17-19, 47-50, 52-53 and 55. The penalties for these offences range from 30 to 80 penalty units. Specifically, subsections 17(1), 18(1) and 19(1) provide for 80 penalty units for an individual.

1.63 While the explanatory statement contains an explanation for why it is necessary and appropriate to impose offences of strict liability in this instrument (noting the potential consequences to the environment if the provisions are not complied with), the committee remains concerned about the high penalties imposed by subsections 17(1), 18(1) and 19(1) in delegated legislation.

1.64 While the committee appreciates that the explanatory statement provides the justification for the higher penalties, the committee considers that penalties that exceed 50 penalty units for individuals and 250 penalty units for corporations should be in primary rather than delegated legislation. The committee also notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences* states that generally, strict liability offences are only appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate).

**1.65 The committee would therefore appreciate the minister's advice as to:**

- **why the above significant penalties are necessary and appropriate for inclusion in delegated legislation; and**
- **the justification for including penalties that exceed the committee's expectations, and the expectations set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.**

---

<sup>36</sup> Attorney General's Department, [A Guide to Framing Commonwealth Offences](#).

**Legal certainty;<sup>37</sup> clarity of drafting<sup>38</sup>**

1.66 Senate standing order 23(3)(m) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes ensuring legal certainty. Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting contains an error or is unclear.

1.67 Sections 57 and 58 of the instrument provide that a fee is payable to NOPSEMA which is 'the total of the expenses incurred by NOPSEMA' in considering the relevant proposal or assessing the relevant financial assurance arrangements.

1.68 A note to these sections in the instrument provides that 'it is expected that NOPSEMA and the person...will agree on the terms of payment of the fee. The invoice will state the terms, whether or not there is an agreement'.

1.69 The explanatory statement provides that NOPSEMA's functions under the Act and regulations are fully cost-recovered through levies and fees payable by the offshore petroleum and greenhouse gas storage industries. Further, the amount of the fee is the total of the expenses incurred by NOPSEMA in considering the proposal to date. Therefore, if a proposal is withdrawn before a decision is made to accept or refuse the proposal, the fee will represent NOPSEMA's expenses in considering the proposal up until the point that the proposal is withdrawn.

1.70 These sections appear to impose an unknown liability on a person or body corporate that submits a proposal for NOPSEMA's consideration. The committee is concerned that such a broad provision imposing a financial liability, particularly one that applies even if a proposal is withdrawn, is in delegated legislation.

1.71 While the committee appreciates the note in the instrument which states that it is expected that NOPSEMA and the person will agree on the terms of payment, this is not a requirement, nor are there any other limitations or safeguards that appear to apply to what can be charged.

1.72 In the absence of further information in the explanatory statement, it is unclear how the relevant fees will be calculated or negotiated, whether there is a maximum amount that can be charged, or if a person may seek either internal or independent review of the fee that is determined.

**1.73 Therefore, the committee requests the minister's advice about:**

- **how the fees referred to in sections 57 and 58 of the instrument will be calculated; and**

---

<sup>37</sup> Senate standing order 23(3)(m).

<sup>38</sup> Senate standing order 23(3)(e).

- 
- **noting the instrument states 'that it is expected that NOPSEMA and the person...will agree on the terms of payment of the fee', further detail about the process in place to ensure an agreement; and**
  - **whether there is a maximum cap or limit on the fee that can be charged; and**
  - **whether a person may seek internal or independent review of the fee that is determined and if so, further detail about this.**



## **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 concerns.



## Chapter 3

### Agency engagement

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.

3.1 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

3.2 The committee commenced engaging with the relevant agency via its secretariat about the following instruments.<sup>1</sup>

##### Instrument

Corporations (Derivatives) Determination 2023 [F2023L01072]

Defence (Visiting Forces) Amendment Regulations 2023 [F2023L01002]

Marine Order 501 (Administration — national law) 2023 [F2023L01069]

Social Security (Remote Engagement Program Payment) Determination 2023 [F2023L01003]

#### Concluded matters

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

##### Instrument

Aviation Transport Security (Screening Officer Requirements) Determination 2023 [F2023L00962]

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

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



## Chapter 4 Undertakings

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

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

### New undertakings

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

Instrument	Undertaking	Date made
<b>Aviation Transport Security (Screening Officer Requirements) Determination 2023 [F2023L00962]</b>	The Department of Home Affairs undertook to amend the explanatory statement in response to the committee's scrutiny concerns.	08/09/2023
<b>Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023 [F2023L00193]</b>	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31/07/2023
<b>Corporations Amendment (Litigation Funding) Regulations 2022 [F2022L01614]</b>	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31/07/2023
<b>Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 11) Determination 2023 [F2023L00559]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	19/07/2023

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

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

Instrument	Undertaking	Date made
<b>Health Insurance (prudential standard) determination No. 2 of 2023 [F2023L00719]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Health Insurance (prudential standard) determination No. 4 of 2023 [F2023L00733]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Health Insurance (prudential standard) determination No. 5 of 2023 [F2023L00734]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Health Insurance (prudential standard) determination No. 6 of 2023 [F2023L00738]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Health Insurance (prudential standard) determination No. 7 of 2023 [F2023L00689]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Health Insurance (prudential standard) determination No. 8 of 2023 [F2023L00691]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Health Insurance (prudential standard) determination No. 9 of 2023 [F2023L00695]</b>	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023
<b>Long Service Leave (Commonwealth Employees) Amendment (Recognising Transferring Employees) Regulations 2023 [F2023L00834]</b>	The Department of Prime Minister and Cabinet undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	27/07/2023

