The Senate

Standing Committee for the Scrutiny of Delegated Legislation

Delegated Legislation Monitor

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Introduction

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

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

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

(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[1]

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

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

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

Publications

Delegated Legislation Monitor

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

Scrutiny News

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

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

Guidelines

Guidelines relating to the committee's scrutiny principles are published on the committee's website.

Other resources

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

The *Federal Register of Legislation* should be consulted for the text of instruments, explanatory statements, and associated information.

The *Senate Disallowable Instruments List* provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.

The *Disallowance Alert* records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.

Report snapshot

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Legislative instruments registered on the Federal Register of Legislation between 19 February and 27 February 2024	26
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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 instrument listed below.

Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024[1]

FRL No.	F2024L00183
Purpose	The purpose of this instrument is to allow for the use of computerised decision-making, by determining that condition 8208 is part of the designated migration law. This enables the Minister to arrange for the use of computer programs to make a decision, exercise a power or comply with an obligation, or do anything else relating to a decision, power or obligation, in relation to critical technology related study under condition 8208.
Authorising legislation	*Migration Act 1958*
Portfolio	Home Affairs
Disallowance	Exempt from disallowance.

Overview

1.3 Section 5 of the Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024 determines visa condition 8208 in Schedule 8 of the Migration Regulations 1994 (the Regulations) to be part of the 'designated migration law' for the purposes of subsection 495A(3) of the *Migration Act 1958* (the Act). This has the effect of enabling the minister to arrange for the use, under their control, of computer programs, to make a decision, exercise 'any power', comply with 'any

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024, *Delegated Legislation Monitor 3 of 2024*; [2024] AUSStaCSDLM 14.

obligation' or 'do anything else related to' making a decision, exercising a power or complying with an obligation in relation to visa condition 8208.[2]

1.4 This visa condition (set out in subclause 8208(1) of Schedule 8 to the Regulations) prohibits a visa holder from undertaking critical technology-related study unless the minister is satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology by the holder and the minister has provided approval for the visa holder to undertake the critical technology-related study in writing.[3] As this provision is designated migration law by the operation of section 5 of the instrument, any decision, exercise of power or compliance with an obligation in relation to determining whether there is an unreasonable risk of unwanted transfer of critical technology by the visa holder and the approval to undertake critical technology-related study can now be done by the operation of a computer program.

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

Scrutiny concerns

Automated decision-making;[4] conferral of discretionary powers;[5] adequacy of explanatory materials[6]

1.6 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 where an instrument provides for automated decision-making for discretionary decisions. The committee's expectations in relation to this matter are set out in guidelines available on the committee's website. 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. Finally, 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.

1.7 The minister's decision to approve the visa holder undertaking a course of study in a critical technology-related area is contingent on the minister's satisfaction that there is not an unreasonable risk of an unwanted transfer of critical technology by the visa holder in paragraph 8208(1)(a) of the Regulations. The minister's decision to approve a visa holder under paragraph 8208(1)(b) is therefore a discretionary decision.

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2 *Migration Act 1958*, subsection 495A(1).

3 Migration Regulations 1994, Schedule 8, subclause 8208(1).

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

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

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

1.8 The committee considers that the use of an automated decision-making process may operate as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of each individual case. Accordingly, the committee considers that, while technology may be used to assist in the decision-making process, instruments should not provide for the complete automation of discretionary decisions themselves. For this reason, the committee considers that the use of automated systems to make decisions is generally suitable only in relation to non-discretionary decisions, except where the scope of the discretion is narrow and the decision-maker is required to apply objective criteria to determine the outcome.

1.9 Where an instrument provides for automated decision-making, it is expected that the explanatory statement justifies why it is considered necessary and appropriate. Additionally, the explanatory statement should include an explanation of the nature of the automated decision-making, including any elements of discretion and what safeguards are in place, such as appropriate review rights and opportunities for correcting errors. The committee also considers that explanatory materials should be sufficiently clear to enable users of the law to understand their legal rights and obligations, particularly in this instance, noting the impact that discretionary decisions can have on an individual's rights and interests.

1.10 In this instance, the committee notes that subsection 495A(1) of the Act enables the minister to arrange for the use of computer programs for 'any purposes' for which the minister 'may, or must' under the designated migration law make 'a decision', exercise 'any power' or comply with 'any obligation' or 'do anything else related' to making a decision, exercising a power or complying with an obligation. Subclause 8208(1) in Schedule 8 to the Regulations provides that a visa holder must not undertake critical technology related study unless the minister is satisfied that there is not an unreasonable risk of an unwanted transfer or critical technology by the holder; and the minister has approved the holder undertaking the study. However, the explanatory statement does not detail what aspects of these decisions under condition 8208 will be made by the computer program and merely restates the effect of the instrument:

> Specifically, by determining that condition 8208 is part of the designated migration law, this allows the Minister to arrange for the use of computer programs to make a decision, exercise a power or comply with an obligation, or do anything else relating to a decision, power or obligation, in relation to critical technology related study under condition 8208.[7]

1.11 As the entirety of condition 8208 is determined to be designated migration law, it appears that the minister's discretion to disapply condition 8208 by assessing the level of risk associated with a visa holder under paragraph 8208(1)(a) can be exercised

7 Explanatory statement, p. 2.

by a computer program. The explanatory statement also does not provide any justification as to why it is necessary and appropriate to use automated decision-making in this circumstance and what safeguards are applicable to discretionary decisions made by a computer program, such as the application of merits review, the correction of errors, and sufficient oversight of the automated decision-making process.

1.12 The committee further notes that as the explanatory statement does not provide information as to safeguards available and how errors in automated decision-making may be identified, such as whether the computer program is routinely audited or if decisions made by the computer are reviewed by the minister (or their delegate), it is unclear to the committee how decisions will be made without fettering the discretion of the minister. The committee is aware that section 495B of the Act enables the minister to substitute a computerised decision for one that is more favourable to the applicant in the event of a computer program not functioning correctly. However, it is unclear to the committee how a malfunction is identified and how the minister would decide in practice to substitute a more favourable decision. The committee's concerns are heightened in this instance as subsection 495B(2) provides that the minister does not have a duty to consider whether to exercise the power to substitute a decision under subsection 495B(1) of the Act.

