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Committee for the
Scrutiny of Delegated
Legislation

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Introduction

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

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

Committee information

Terms of reference

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

- (a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;
- (b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;
- (c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;
- (d) those likely to be affected by the instrument were adequately consulted in relation to it;
- (e) its drafting is defective or unclear;
- (f) it, and any document it incorporates, may be freely accessed and used;
- (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
- (h) it trespasses unduly on personal rights and liberties;
- (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- (j) it contains matters more appropriate for parliamentary enactment;
- (k) in the case of an instrument exempt from sunset, it is appropriate for the instrument to be exempt from sunset;

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

Undertakings

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

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

Matters of interest to the Senate

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

Disallowance process¹

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

Scrutiny period	
Legislative instruments registered on the Federal Register of Legislation between 17 November and 19 December 2023	197
Instruments in this period exempt from disallowance	30
Chapter 1: New and ongoing matters	
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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 Amendment (Bridging Visa Conditions) Regulations 2023¹

FRL No.	F2023L01629
Purpose	The instrument amends the Migration Regulations 1994 to make technical amendments to provisions enabling the minister to grant a Bridging R (Class WR) visa without application, make amendments consequential to amendments to the <i>Migration Act 1958</i> , set out the operation and application of certain visa conditions, and provide for periodic review of the imposition of certain visa conditions.
Authorising legislation	<i>Migration Act 1958</i>
Portfolio	Home Affairs
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 February 2023).

Overview

1.3 The Migration Amendment (Bridging Visa Conditions) Regulations 2023 (the instrument) make a number of amendments to the Migration Regulations 1994 (Migration Regulations). These include amendments to set out the application and operation of certain visa conditions which must be applied to a Bridging R (Class WR) visa (BVR) in certain circumstances and to provide for periodic review of the imposition

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Bridging Visa Conditions) Regulations 2023, *Delegated Legislation Monitor 1 of 2024*; [2023] AUSStaCSDLM 2.

of certain conditions specified in the Migration Regulations, including in relation to curfews and monitoring devices.

1.4 The instrument also makes technical amendments to provisions enabling the minister to grant a BVR without application, as well as amendments consequential to those that would be made by the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Matters) Act 2023*. These amendments follow from the insertion and amendment of a number of visa conditions in the Migration Regulations, made by the *Migration (Bridging Visa Conditions) Act 2023* following the High Court's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)*.²

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

Scrutiny concerns

Significant matters in delegated legislation³

1.6 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

1.7 The instrument amends a number of existing, and specifies two new, conditions for BVR visa holders. This includes amendments to conditions 8612 and 8615 so that BVR holders in the NZYQ-affected cohort are only required to notify the department of the details of persons ordinarily residing with them and to report membership of organisations only where the BVR holder has been convicted of an offence involving a minor or other vulnerable person.⁴ Further amendments include that certain conditions – relating to financial transactions, bankruptcy, curfews and electronic monitoring – imposed on a BVR granted to a non-citizen will only be imposed for 12 months. As noted in the explanatory statement, this will ensure that such conditions are subject to periodic review. If the minister grants a further BVR during or after that period, they must reconsider whether it is not reasonably necessary to impose the condition for protection of any part of the Australian community.

² The Senate Standing Committee for the Scrutiny of Bills has commented on the Migration (Bridging Visa Conditions) Bill 2023, which became the *Migration (Bridging Visa Conditions) Act 2023*. See Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 15 of 2023](#) (29 November 2023), pp. 7-27.

³ Senate standing order 23(3)(j).

⁴ Item 18 in Part 1 of Schedule 1.