<b>Instrument</b>	<b>Undertaking</b>	<b>Date made</b>
<b>Radiocommunications (Spectrum Licence Allocation—3.4/3.7 GHz Bands) Determination 2023 [F2023L00865]</b>	The Australian Communications and Media Authority undertook to issue a supplementary explanatory statement with the additional information requested for inclusion.	16/08/2023
<b>Statement of Principles concerning peripheral neuropathy (Balance of Probabilities) (No. 73 of 2023) [F2023L00941]</b>	The Repatriation Medical Authority undertook to progress amendments to the explanatory statement to the instrument to address the committee's scrutiny concerns.	18/08/2023
<b>Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 [F2023L01629]</b>	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31/07/2023

## Implemented undertakings

4.4 Since the last Monitor was tabled, the following undertakings have been implemented.

<b>Instrument</b>	<b>Undertaking</b>	<b>Date implemented</b>
<b>Human Services (Medicare) (Medicare Programs) Amendment Specification 2023 [F2023L00522]</b>	The Department of Social Services undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	23/05/2023
<b>Statement of Principles concerning peripheral neuropathy (Balance of Probabilities) (No.73 of 2023) [F2023L00941]</b>	The Repatriation Medical Authority undertook to progress amendments to the explanatory statement to the instrument to address the committee's scrutiny concerns.	18/08/2023



---

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

---



## Chapter 5

### Expenditure and taxation in delegated legislation

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

#### Commonwealth expenditure

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

5.2 Instruments made under the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified. The committee has resolved to draw these instruments to the Senate's attention under Senate standing order 23(4).<sup>2</sup>

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

Instrument	Amount	Grant/Program
<b>Financial Framework (Supplementary Powers) Amendment (Industry, Science and Resources Measures No. 2) Regulations 2023 [F2023L01019]</b>	\$15 Million	Government seeking to acquire shares in Silicon Quantum Computing Pty Ltd

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

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



## Chapter 6

### Exemptions from disallowance and sunseting

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

#### Exemptions from disallowance

6.2 On 16 June 2021, the Senate resolved that delegated legislation should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.<sup>3</sup>

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

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

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>4</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>5</sup>
- overrides or modifies primary legislation;

---

<sup>3</sup> For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

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

<sup>5</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

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

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

6.6 Further information about the committee's expectations regarding the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>6</sup>

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

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

#### **Instrument**

Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation Instrument No. APVMA 3, 2023 [F2023L01013]

Clean Energy Finance Corporation Investment Mandate Direction 2023 [F2023L01023]

Competition and Consumer (Price Inquiry—Child Care) Amendment Direction 2023 [F2023L01113]

Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 1) Determination 2023 [F2023L01012]

Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 2) Determination 2023 [F2023L01087]

Food Standards (Application A1227 – Alpha-arabinofuranosidase from GM *Trichoderma reesei* as a processing aid) Variation [F2023L01124]

<sup>6</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2<sup>nd</sup> edition (February 2022) pp. 47–49; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 61–72; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 99–123.

## Instrument

Food Standards (Application A1228 – Endo-1,4-beta-xylanase from GM *Trichoderma reesei* (gene donor: *Talaromyces leycettanus*) as a processing aid) Variation [F2023L01120]

Food Standards (Application A1229 – Carboxypeptidase from GM *Aspergillus oryzae* as a processing aid) Variation [F2023L01121]

Food Standards (Proposal P1061 – Code Revision (2023)) Variation [F2023L01004]

Superannuation Industry (Supervision) Act exemption No. 1 of 2023 [F2023L01078]

Superannuation Technical Determination No. 1 of 2023 – Actual and benchmark return formulae modifications [F2023L01066]

Torres Strait Fisheries (Furnishing of Logbooks) Instrument 2023 [F2023L01024]

## Exemptions from sunseting

6.8 Senate standing order 23(3)(k) requires the committee to scrutinise instruments which are exempt from the sunseting provisions of the *Legislation Act 2003* (the Legislation Act), including whether it is appropriate for these instruments to be exempt from sunseting.

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

6.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.<sup>7</sup>

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

<sup>7</sup> For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

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

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>8</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>9</sup>
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

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

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>10</sup>

---

<sup>8</sup> Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunseting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

<sup>9</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

<sup>10</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2<sup>nd</sup> edition (February 2022) pp. 34–35; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 87–88 and 99–123.

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

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

**Instrument**

Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation Instrument No. APVMA 3, 2023 [F2023L01013]

Clean Energy Finance Corporation Investment Mandate Direction 2023 [F2023L01023]

Competition and Consumer (Price Inquiry—Child Care) Amendment Direction 2023 [F2023L01113]

Defence (Visiting Forces) Amendment Regulations 2023 [F2023L01002]

Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 1) Determination 2023 [F2023L01012]

Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 2) Determination 2023 [F2023L01057]

Food Standards (Application A1227 – Alpha-arabinofuranosidase from GM *Trichoderma reesei* as a processing aid) Variation [F2023L01124]

Food Standards (Application A1228 – Endo-1,4-beta-xylanase from GM *Trichoderma reesei* (gene donor: *Talaromyces leycettanus*) as a processing aid) Variation [F2023L01120]

Food Standards (Application A1229 – Carboxypeptidase from GM *Aspergillus oryzae* as a processing aid) Variation [F2023L01121]

Food Standards (Proposal P1061 – Code Revision (2023)) Variation [F2023L01004]

Superannuation Industry (Supervision) Act exemption No. 1 of 2023 [F2023L01078]

Superannuation Technical Determination No. 1 of 2023 – Actual and benchmark return formulae modifications [F2023L01066]

Taxation Administration (Defence Related International Obligations and Other Matters – Indirect Tax Refunds) Determination 2023 [F2023L01017]

**Senator Linda White**  
**Chair**