1.13 Finally, the committee notes that under paragraph 4.02(4)(u) of the Regulations, the decision not to approve a visa holder undertaking critical technology related study for the purposes for condition 8208 is a reviewable decision under subsection 338(9) of the Act. The committee generally does not consider the availability of review, of itself, to be an adequate safeguard when automating discretionary decisions, nor as an adequate justification for the appropriateness of this form of decision-making. Additionally, noting the committee's concerns above about the scope and nature of the decision-making authorised by the instrument, it is unclear how merits review will operate in this context, as the explanatory statement does not identify which aspects of condition 8208 will be made by the computer program and whether the computer program is able to provide the applicant with written reasons for the decision which the applicant would be able to use to seek review.

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

- **whether further detail can be provided about the scope and nature of decision making under the instrument, including which aspects of decisions relating to visa condition 8208 will be made by a computer program and the extent to which these involve discretion;**
- **whether detail can be provided regarding the information which informs the decision made by the computer program, including whether advice is provided by other government departments and agencies;**

- **why it is considered necessary and appropriate for the instrument to provide for automated decision-making, noting that it appears automated decision-making may be used for any purpose in relation to making a decision, exercising a power or complying with any obligation relating to visa condition 8208;**
- **what safeguards are in place to ensure that the minister (or their delegate) exercises their discretionary powers under subclause 8208(1) of Schedule 8 to the Migrations Regulations personally and without fetter;**
- **the mechanisms used to identify errors in automated decision-making and, where errors arise, the mechanisms to correct those errors; and**
- **noting that it is unclear which aspects of the decisions will be made by a computer program, how merits review is intended to operate as a safeguard and whether applicants will be provided with a written statement of reasons for relevant decisions.**

1.15 The committee also requests the minister's advice as to whether consideration has been given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide*[8] in relation to providing for automated decision-making.

8 Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide* (2019).

Ongoing matters

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

Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023[9]

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

Overview

1.17 This instrument is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act). It remakes the Offshore Petroleum and Greenhouse Gas (Greenhouse Gas Injection and Storage) Regulations 2011, which are due to sunset on 11 April 2024. The measures in the instrument facilitate and regulate safe and sustainable greenhouse gas injection and storage operations in offshore areas.

1.18 The committee initially raised scrutiny concerns with the instrument on 7 February 2024 in *Delegated Legislation Monitor 1 of 2024*[10] and the minister

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9 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023; [2024] AUSStaCSDLM 15.

10 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) pp. 16–22.

provided a response dated 14 February 2024.[11] As the committee retained concerns, it sought the minister's further advice on 28 February 2024 in *Delegated Legislation Monitor 2 of 2024*,[12] and the minister provided a response on 12 March 2024.[13] As the committee retains scrutiny concerns about the below matters, it has resolved to raise those concerns with the Minister for Resources and Northern Australia.

Scrutiny concerns

Availability of independent merits review[14]

1.19 In *Delegated Legislation Monitors 1 and 2 of 2024*, the committee raised concerns about the exclusion of independent merits review of the following decisions made by the minister under the instrument:

- to approve or refuse to approve a draft site plan,[15] if satisfied that it meets the criteria in Division 2 of the instrument (subsections 25(1) and 25(2)); and
- to withdraw approval of a site plan where the licensee has failed to meet the conditions in paragraph 32(1)(b) (subsection 32(2)).[16]

1.20 The instrument's explanatory statement justifies the exclusion of decisions under subsection 25(1) on the basis that they are a preliminary step to decisions under the OPGGS Act to provide an offer document advising the applicant that the minister is prepared to subsequently grant a greenhouse gas injection licence. It justifies the exclusion of decisions under subsection 32(2) on the basis that they are of a law enforcement nature. While the Administrative Review Council's Guide, *What decisions should be subject to merits review?* (the ARC guide)[17] recognises these are appropriate grounds for excluding merits review, the committee was unclear as to how subsections 25(1) and 32(2) fell within those categories. The committee therefore sought the minister's advice in *Delegated Legislation Monitor 1 of 2024* as to whether further

11 See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation (14 February 2024) p. 5.

12 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 2 of 2024* (28 February 2024) pp. 11–16.

13 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

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

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

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) pp. 17–19; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 2 of 2024* (28 February 2024) pp. 12–14.

17 Administrative Review Council, *What decisions should be subject to merits review?* (1999).

justification could be provided for the exclusion of merits review with reference to the ARC guide.[18]

1.21 In her response of 14 February 2024,[19] the minister advised that the Australian Government had announced a policy review of the offshore environmental management framework, inclusive of the carbon capture and storage regulatory regime, as part of which the availability of independent merits review would be further considered. In the meantime, it was important that the regulations continue in force for regulatory certainty, to provide a robust framework, and noting that the previous regulations also do not provide for merits review.

1.22 While welcoming the minister's advice that the application of merits review would be considered as part of the upcoming policy review, the committee retained concerns. The minister's response did not provide detail about the expected timeframe for undertaking and implementing such a review and did not address the committee's immediate scrutiny concerns as, prior to the upcoming review, the relevant decisions remain excluded from merits review. Accordingly, the committee sought further justification for excluding merits review, with reference to the grounds cited in the explanatory statement or any other grounds in the ARC guide. The committee also sought the minister's advice as to whether, if independent merits review could not be provided for, any other mechanisms such as internal review were available. Finally, the committee sought advice about the expected timeframes for the policy review.

Minister's response[20]

1.23 In her correspondence of 12 March 2024, the minister advised that, as described in the explanatory statement, it is appropriate to exclude decisions under subsection 25(1) because they are preliminary in nature, and decisions under subsection 32(2) because they have the character of law enforcement decisions (citing the ARC guide). Regarding decisions under subsection 25(1), the minister further clarified that these decisions are preliminary to the substantive decision under the OPGGS Act, which determines whether the applicant for a greenhouse gas (GHG) injection licence will receive an offer document advising that the minister is prepared to grant the licence (which is also not a reviewable decision). However, the minister also referred to the ARC guide which states that, for preliminary or procedural decisions, the beneficial effect of review is generally limited by the fact that they do not generally have substantive consequences.