1.8 Additionally, the instrument repeals condition 8550 which required BVR visa holders in the NZYQ-affected cohort to notify the minister of any change in personal details,⁵ and introduces two new conditions, requiring all such visa holders to notify the minister of a change in their name, address, phone number or email (condition 8625) and requiring those who have been convicted of an offence involving a minor or vulnerable person to provide online profile or internet user details (condition 8626).⁶

1.9 The instrument's explanatory statement provides that it is appropriate for these matters to be implemented in regulations, because it has been the consistent practice of the Government of the day to provide for detailed matters concerning visa criteria and conditions in the regulations rather than the Migration Act, and because the Act expressly provides for such matters to be prescribed in regulations. In addition, providing these details in delegated legislation gives the Government the ability to effectively manage the operation of Australia's visa program and to respond quickly to emerging needs.

1.10 The committee notes this explanation relating to the consistent practice of governments and the need for flexibility to respond quickly to emerging needs. It also notes that conditions amended by the instrument are currently set out in the Migration Regulations and that the conditions as amended by the instrument appear to be more limited in their application and less rights restrictive. For example, the committee notes the explanation in the explanatory statement that, while amended condition 8615 may still limit the right to freedom of association, the amendment ensures that the measure will be more proportionate by limiting it to BVR holders where there is a greater risk to community safety.⁷

1.11 The committee nevertheless reiterates its concern that, as a matter of principle, significant matters should ordinarily be included in primary legislation, due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation. The committee notes that the Migration Regulations were recently amended by primary legislation, the *Migration (Bridging Visa Conditions) Act 2023*, and that these amendments to the BVR framework commenced on 18 November 2023. The committee notes with concern the unusual circumstances that have led to the BVR framework being further amended by delegated legislation a short time after the primary legislation was passed by the Parliament.

1.12 The committee also notes that the Senate Standing Committee for the Scrutiny of Bills has commented on the Migration Amendment (Bridging Visa Conditions) Bill 2023 in relation to the inclusion of significant matters in delegated legislation.

⁵ Item 15 in Part 1 of Schedule 1.

⁶ Item 34 in Part 1 of Schedule 1.

⁷ Explanatory statement, p. 12.

1.13 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate in this instance to further amend the BVR framework by delegated legislation, rather than primary legislation.

Conferral of discretionary powers;⁸ availability of independent merits review⁹

1.14 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer broad discretionary powers on a person. In addition, Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests.

1.15 Item 12 in Part 1 of Schedule 1 to the instrument inserts new regulation 2.25AE(1) into the Migration Regulations, which provides that if specified visa conditions – relating to electronic monitoring, financial transactions, bankruptcy and curfews – are imposed on a BVR holder, they will be subject to those conditions for a period of 12 months.¹⁰ As noted in the instrument's explanatory statement, if the minister decides to grant a further BVR during or after that period, new subclause 070.612A(1) will apply.

1.16 New subclause 070.612A(1) (inserted by Item 17 of in Part 1 of Schedule 1) provides that these conditions must be imposed by the minister when a BVR is granted, if subclause 070.612A(3) applies,¹¹ unless the minister is satisfied that it is 'not reasonably necessary' to impose the condition for the protection of any part of the community. Item 17 also inserts new subclause 070.612A(2) which requires the minister to decide whether or not to impose each of the conditions in the following sequential order: 8621 (electronic monitoring), 8617 (financial transactions), 8618 (bankruptcy) and 8620 (curfews).

1.17 The committee considers that instruments that confer broad, discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. The committee also expects the explanatory statement to outline the nature and source of any relevant limitations on the exercise of the powers.

⁸ Senate standing order 23(3)(c).

⁹ Senate standing order 23(3)(i).

¹⁰ Condition 8621 requires a BVR holder in the NZYQ-affected cohort to wear a monitoring device at all times; condition 8617 requires them to notify Immigration in relation to financial transactions; condition 8618 requires them to notify Immigration in relation to bankruptcy; and condition 8620 requires them to abide by a curfew.

¹¹ That is, if the visa was granted under regulation 2.25AA and at the time of grant, there was no real prospect of the removal of the holder from Australia becoming practicable in the reasonably foreseeable future, or the visa was granted under regulation 2.25AB.