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18 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) p. 19.

19 See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation (14 February 2024) p. 5.

20 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

1.24 The minister further indicated that the grounds for withdrawing approval of a site plan under subsection 32(2) relate to non-compliance with the requirements of the instrument or a direction given by the minister under the OPGGS Act, incidents of which are sufficiently serious to be punishable by offence or civil penalty provisions. Further, the relevant offence and civil penalty provisions have been framed in accordance with the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.*[21] For these reasons, the minister advised that section 32(2) has the character of an enforcement decision.

1.25 In response to the committee's further queries, the minister indicated that the instrument does not provide for internal review. However, she advised of additional steps under the instrument, designed to ensure that applicants or licensees are 'given appropriate opportunities to provide fulsome information to support the [minister] to make the appropriate decision'.

1.26 In recognition of the 'potential significant consequences' of a preliminary decision under subsection 25(1) on the later substantive decision under the OPGGS Act, before the minister refuses approval of a draft site plan on the basis they are not satisfied that it meets the criteria in Division 2, the applicant must be given the opportunity to vary the draft site plan or provide further information if the minister 'reasonably believes' that doing so could satisfy them that it meets the relevant criteria (section 27). Further, under section 33, before withdrawing approval of a site plan, the minister must provide at least 30 days written notice of their intention, provide the licensee with a specified time-period to provide additional information for the minister's consideration and consider any action by the licensee to remove the ground for withdrawing approval or prevent recurrence of that ground, as well as any matter submitted to the minister.

1.27 Finally, the minister indicated that, as part of the policy review (the Review of the Offshore Carbon Capture and Storage Regime), the OPGGS Act and associated regulations would be analysed over the course of 2024 to evaluate if they are fit-for-purpose and reflect best practice, including the potential application of merits review principles. Any proposed reforms under the instrument would likely be progressed during the 2025-26 financial year.

Committee view

1.28 The committee thanks the minister for her advice regarding the expected timeframes in relation to the policy review, and more generally welcomes the review to evaluate whether the legislative framework remains fit-for-purpose. However, the committee notes the advice that, if there are any proposed reforms under the instrument, they will likely not be progressed until the 2025-26 financial year, and it is

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[21] Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).

therefore concerned that the relevant decisions under the instrument will remain excluded from merits review in the meantime.

1.29 While noting the minister's advice about the grounds for excluding the relevant decisions from merits review, the committee reiterates the concerns it raised in *Delegated Legislation Monitor 1 of 2024* that it is unclear as to how the relevant decisions fall within these categories in the ARC guide.

1.30 In particular, the committee remains unclear as to how decisions under subsection 25(1) to approve or refuse a site plan are preliminary decisions under the OPGGS Act, as approval of a site plan appears to be not merely a step in the decision to provide the applicant with an offer document and subsequently grant a licence, but a precondition to these decisions under the OPGGS Act. The committee notes that operations cannot be carried on in relation to a GHG formation identified in a licence without an approved site plan being in force (see subsection 22(1) of the instrument and subsection 457(1) of the OPGGS Act).

1.31 As noted in the minister's further response, preliminary decisions are generally deemed to be appropriate for exclusion from merits review because they 'do not generally have substantive consequences'.[22] However, in this regard, the committee notes that licensees are subject to strict liability and civil penalty provisions under subsections 22(3) and (4) of the instrument for carrying on operations without an approved site plan being in force which suggests to the committee the decision to approve or refuse a draft site plan is not preliminary in nature.

1.32 It also remains unclear to the committee how decisions under subsection 32(2) to withdraw approval of a site plan are of a law enforcement nature. The ARC guide states that it is not appropriate for decisions of a law enforcement nature to be subject to merits review as review of such decisions could jeopardise the investigation of possible breaches and subsequent enforcement of the law.[23]

1.33 The committee understands that the minister may withdraw approval of a site plan where the licensee has failed to comply with the plan, failed to review the plan or failed to submit a draft variation as required by Division 7 of the instrument, or failed to comply with a direction of the minister, and that the licensee commits an offence of strict liability by contravening these requirements and may be subject to civil penalties. While the basis on which the minister may withdraw a site plan relates to non-compliance with the law, the committee is unclear as to how the decision to

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22 Administrative Review Council, *What decisions should be subject to merits review?* (1999) p. 12, paragraph [4.4].

23 Administrative Review Council, *What decisions should be subject to merits review?* (1999) p. 18, paragraph [4.31].

withdraw the plan itself is a decision of a law enforcement nature and analogous to the examples in the ARC guide.[24]

1.34 Finally, the committee welcomes the minister's advice regarding the inclusion of safeguards in sections 27 and 33, which require the minister to give applicants the opportunity to provide additional information and, in the case of section 33, a requirement to provide notice of intention to make the decision. However, these are general administrative law principles of procedural fairness and do not support a justification for the exclusion of merits review. In addition, while the opportunity to provide additional information may support the minister to make the appropriate decision, this is distinct from the capacity for review of the decision once made. The committee's concerns are heightened because the decisions under the OPGGS Act in relation to GHG licenses are also excluded from merits review.

1.35 In light of the above, the committee requests the minister's advice in relation to whether further justification can be provided as to:

- **how decisions under subsections 25(1) are appropriate for exclusion from merits review on the basis that they are preliminary decisions or fall within any other grounds contemplated in the Administrative Review Council Guide, *What decisions should be subject to merits review?* (Administrative Review Council guide); and**
- **how decisions under subsection 32(2) are appropriate for exclusion from merits review on the basis that they are law enforcement decisions or fall within any other grounds contemplated in the Administrative Review Council guide?**

***Conferral of discretionary powers*[25]**

1.36 The committee also previously raised concerns about the scope of the discretion under subsections 25(3) and 42(3) of the instrument, which enable the minister, in deciding whether to approve a draft site plan or a variation to a site plan, to have regard to 'any other matters' they consider relevant. In *Delegated Legislation Monitor 1 of 2024*, the committee sought the minister's advice regarding 'any other matters' that may be considered relevant, and whether there are any safeguards or limitations on these discretionary powers.[26]

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24 Administrative Review Council, *What decisions should be subject to merits review?* (1999) p. 18, paragraphs [4.31]–[4.35].

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

26 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) pp. 20–22.

1.37 The minister's response of 14 February 2024[27] included advice that site plans will likely be complex documents and it may not be possible to cover all matters that may be relevant on a case-by-case basis, particularly given that each GHG injection and storage operation will differ, including in relation to location, the nature of the identified GHG storage formation, potential behaviour of an injected GHG substance and infrastructure, and equipment to be used for operations. However, if it became evident in practice that particular matters were frequently taken into account, the instrument could be amended in future to prescribe such matters as criteria to be taken into account. Noting the potential impact of discretionary decisions on rights and the need for legal certainty, the committee noted that it would be helpful to provide in the explanatory statement an example of the kinds of matters it was envisaged might be taken into account when drafting the instrument. Accordingly, the committee sought the minister's advice as to whether further detail could be provided in the instrument's explanatory statement about what kinds of 'other matters' may be relevant under these provisions.

Minister's response[28]

1.38 In the response of 12 March 2024, the minister reiterated her earlier advice that the discretion is appropriately constrained by the wording of the provisions which ensure that any other relevant matters to which the minister may have regard are directly relevant to the decision under consideration. As such, other relevant matters are likely to include consideration of relevant government policy or requirements as set out in guidelines and that the minister cannot take into account irrelevant considerations. The minister undertook to amend the explanatory statement to reflect this information.

1.39 The minister then provided the example that offshore GHG proponents are required to obtain approvals across a range of legislative frameworks including the OPGGS Act, the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) and the *Environment Protection (Sea Dumping) Act 1981* (the Sea Dumping Act). All three frameworks require overlapping assessments of geological considerations and the environmental impacts of projects and provide differing discretions to ministers in applying conditions and compliance obligations on titleholders, which include ongoing monitoring obligations under all three frameworks. Further, there is a guidance note which provides recommendations on a best practice approach to sequencing approvals. The discretion under subsection 25(3) will enable the minister to take into account the approval terms, including conditions of an earlier permit approval under the Sea Dumping Act or EPBC Act, when considering the content of a site plan. Given that site plans consider similar

27 See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation (14 February 2024), p. 5.

28 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

environmental and geological factors to approvals under the other frameworks, the minister's discretion to have regard to these materials will limit the potential for the imposition of incompatible obligations and conditions, and assist to mitigate the risk of inconsistent decision making across the frameworks.

1.40 Similarly, in considering whether to approve the variation of an approved site plan, under subsection 42(3), the minister can take into account the approval terms and conditions of previous approvals under the EPBC Act and Sea Dumping Act for the relevant project. The site plan variation will address similar environmental and geological factors as approvals under the other legislative frameworks and, as such, the flexibility afforded to the minister to consider these materials will further assist to mitigate the risk of introducing inconsistencies in obligations and approval conditions between the three frameworks.

Committee view

1.41 The committee thanks the minister for her advice that, under subsections 25(3) and 42(3) of the instrument, other relevant matters which the minister may take into account are anticipated to include relevant government policy or requirements in guidelines. The committee also thanks the minister for her advice that offshore gas proponents are required to obtain approvals across a range of Acts, including the OPGGS Act, Sea Dumping and EPBC Act, and that subsections 25(3) and 42(3) will enable the minister to take into account the approval terms and conditions of earlier permit approvals under these frameworks, when considering the content of a site plan or whether to approve variation of a draft site plan.

1.42 Further, the committee welcomes the minister's undertaking to amend the explanatory statement, and notes that a replacement explanatory statement was registered on 18 March 2024. The replacement explanatory statement provides that the minister's discretion under subsections 25(3) and 42(3) enables the minister to take into account relevant matters on a case-by-case basis and is necessary due to the complexity of site plans. The replacement explanatory statement further provides that, as any other matter to which the minister may have regard must be directly relevant to the decision under consideration, it may include consideration of government policy or requirements set out in guidelines, and that irrelevant considerations cannot be taken into account.

1.43 However, the committee considers that it is unclear from the reference in the amended explanatory statement to government policy or requirements in guidelines what specific matters may be taken into account. It would therefore be helpful to further amend the explanatory statement to include the additional context that the discretion in subsections 25(3) and 42(3) will enable the minister to take into account the approval terms and conditions under the OPGGS Act, the Sea Dumping Act and the EPBC Act.

1.44 The committee considers that this detailed background and the examples provided are the kind of substantive guidance that would be helpful for inclusion in the explanatory statement, to assist users of the law to understand their rights and obligations on the face of the instrument and its explanatory statement.

1.45 While noting the minister's advice and the undertaking to amend the explanatory statement, the committee requests the minister's additional advice as to whether the explanatory statement can be further amended to include the detailed examples provided of other relevant matters that may be taken into account under subsections 25(3) and 42(3) of the instrument.

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024[29]

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

Overview

1.46 Subsection 247(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) allows the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the rules) to specify circumstances in which the obligations in the Act do not apply to the provision of a designated service. The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024 (the instrument) amends the rules to exempt the issue or sale of securities and derivatives on specified low money laundering and terrorism financing risk domestic financial markets from the Act.

1.47 The committee raised scrutiny concerns in relation to the instrument in *Delegated Legislation Monitor 2 of 2024*, on 28 February 2024.[30] The Attorney-General provided a response dated 20 March 2024.[31] As the committee retains scrutiny

[29] This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024; [2024] AUSStaCSDLM 16.

[30] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 2 of 2024* (28 February 2024) pp. 3–5.

[31] This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

concerns about the below matters, it has resolved to raise those concerns with the Attorney-General.

Scrutiny concerns

Exemption from the operation of primary legislation;[32] parliamentary oversight[33]

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

1.49 As the rules are exempt from sunsetting and there does not otherwise appear to be a time limit in either the instrument or the rules, the effect of this amendment appears to create an ongoing exemption to the operation of the Act. It also did not appear to the committee that the instrument's explanatory statement adequately explained why it was necessary and appropriate to include the above exemptions in delegated, rather than primary, legislation.