Additionally, where an instrument empowers a decision-maker to make discretionary decisions, the committee ordinarily expects that those decisions will be subject to merits review.

1.18 The instrument's explanatory statement explains that the purpose of this amendment is to provide the minister with authority to exercise a discretion not to impose a mandatory visa condition, if satisfied that it is 'not reasonably necessary' for the protection of the community. It also explains that, under new subclause 070.612A(2), the minister must consider the reasonable necessity of each condition for the protection of the community, and the extent to which each of the other conditions contribute to this purpose.¹² However, the instrument does not explain the factors that may be taken into account in determining the reasonable necessity of each individual condition. It is also unclear whether there are any review mechanisms available in relation to decisions under new subclause 070.612A(1).

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

- **whether further detail can be provided regarding the factors the minister may take into account in determining whether each of the relevant conditions is 'not reasonably necessary' for the protection of the Australian community; and**
- **whether any safeguards or limitations apply to the exercise of the minister's powers or functions under new subclause 070.612A(1), including the availability of any review mechanisms such as independent merits review.**

Consultation with persons affected¹³

1.20 Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, as well as relevant experts, were adequately consulted in relation to the specific instrument. Further, section 17 of the *Legislation Act 2003* (Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

1.21 Accordingly, explanatory statements to instruments should provide details of any consultation undertaken. If no consultation was undertaken with persons likely to

¹² Explanatory statement, p.23.

¹³ Senate standing order 23(3)(d).

be affected or relevant experts, the explanatory statement should justify why no such consultation was undertaken.

1.22 In this instance, the explanatory statement to the instrument indicates that the Office of Impact Analysis (OIA) has been consulted in relation to the amendments made by the instrument, and that the department has consulted other Commonwealth agencies in the course of developing the instrument, including the Attorney-General's Department.

1.23 However, the explanatory statement does not specify which other Commonwealth agencies were consulted, or otherwise address whether any persons likely to be affected by the amendments or experts were consulted. The committee does not consider consultation with the OIA to be an adequate substitution for consulting with individuals affected by the instrument or relevant experts. Further, any requirements to consult with the OIA are separate to the requirements in relation to consultation under the Legislation Act.

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

- **which other Commonwealth agencies were consulted; and**
 - **whether any persons likely to be affected by the instrument, any experts or any stakeholders representing the NZYQ-affected cohort were otherwise consulted and, if so, who or, if not, why not.**
-

Biosecurity (Electronic Decisions) Determination 2023¹⁴

FRL No.	F2023L01672
Purpose	The instrument provides the relevant provisions of the <i>Biosecurity Act 2015</i> 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	<i>Biosecurity Act 2015</i>
Portfolio	Agriculture, Fisheries and Forestry
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 February 2023).

Overview

1.25 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).

1.26 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.

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

¹⁴ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Biosecurity (Electronic Decisions) Determination 2023, *Delegated Legislation Monitor 1 of 2024*; [2023] AUSStaCSDLM 3.

Scrutiny concerns

Automated decision-making;¹⁵ conferral of discretionary powers¹⁶

1.28 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. The committee considers this to include provisions that facilitate automated decision-making. In addition, Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes provisions that broadly delegate administrative powers or functions.

1.29 Subsection 5(1) of the instrument determines four provisions of the Act under which a decision may be made by operation of a computer program. The relevant provisions enable a biosecurity officer to require a person, who the officer ‘suspects on reasonable grounds’:

1.29.1. has information (subsection 195(2)); or custody or control of documents (subsection 195(3)) in relation to an aircraft or vessel that is the subject of a pre-arrival report under paragraphs 193(1)(a) or 193(1A) of the Act; or

1.29.2. has information (subsection 200(1)); or custody or control of documents (subsection 201(1)) in relation to a conveyance that is subject to a biosecurity control,

to answer questions or provide information, in writing, in relation to the relevant aircraft, vessel or conveyance.

1.30 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 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.

1.31 Where an instrument nonetheless provides for automated decision-making, the explanatory statement should justify why this is necessary and appropriate. Additionally, the explanatory statement should explain the nature of the decision-making being automated, including any elements of discretion, and the safeguards

¹⁵ Senate standing order 23(3)(m).

¹⁶ Senate standing order 23(3)(c).

that apply, such as opportunities for review and whether there are mechanisms in place to correct errors. The committee's concerns in this regard will be heightened where independent merits review is not available.

1.32 In this instance, the explanatory statement justifies the appropriateness of providing for automated decision-making for the decisions listed in subsection 5(1) of the instrument, including that these decisions are routine and less complex, and particular facts are established without the need for subjective assessment. It provides a further justification that electronic decision-making will optimise the department's resources. Finally, as noted in the explanatory statement, while the relevant decisions require the formation of a state of mind, subsection 541A(4) of the Act provides that an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates.

1.33 The explanatory statement notes that several safeguards apply in relation to automated decisions, including:

- 1.33.1. under subsection 541A(3) of the Act, the Director of Biosecurity must take 'reasonable steps' to ensure electronic decisions are consistent with the objects of the Act – as such, the business rules underpinning operation of the computer program are designed so decisions made are consistent with these objects;
- 1.33.2. under subsection 541A(4), the Director of Biosecurity must take 'reasonable steps' to ensure that an electronic decision is based on grounds on the basis of which a biosecurity officer could have made that decision. The explanatory statement explains that this safeguard provides that decisions (made either by a human or computer) involve the application of the same specific business rules and detailed criteria;
- 1.33.3. under subsection 541A(7) of the Act, a biosecurity officer may make a decision in place of a computer program if satisfied that the electronic decision is not consistent with the Act's objects or that another decision would be 'more appropriate in the circumstances';
- 1.33.4. the inclusion of a condition in subsection 5(3) that users of an authorised computer program must be satisfied 'on reasonable grounds' that information entered into the program is true and correct, and must ensure that information is entered accurately;
- 1.33.5. 'proper mechanisms' will be in place to identify data-entry errors or other incorrect inputs and any data entry errors will mean the system will not process the decision automatically;
- 1.33.6. there is an 'ability to generate an audit trail' of the decision-making path for audit and review processes, including a record of every computer program user transaction and, in the event of system

malfunction, all directions or decisions can be overridden by a biosecurity officer.

1.34 While noting the explanation regarding the appropriateness of providing for automated decision-making, the committee retains some concerns about how the above provisions operate as safeguards. Notably, neither the instrument or its explanatory statement defines what are ‘reasonable steps’ for the purposes of the safeguards in subsections 541A(3) or 541A(4), or explains how the business rules are designed so that automated decisions will be consistent with the Act’s objects. The explanatory statement also does not provide information about the factors that a biosecurity officer will consider (under subsection 541A(7)) in determining whether they are satisfied that an automated decision is not consistent with the Act’s objects or that another decision is more appropriate in the circumstances. In addition, subsection 5(3) of the instrument does not define or otherwise limit the phrase ‘on reasonable grounds’.

1.35 While the explanatory statement notes that ‘proper mechanisms’ will be in place to identify errors, and that there is an ability to generate an audit trail of the decision-making path for audit and review processes, it appears unclear on the face of the instrument and explanatory statement what these mechanisms entail and whether there are mechanisms in place to correct errors when they are identified. The committee would appreciate further detail on the audit and review processes, particularly noting that the Act does not appear to provide for independent merits review of the relevant decisions (see subsection 574(1) of the Act). The committee’s concerns are particularly heightened in this regard, noting that the Act imposes offence and civil penalty provisions for failure to provide the information or documentation requested by the decision-maker.¹⁷

1.36 Finally, the committee notes that subsection 5(2) of the instrument specifies the classes of persons that may use an authorised computer program to make a decision referred to in subsection 5(1). As noted in the explanatory statement, these include employees or officers of the department or consultants and contractors performing services for the department, and registered agents or masters of a ship, aircraft operators or airlines, or persons in charge of a conveyance or acting on behalf of such persons. As the Act empowers only biosecurity officers, who are persons with specified training and qualification requirements,¹⁸ to make the relevant decisions, the committee is concerned about the broad scope of persons who may directly engage with the computer program to have it make a decision, noting the lack of clarity around the applicable safeguards.