1.50 In *Delegated Legislation Monitor 2 of 2024*, the committee noted its usual expectations that exemptions to primary legislation should ordinarily be included in primary legislation but, where included in delegated legislation, should operate no longer than strictly necessary. Accordingly, the committee requested the Attorney-General's advice as to whether the Act could be amended to include the exemptions; if not, why it was necessary and appropriate to use delegated legislation to make the amendments, and whether the amendments could be time-limited or subject the measures to sunsetting.[34]

Attorney General's response[35]

1.51 In his response of 20 March, the Attorney-General noted that the amendments made by the instrument extend one part of the existing exemptions in Chapter 21 of the rules to apply to market participants of FEX, and to clarify that ASEL is not a 'prescribed financial market' under the *Corporations Act 2001* (Corporations Act) but rather is specified as an exempt financial market.

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

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

34 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 2 of 2024* (28 February 2024) p. 5.

35 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

1.52 The Attorney-General advised that the use of delegated legislation was appropriate, referring to his previous response on 4 October 2022,[36] to similar concerns the committee had raised with the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2)*.[37] As outlined in that letter, the inclusion of exemptions in the rules ensures that the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC) has sufficient flexibility to make, amend and repeal exemptions as circumstances require, without being delayed by infrequent and lengthy legislative amendment processes. The Attorney-General further advised that, in this instance, the issue was time-sensitive and needed to be addressed faster than legislative amendment would allow.

1.53 The Attorney-General also advised that the Australian Government had commenced consultation on reforms to Australia's anti-money laundering and counter-terrorism financing regime. As part of these reforms, the Attorney-General's Department is considering which of the exemptions currently contained in the rules should be moved into the Act.

1.54 He indicated that, to ensure appropriate parliamentary oversight and provide regulatory certainty for industry, the department proposes to include in the Act those exemptions which are intended to be enduring. Those which are intended to be limited in scope, have detailed conditions attached or are likely to require amendment to adapt to changing circumstances will be retained in the rules. Further, those which are intended to be retained in the rules will be remade and time-limited, consistent with the committee's expectations. The Attorney-General noted that this reform process will provide an opportunity to systematically consider exemptions to the Act in a way that is consistent and ensure equal treatment for businesses relying on them.

Committee view

1.55 The committee notes the Attorney-General's advice that, in this case, it was considered appropriate to introduce exemptions into the rules via delegated legislation for reasons of flexibility and as the amendments were time-sensitive. The committee also notes the advice that it was not considered appropriate to time-limit all of the exemptions in Chapter 21 – due to the broader regulatory impact on the range of entities relying on the exemptions – or to time-limit only the amendments made by this instrument – as this would disadvantage FEX and ASEL.

1.56 In this regard, the committee restates its longstanding view that, as a matter of principle, executive-made law should not ordinarily amend primary legislation and does not consider reasons of flexibility alone to be a sufficient justification. However, it acknowledges that, in this instance, the amendments were considered to be

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[36] See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation (4 October 2022) pp. 1–3.

[37] See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2022* (7 September 2022) pp. 43–45.

time-sensitive. The committee also reiterates its view (reflected in Senate standing order 23(3)(l)) that, where delegated legislation creates exemptions to primary legislation, such provisions should operate no longer than strictly necessary. While the committee considers that in most cases this means 3-5 years, at the very least, such measures should be subject to a ten-year sunsetting period to facilitate a minimum level of oversight and to ensure that executive made law remains fit-for-purpose and up to date. It also does not consider that regulatory impact is ordinarily a sufficient justification for failing to provide such time-limits.

1.57 While noting the above, the committee welcomes the Attorney-General's advice that the Government has commenced consultation on reforms to the regime, which will include consideration of which exemptions currently contained in the rules should be moved into the Act. In particular, the committee welcomes the advice that the department proposes to move the exemptions that are intended to be enduring into the Act and to time limit those which are retained in the rules. Further, the committee welcomes the Attorney-General's advice that such a reform process will enable the exemptions to the Act to be considered in a systematic, consistent way to ensure equal treatment for the businesses relying on them.

1.58 The committee considers that the department's proposal would address its concerns on an ongoing basis. However, the committee considers that it would be helpful if advice could be provided regarding the expected timeframes for such a review, noting that the ongoing exemptions remain in delegated legislation in the meantime.

1.59 In light of the above, the committee requests the Attorney-General's advice as to whether an update can be provided on the expected timeframes in relation to reforms to the anti-money laundering and counter-terrorism financing regime and associated legislative amendments.

Biosecurity (Electronic Decisions) Determination 2023[38]

FRL No.	F2023L01672
Purpose	This instrument provides the relevant provisions of the *Biosecurity Act 2015* under which a decision may be made by the operation of a computer program and the classes of persons that may use a computer program under an arrangement made under subsection 541A(1) of the Act, and the conditions of that use.
Authorising legislation	*Biosecurity Act 2015*
Portfolio	Agriculture, Fisheries and Forestry
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 February 2024). Notice of motion to disallow must be given by 15 May 2024.

Overview

1.60 Subsection 541A(1) of the *Biosecurity Act 2015* (the Act) provides that the Director of Biosecurity may arrange for the use, under their control, of computer programs for any purposes for which a biosecurity officer may make a decision under a 'relevant provision' of the Act as specified in a determination made under subsection 541A(2), as authorised by subsection 541A(1).

1.61 The Biosecurity (Electronic Decisions) Determination 2023 (the instrument) is made under subsection 541A(2) of the Act. It authorises the Director of Biosecurity to arrange for a computer program to make decisions under four provisions of the Act, which enable a biosecurity officer to compel the provision of information or documents. The instrument also specifies classes of persons that may use an authorised computer program for such a decision and sets out conditions on the use of such a computer program.

1.62 The committee raised scrutiny concerns with the instrument on 7 February 2024, in *Delegated Legislation Monitor 1 of 2024*,[39] and the minister provided a response dated 21 March 2024.[40] As the committee retains scrutiny

38 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Biosecurity (Electronic Decisions) Determination 2023; [2024] AUSStaCSDLM 17.

39 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) pp. 9-15.

40 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

concerns about the below matters, it has resolved to raise them with the Minister for Agriculture, Fisheries and Forestry and Emergency Management.