1.37 Finally, the committee notes the Royal Commission into the Robodebt Scheme made two recommendations relating to automated decision making that included

¹⁷ *Biosecurity Act 2015*, subsections 195(6) and 195(7); 200(1) and 201(1).

¹⁸ *Biosecurity Act 2015*, section 545(5).

advice to the Government in its use and for the reform and regulation of automated decision-making.¹⁹

1.38 In light of the above the committee requests the minister's advice as to whether further detail can be provided regarding:

- the factors that the Director of Biosecurity considers in exercising the safeguards in subsections 541A(3) and 541A(4) of the Act, and what is meant by 'reasonable steps' in relation to decisions that will be made by the operation of a computer program;
- the factors that a biosecurity officer considers in determining that an electronic decision is not consistent with the Act's objects or that another decision is 'more appropriate in the circumstances' under subsection 541A(7) of the Act;
- the factors and weighting of criteria in the business rules that assist with decision-making;
- the mechanisms used to identify errors in automated decision-making and, where errors arise, the mechanisms to correct those errors including the use of safeguards such as the availability of review by a biosecurity officer; and
- specific safeguards in relation to users of the computer program, including a failure to comply with conditions of use specified in the instrument, noting that the instrument enables a wide range of persons to directly engage the computer program to make a decision.

1.39 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* in relation to providing for automated decision-making;²⁰ and
- addressing recommendations 17.1 and 17.2 of the Royal Commission into the Robodebt Scheme.

¹⁹ [The Royal Commission into the Robodebt Scheme](#), July 2023, p. xvi. See in particular, recommendations 17.1 and 17.2.

²⁰ Commonwealth Ombudsman, [Automated Decision-making Better Practice Guide](#), January 2023.

Availability of independent merits review²¹

1.40 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits, or fails to provide for the independent review of decisions affecting rights, obligations, or interests. Where an instrument empowers a decision-maker to make discretionary decisions, the committee ordinarily expects that those decisions will be subject to merits review. This is of particular concern where the instrument provides for automated decision-making.

1.41 As noted, the instrument provides for the automation of decisions under subsections 195(2), 195(3), 200(1) and 201(1) of the Act, which are not included as 'reviewable decisions' under subsection 574(1) the Act. It therefore appears to be the case that independent merits review is not available in relation to these decisions including when they are made by a computer program. In this regard, the committee notes that subsection 574(2) of the Act enables regulations made under the Act to provide that specified provisions of the Act are 'reviewable decisions'.

1.42 In light of the above the committee requests the minister's advice as to whether legislative amendments could be made to provide that the decisions specified in subsection 5(1) are 'reviewable decisions' under the *Biosecurity Act 2015* or whether independent review of these discretionary decisions could otherwise be provided for.

Consultation with persons affected²²

1.43 Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, as well as relevant experts, were adequately consulted in relation to the specific instrument. Further, section 17 of the *Legislation Act 2003* requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

1.44 Accordingly, explanatory statements to instruments should provide details of any consultation undertaken. If no consultation was undertaken with persons likely to be affected or relevant experts, the explanatory statement should justify why no such consultation was undertaken. In this instance, the explanatory statement to the instrument indicates that the Attorney-General's Department was consulted in the making of the instrument. However, the explanatory statement does not indicate

²¹ Senate standing order 23(3)(i).

²² Senate standing order 23(3)(d).

whether consultation was undertaken with persons likely to be affected by the instrument or with relevant experts.

1.45 Accordingly, the committee requests the minister's advice as to whether any consultation was undertaken in relation to the instrument with persons affected or experts or, if not, why not.

Clarity of drafting²³

1.46 Finally, Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting contains an error or is unclear.

1.47 In this instance, the instrument's explanatory statement appears to contain a drafting error, as it 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 appears to specify the obligations of such classes of persons in subsection 5(2) and the conditions of use of computer programs in subsection 5(3). There does not appear to be a subsection 5(4) in the instrument. The committee notes the importance of accurate drafting in pieces of delegated legislation and their explanatory statements.

1.48 Accordingly, the committee requests the minister's advice as to whether the explanatory statement can be amended to correct the possible drafting error identified above.

²³ Senate standing order 23(3)(e).

Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023²⁴

FRL No.	F2023L01551
Purpose	The 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	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
Portfolio	Industry, Science and Resources
Disallowance	15 sitting days after tabling (tabled in the Senate on 28 November 2023). Notice of motion to disallow must be given by 19 March 2024.

Overview

1.49 This instrument is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act). It repeals and remakes the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011, which are due to sunset on 1 April 2024.

1.50 The measures in the instrument facilitate and regulate safe and sustainable greenhouse gas injection and storage operations in offshore areas. This includes by providing for:

- matters relating to a ministerial determination that there is a significant risk that an operation carried on under a title will have a significant adverse impact on operations under another title;
- requirements for applications for parts of geological formations as identified greenhouse gas storage formations; and
- the requirement for an approved site plan to be in force when a licensee carries on operations in relation to a storage formation.

²⁴ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023, *Delegated Legislation Monitor 16 of 2023*; [2023] AUSStaCSDLM 4.

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

Scrutiny concerns

Availability of independent merits review²⁵

1.52 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of a decision affecting rights, obligations or interests. Where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect rights, obligations or interests, the committee generally expects that those decisions will be subject to independent merits review. Where an instrument provides that such decisions are excluded from merits review, the committee considers that the explanatory statement should comprehensively justify the nature and scope of the relevant exclusions. The committee expects it to do so with reference to the factors in the Administrative Review Council's Guide: *What decisions should be subject to merits review?* (the ARC guide).²⁶

1.53 The instrument confers a number of discretionary decisions, which are excluded from independent merits review.²⁷ This includes section 25, which provides that the minister must approve or refuse to approve a draft site plan,²⁸ if satisfied that it meets the criteria in Division 2 of the instrument. The explanatory statement justifies the exclusion of merits review because these decisions are a preliminary step in the substantive decision under the Act to grant a greenhouse gas injection licence.

1.54 The committee notes the ARC guide recognises that it is appropriate to exclude preliminary decisions from merits review,²⁹ where the decisions do not have substantive consequences so that the beneficial effect of merits review is limited. In contrast, the guide contemplates that decisions which may cause hardship or result in a penalty should be merits reviewable.³⁰ In this regard, it appears that approval of a site plan under section 25 is not merely a step in the decision to grant a licence but rather a precondition of granting the licence. Specifically, operations cannot be carried on in relation to a greenhouse gas storage formation identified in a licence *without* an approved site plan being in force. Licensees are subject to both strict liability and civil

²⁵ Senate standing order 23(3)(i).

²⁶ Administrative Review Council, [What decisions should be subject to merits review?](#) (1999)

²⁷ See sections 12, 25, 32 and 37.

²⁸ 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.

²⁹ Administrative Review Council, [What decisions should be subject to merits review?](#) (1999), p. 12, paragraphs [4.3]-[4.7].

³⁰ Administrative Review Council, [What decisions should be subject to merits review?](#) (1999), p. 12, paragraph [4.4].

penalty provisions for breaching this requirement.³¹ Further, the minister must be reasonably satisfied that a draft site plan meets the specified criteria. As some criteria relate to predictions for the behaviour of greenhouse gas substances and geological risks, it appears that site plans may have potentially significant environmental consequences.