Scrutiny concerns

Automated decision making;[41] conferral of discretionary powers[42]

1.63 In *Delegated Legislation Monitor 1 of 2024*,[43] the committee raised concerns that the instrument facilitates an automated decision-making process for discretionary decisions. Subsection 5(1) of the instrument determines four provisions of the Act under which decisions may be made by operation of a computer program. Those provisions enable a biosecurity officer to require a person whom the officer 'suspects on reasonable grounds' has information, custody or control of documents in relation to an aircraft or vessel that is the subject of a pre-arrival report under the Act or in relation to a conveyance that is subject to a biosecurity control,[44] to answer questions or provide information, in writing, in relation to the relevant aircraft, vessel or conveyance.

1.64 While the committee noted the justification in the instrument's explanatory statement as to the appropriateness of providing for automated decision-making, it was concerned about how a number of provisions of the Act identified as safeguards in the explanatory statement would operate. Accordingly, the committee sought the minister's advice as to: [45]

- what factors are considered in exercising the discretion under subsections 541A(3) and 541A(4) which require the Director of Biosecurity (the Director) to take 'reasonable steps' to ensure that electronic decisions are consistent with the Act's objects, and based on grounds on the basis of which a biosecurity officer could have made that decision and what is meant by 'reasonable steps';
- the factors considered under subsection 541A(7) which enables a biosecurity officer to make a decision in place of a computer program if satisfied that the decision is not consistent with the Act's objects or another decision would be 'more appropriate in the circumstances';
- the factors and weighting of criteria in the business rules underpinning the computer program, which assist with decision-making; and

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

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

43 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024).

44 See subsections 195(2), 195(3), 200(1) and 201(1) of the Act.

45 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) p. 13.

- the mechanisms used to identify and correct errors in automated decision making, including the use of safeguards such as the availability of review by a biosecurity officer.

1.65 The committee also sought the minister's advice as to whether there are any specific safeguards in relation to the wide range of persons whom the instrument enables to use the computer program, including a failure to comply with conditions of use in the instrument.

1.66 Finally, the committee requested the minister's advice as to whether consideration had been given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide* (the Ombudsman's Guide),[46] or addressing recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt scheme, which relate to legislative reform and establishment of a body to monitor and audit automated decision-making.[47]

Minister's response[48]

1.67 In his response, the minister advised that, the Director has taken 'reasonable steps' (under subsections 541A(3) and 541A(4) of the Act) to ensure that decisions made by the computer program are consistent with the objects of the Act and that any electronic decisions are based on the grounds on the basis of which a biosecurity officer could have made a decision. These include ensuring the arrangement under subsection 541A(1) of the Act (for computer programs to make a decision) provides measures and processes for electronic decisions that would lead to the effective assessment and management of biosecurity risks, including arranging for updates to the system with technical and scientific criteria based on biosecurity risk.

1.68 Further, the minister indicated that the arrangement under subsection 541A(1) provides for appropriate and accurate business rules so that the computer program considers the same grounds on the basis of which a biosecurity officer could have made that decision. Finally, he advised that biosecurity officers can override advice issued by the computer and manually exercise a power or decision 'at any time'.

1.69 The minister also noted that the computer program incorporates a series of business rules to determine whether extra information, answers to questions or production of documents is required for further decisions to be made (other than by a computer) and that these rules are based on technical and scientific criteria for the assessment of biosecurity risk, for example, the level of risk associated with a pest or

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46 Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide* (updated January 2019).

47 *The Royal Commission into the Robodebt Scheme* (July 2023) p. xvi.

48 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

disease in a particular country or region at a particular time, and are the same criteria that a human decision-maker would consider to make a decision.

1.70 The minister then provided two examples of the kind of technical and scientific information that may be included in the business rules, namely when the computer program or officer may request additional information or answers to questions under subsections 195(2), 195(3), 200(1) or 201(1) of the Act.

1.71 Specifically, once a pre-arrival report is submitted for a vessel (subsections 195(2) and 195(3)), the computer program uses a series of criteria to determine whether the vessel operator is required to complete a Seasonal Pest Questionnaire. Relevant criteria will depend on the type of vessel, type of pest and whether the date range of arrival is a time during which that pest is a biosecurity concern. If these objective criteria are met, the computer will then send a questionnaire, requiring additional information and/or documents, which will enable an accurate assessment of the biosecurity risks by an officer, prior to the vessel entering an Australian port.

1.72 Similarly, the computer program may require the master of a vessel that has entered Australian territory and is subject to a biosecurity control to provide information, answer questions or produce documents to assess the level of biosecurity risk associated with that vessel (subsections 200(1) or 201(1)). If vessel masters or shipping agents become aware of any additional travellers on board with signs of symptoms of a listed human disease (under the Biosecurity (Listed Human Disease) Determination 2016), they must notify the department. The computer program will then make a decision about whether to send a human health questionnaire and require the production of specified documents such as a medical log and/or testing results, which will enable a biosecurity officer to assess the level of biosecurity risk associated with the reporting of the disease and ensure the biosecurity risk is properly managed.

1.73 The minister further advised that the business rules include rule parameters and safeguards, such as formulas that weigh different factors to assist with automated decision making, the mechanisms to identify errors in such decision making and measures to correct errors based on those safeguards. Further, an audit trail of decisions can be made available to a biosecurity officer to assist in identifying and rectifying errors in decisions.

1.74 In addition, the minister noted, in relation to safeguards applying to the wide range of users of the program, that the system is a secure environment accessible only through registration and that each user's access and action can be traced and reported on. Further, the department provides instructional and training material to vessel masters and shipping agents to ensure they understand the conditions of use of the program and requirement to comply with them, especially the need to ensure information is accurately entered.

1.75 Finally, the minister indicated that the business rules, departmental policy and instructional material were designed with consideration of the Ombudsman's Guide, and that the Australian Government has committed to considering opportunities for legislative reform in response to recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme.

Committee view

1.76 The committee thanks the minister for his detailed advice regarding the operation of a number of safeguards on the automated decision-making enabled by the instrument. Noting that automated decision-making may operate as a fetter on discretionary decisions, the committee considers that this information should be included in the instrument's explanatory statement, to make it clear to users of the law what safeguards apply to the automation of decisions under the instrument.