1.55 In addition, the explanatory statement provides a second justification for the exclusion of merits review because a decision to approve or refuse a draft site plan involves the evaluation of complex and competing facts, and highly technical matters. However, the committee notes that the ARC guide states that this is insufficient to justify an exclusion of merits review and, accordingly, it is not in line with the committee's usual expectations.³² The explanatory statement adds that a merits review tribunal would be required to possess or obtain relevant expertise and that the costs, difficulty and potential delays in finding expertise may outweigh any impact of a lack of merit on the applicant. However, the ARC guide rejects similar justifications and states:

[5.18] For example, the Council rejected an argument that decisions of the Australian Broadcasting Tribunal were inappropriate for review because of the expertise of the Tribunal. The Council's reasoning focussed on the need to review or check even the findings of experts. Further, and as a practical matter, the Council also noted the ability to appoint experts to the AAT, the body that would be reviewing the decisions of the Tribunal.

1.56 While the committee considers that some decisions are appropriate for exclusion from merits review if they are preliminary decisions, it notes that the explanation for exclusion of merits review based on expertise is not in accordance with the ARC guide or its usual expectations.

1.57 Decisions under subsection 32(2) which enable the minister to withdraw approval of a site plan, where the licensee has failed to meet the conditions in paragraph 32(1)(b),³³ are also excluded from merits review. The explanatory statement justifies this exclusion on the basis that these are decisions of a law enforcement nature.

³¹ See section 22 of the instrument.

³² Administrative Review Council, [What decisions should be subject to merits review?](#) (1999), p. 28, paragraph [5.16].

³³ That is, where the licensee has failed to comply with the plan, to review the plan as required by Division 7 of the instrument, to submit a draft variation of the plan to the minister, or to comply with a direction given by the minister under the Act.

1.58 The guide provides that the exclusion of law enforcement decisions from merits review is appropriate because such review could jeopardise an investigation and enforcement of the law.³⁴

1.59 The committee is of the view that a decision under subsection 32(2) appears to relate to the enforcement of a regulatory scheme and is therefore not a law enforcement decision in the same way that, for example, prosecutorial discretions related to witnesses are. As such, a decision to withdraw a site plan does not appear to be analogous to law enforcement decisions accepted by the ARC guide. Further, such a decision would have a significant impact on the expectations and interests of licensees operating under a previously approved licence.

1.60 The explanatory statement adds that merits review is also inappropriate because it might cause unnecessary delay that could result in the risk of serious harm to the environment or the operations of other affected titleholders. It is unclear to the committee how this applies to decisions under subsection 32(2), noting that subsection 33(2) requires the minister to provide 30 days' notice of their intention to withdraw approval.

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

- **decisions under subsection 25(1) to approve or refuse draft site plans are appropriate for exclusion from merits review, with reference to the Administrative Review Council Guide, *What decisions are appropriate for merits review?*, noting the potential significant consequences of draft site plans; and**
- **decisions under subsection 32(2) to withdraw approval of a site plan are appropriate for exclusion from merits review, with reference to the Administrative Review Council guidance and, if known, examples of the kinds of other relevant decisions that would be considered to fall within law enforcement decisions excluded in that guidance; and**
- **notes that the exclusion of merits review on the basis of decision-makers' expertise is not in accordance with the Administrative Review Council guidance.**

³⁴ Administrative Review Council (1999), [What decisions should be subject to merits review?](#), p. 18, paragraphs [4.31]-[4.32].

Conferral of discretionary powers;³⁵ adequacy of explanatory materials³⁶

1.62 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer broad discretionary powers on a person. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.63 In deciding whether to approve a draft site plan, subsection 25(3) enables the minister to have regard to ‘any other matters’ they consider relevant. Similarly, section 42 enables the minister to approve or refuse a draft variation to an approved plan if reasonably satisfied that it meets the criteria in Division 2 of Part 4 of the instrument (see subsection 25(2)). While subsection 42(2) allows the minister to approve the variation if reasonably satisfied of the specified matters, subsection 42(3) enables them to also have regard to ‘any other matters’ they consider relevant.