1.77 In particular, the committee welcomes the minister's advice regarding how the Director has taken 'reasonable steps' to ensure electronic decisions are consistent with the Act's objects and based on the grounds on which a biosecurity officer could have made the decision. This includes through updating the system with technical and scientific criteria based on biosecurity risk and providing appropriate and accurate business rules. The committee considers that it would be particularly useful to set out the detailed examples of the kinds of technical and scientific information that may be included in the business rules, in relation to determining when the provision of extra information, answers to questions or provision of documents is necessary to enable an assessment of the level of biosecurity risk by a biosecurity officer. The committee also considers the application of specific safeguards in relation to users of the computer program, including the provision of instructional and training material, a particularly important safeguard on an individual's engagement with automated decision-making processes. Finally, the committee considers that it would be helpful to explain in the instrument's explanatory statement that the department considered the Ombudsman's Guide in relation to the business rules, departmental policy and instructional material.

1.78 Although the committee does not expect the explanatory statement to be updated in this regard, it also welcomes the minister's advice that the Government has considered the recommendations of the Robodebt Royal Commission and has committed to considering opportunities to legislate a consistent legal framework for automation in government services.

1.79 The committee notes the minister's advice that biosecurity officers can override the advice issued by the computer program and manually exercise a relevant power 'at any point in time'. In this regard, the committee notes that subsection 541A(7) of the Act enables a biosecurity officer to make a decision in substitution for an electronic decision where satisfied that the decision is not consistent with the objects of the Act or that another decision is 'more appropriate in the circumstances'. However, it is unclear to the committee what factors biosecurity

officers would take into account and on what basis they would be satisfied that a decision was not consistent with the Act's objects or that another decision was more appropriate, such that they would decide to exercise this discretionary power and override the decision.

1.80 The committee further notes the minister's advice as to the inclusion in the business rules of mechanisms to identify and correct errors made by the computer program and that an audit trail of decisions can be made available to a biosecurity officer to assist in identifying, and subsequently rectifying, errors in decision outcomes. However, it remains unclear to the committee how errors of the computer program may be identified in the first instance, when an audit trail would be generated, and what factors may trigger the intervention of a biosecurity officer to override the advice issued by the computer program.

1.81 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be amended to include the detailed advice provided about the safeguards applying to automated decisions under the instrument, including:

- **how the Director of Biosecurity has taken 'reasonable steps' under subsections 541A(3) and 541A(4) of the *Biosecurity Act 2015* (the Act)*;***
- **the detailed examples of the technical and scientific information that may be included in the business rules in relation to determining when extra information, answers to questions or provision of documents is necessary;**
- **the specific safeguards applying to users of the computer program; and**
- **that consideration has been given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide*.**[49]

1.82 The committee requests the minister's further advice as to:

- **the specific factors to be taken into account in determining whether a biosecurity officer is satisfied that a decision is not consistent with the objects of the Act or that another decision might be more appropriate under subsection 541A(7) of the Act; and**
- **whether further detail can be provided regarding the specific mechanisms employed to identify errors, and how and when an audit trail would be generated to identify and rectify such errors.**

Availability of independent merits review[50]

1.83 In *Delegated Legislation Monitor 1 of 2024*, the committee requested the minister's advice as to whether legislative amendments could be made to provide for

[49] Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide* (updated January 2019).

[50] Senate standing order 23(3)(i).

independent merits review of the decisions which the instrument enables to be made by a computer (that is, decisions under subsections 195(2), 195(3), 200(1) and 201(1) of the Act).[51] The committee noted that the Act does not define these decisions as 'reviewable decisions', but that it also enables regulations to specify decisions under the Act as 'reviewable decisions'.[52]

Minister's response[53]

1.84 The minister advised that he did not propose to provide for independent merits review of the above decisions, as the requirement of information or documents in the context of assessing biosecurity risk does not, in and of itself, affect the rights and obligations of individuals. The minister stated that such decisions are preliminary to a substantive decision about how to manage any biosecurity risk that is identified (citing the Administrative Review Council's Guide, *What decisions should be subject to merits review?* (the ARC guide)).[54] Specifically, the requirement to provide information under subsections 195(2), 195(3), 200(1) and 201(1) of the Act enables biosecurity officers to have access to the necessary information to make a timely and accurate assessment of biosecurity risk based on the information provided under these provisions. Further, while there are civil penalty and offence provisions for providing false or misleading information under these provisions, the minister noted that a decision to pursue such penalties is not subject to automation and the imposition of any civil penalty or conviction of an offence can only occur through judicial process.

Committee view

1.85 The committee thanks the minister for his advice that the decisions are not appropriate for independent merits review, on the ground that they are preliminary decisions as contemplated by the ARC guide. Although there are related penalties for the provision of false or misleading information which would affect the rights and interests of users of the computer program, the committee notes that the above decisions require the provision of information or documents to enable officers to assess biosecurity risk based on the information provided and make a subsequent decision whether or not to take further action. Therefore, such decisions appear to be analogous to the example contemplated in the ARC guide of a preliminary decision that facilitates, or leads to, the making of a substantive decision.[55]

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51 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) p.14.

52 See *Biosecurity Act 2015*, subsections 574(1) and 574(2).

53 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

54 Administrative Review Council, *What decisions should be subject to merits review?* (1999).

55 Administrative Review Council, *What decisions should be subject to merits review?* (1999) p.12 , paragraphs [4.3]-[4.5].

1.86 The committee considers that this information should be included in the instrument's explanatory statement, in line with its usual expectations that where independent merits review is not available for a decision, the instrument's explanatory statement explains this with reference to a justification in the ARC guide.

1.87 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be amended to include the justification provided for the exclusion of independent merits review with reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*

Consultation with persons affected[56]

1.88 In *Delegated Legislation Monitor 1 of 2024*, the committee raised concerns about the consultation that was undertaken in relation to the instrument. The instrument's explanatory statement provides that the Attorney-General's Department was consulted in the making of the instrument but does not set out whether consultation was undertaken with persons likely to be affected by the instrument or with relevant experts. Accordingly, the committee sought the minister's advice about this matter.[57]

Minister's response[58]

1.89 In his response, the minister advised that (in addition to consultation with the Attorney-General's Department and the Office of Impact Analysis), the department regularly meets with persons using the computer program and those affected by the instrument to discuss maritime-related biosecurity activities and supporting operational tasks, including updates to the computer program and associated processes. More specifically, the minister noted that the computer program subject to the instrument was designed with the assistance of industry over a period of five years. The minister indicated that automating decisions to require further information or documentation under the instrument provides efficiencies for industry and the department and supports timely decisions based on the information inputted into the computer program.

Committee view

1.90 The committee welcomes the minister's advice about the department's regular meetings with users of the program and those affected by the instrument, as well as the advice that the program was developed with the assistance of industry. In this regard, the committee restates its expectations (under Senate standing

56 Senate standing order 23(3)(d).

57 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) p.15.

58 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

order 23(3)(d)) that explanatory statements should set out any consultation that was undertaken with experts or those likely to be affected by the instrument and, where a rule-maker relies on previous broader consultation, details of the previous consultation and why it was not considered necessary to undertake additional consultation in relation to the specific instrument.

1.91 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be amended to include the advice provided regarding regular meetings with users and those affected by the instrument, as well as the consultation that was previously undertaken in relation to the relevant computer program.

***Clarity of drafting*[59]**

1.92 Finally, in *Delegated Legislation Monitor 1 of 2024*, the committee requested the minister's advice as to whether the explanatory statement could be amended to correct a possible drafting error.[60] Specifically, the explanatory statement refers on page 7 to the obligations of a class of persons who may use an authorised computer program under subsections 5(2) or 5(3) and states that subsection 5(4) provides the conditions of use of an authorised computer program. However, the instrument itself appears to specify the obligations in subsection 5(2) and the conditions of use in subsection 5(3), and there does not appear to be a subsection 5(4).

Minister's response[61]

1.93 In his response, the minister advised that he had emphasised the importance of accurate drafting in explanatory statements to his department, who would ensure that this drafting error was corrected.

Committee view

1.94 The committee welcomes the minister's undertaking to ensure that the drafting error in the explanatory statement is corrected, and notes that this is important in ensuring that rights and obligations are clear on the face of delegated legislation and its explanatory materials.

1.95 In light of the minister's undertaking to ensure the amendment of the explanatory statement, the committee concludes it examination of the instrument in relation to this issue.

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

60 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) p. 15.

61 This correspondence was tabled with this monitor and will be accessible via the *Delegated Legislation Monitors* page on the committee's website.

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 The committee has resolved not to conclude its examination of any instruments raising significant technical scrutiny concerns in this monitor.

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 instrument.[1]

Instrument
Social Security (Repeal—LIN 24/005) Instrument 2024 [F2024L00205]

Concluded matters

3.3 The committee has concluded its consideration of the following instruments after engagement with relevant agencies via its secretariat.[2]

Instrument
Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 8) Determination 2024 [F2024L00178]
Road Vehicle Standards Amendment (2023 Measures No. 1) Rules 2023 [F2024L00086]
Export Control (Animals) Amendment (Improving Regulatory Outcomes) Rules 2023 [F2023L01700]

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.

Chapter 4
Undertakings

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

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

New undertakings

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

Instrument	Undertaking	Date made
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023 [F2023L01417]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	19 February 2024
Vehicle Standard (Australian Design Rule 113/00 – Acoustic Vehicle Alerting Systems for Quiet Road Transport Vehicles) 2024 [F2024L00089]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	20 February 2024

1 See the *Index of Undertakings* page on the committee's website.

2 See the *Index of Instruments* page on the committee's website.

Implemented undertakings

4.4 During this period, the following undertakings have been implemented.

Instrument	Undertaking	Date implemented
Industry Research and Development (Australian Centre for Quantum Growth Program and Critical Technologies Challenge Program) Instrument 2023	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	20 February 2024
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023 [F2023L01417]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	21 February 2024
Radiocommunications Accreditation (Amateur Radio Examinations) Rules 2023 [F2024L01651]	The agency undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	23 February 2024

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. This includes expenditure-related instruments and instruments that levy taxation.

5.2 The committee has not identified any expenditure-related instruments or instruments that levy taxation that were registered during the reporting period.

Chapter 6
Exemptions from disallowance and sunsetting

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 sunsetting 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.[1]

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;[2]
- is exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the *Legislation Act 2003*;[3]
- overrides or modifies primary legislation;

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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.

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.

- 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.[4]

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	Source of exemption
Food Standards (Application A1270 – Food derived from herbicide-tolerant and insect-protected corn line DP51291) Variation [F2024L00181]	Subsection 44(1) of the *Legislation Act 2003*
Food Standards (Proposal M1021 – Maximum Residue Limits (2022) – Schedule 20) Variation [F2024L00184]	Subsection 44(1) of the *Legislation Act 2003*
Food Standards (Proposal M1021 – Maximum Residue Limits (2022) – Schedule 22) Variation [F2024L00185]	Subsection 44(1) of the *Legislation Act 2003*

Exemptions from sunsetting

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

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

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

6.9 The sunsetting 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. Sunsetting 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 sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunsetting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.[5]

6.11 Where an instrument is exempt from sunsetting, 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 sunsetting, this section identifies instruments which do not satisfy the committee's expectations regarding the appropriateness of their exemption from sunsetting.

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

- is exempt from sunsetting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;[6]
- is exempt from sunsetting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003;*[7]

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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 sunsetting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

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

- 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 sunsetting, 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 sunsetting.

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunsetting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.[8]

Instruments which do not meet the committee's expectations

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

Instrument	Source of exemption
Food Standards (Application A1270 – Food derived from herbicide-tolerant and insect-protected corn line DP51291) Variation [F2024L00181]	Subsection 54(1) of the *Legislation Act 2003* Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Food Standards (Proposal M1021 – Maximum Residue Limits (2022) – Schedule 20) Variation [F2024L00184]	Subsection 54(1) of the *Legislation Act 2003* Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Food Standards (Proposal M1021 – Maximum Residue Limits (2022) – Schedule 22) Variation [F2024L00185]	Subsection 54(1) of the *Legislation Act 2003* Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

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

Senator Paul Scarr
Acting Chair