1.64 These provisions appear to confer broad discretionary powers on the minister and neither the instrument nor its explanatory statement defines ‘any other matters’ or provides guidance on the types of matters that may be relevant under these provisions.

1.65 In light of the above, the committee requests the minister’s advice as to:

- **examples of the types of ‘other matters’ that may be relevant under subsections 25(3) and 42(3); and**
- **whether there are any safeguards or limitations on these discretionary powers.**

Strict liability;³⁷ significant penalties in delegated legislation³⁸

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

1.67 It is the committee’s view that significant penalties should ordinarily be included in primary, rather than delegated, legislation to ensure appropriate

³⁵ Senate standing order 23(3)(c).

³⁶ Senate standing order 23(3)(g).

³⁷ Senate standing order 23(3)(h).

³⁸ Senate standing order 23(3)(j).

parliamentary oversight. In this regard, the committee's view is that delegated legislation should generally not contain penalties exceeding 50 penalty units for individuals and 250 penalty units for bodies corporate. However, where delegated legislation does include significant penalties, the committee expects its explanatory statement to justify the appropriateness of the higher penalty, as well as why it is necessary and appropriate to be included in delegated legislation.

1.68 The instrument contains a number of strict liability and civil penalty provisions. In line with the committee's expectations, the explanatory statement explains why it is necessary and appropriate to apply strict liability to the relevant offences with reference to the principles set out in part 2.2.6 of the *Attorney-General's Department's Guide to Framing Commonwealth Offences*.³⁹

1.69 However, the instrument also contains a number of strict liability and civil penalty provisions which impose penalty units greatly exceeding the committee's usual expectations. Subsections 22(3), 37(5), 40(4) and 51(3) are strict liability offences of 100 penalty units for individuals, increased by five times for bodies corporate, due to subsection 4B(3) of the *Crimes Act 1914*. Subsections 36(6), 39(5), 51(6), 52(5) and 52(6) are civil penalty provisions of 500 penalty units, while subsections 22(4), 37(6), 40(5) and 51(5) are civil penalty provisions of 1000 penalty units.

1.70 While the above penalties vastly exceed the amount of penalty units the committee considers appropriate for inclusion in delegated legislation, the explanatory statement does justify the appropriateness of these penalties and their inclusion in delegated legislation.

1.71 For example, regarding the strict liability offences, the explanatory statement notes that licensees are 'well-resourced' and 'sophisticated', and a smaller penalty would not be sufficient to appropriately address the conduct. The explanatory statement also notes the potential for severe risks to or impact on the environment, and the operations of other titleholders under the legislation.

1.72 Further, regarding the civil penalty provisions, the explanatory statement also notes that, to be an effective deterrent, the penalty must be sufficiently significant to overcome any sense that a potential fine for non-compliance might otherwise be perceived as a 'cost of doing business'. The explanatory statement also notes that the inclusion of such significant penalties in delegated legislation is authorised by the Act (section 790) and that setting out all of the provisions (including enforcement provisions) in one instrument provides greater clarity to licensees.

1.73 The committee notes the significant penalties in this instrument are authorised by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* and that their inclusion in delegated legislation appears to be adequately justified in the

³⁹ Attorney General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011).

instrument's explanatory statement. Accordingly, the committee is not requesting the minister's advice in relation to this issue.

1.74 However, as the penalties are of such significance, the committee has resolved to draw their inclusion in delegated legislation to the attention of the Senate under standing order 23(4).

Ongoing matters

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

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023⁴⁰

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

Overview

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

1.77 The committee's secretariat, on behalf of the committee, engaged with the Department of Finance, who provided a response in consultation with the Attorney-General's Department in November 2023. As the committee retained scrutiny concerns following that response, it sought advice from the Minister for Finance on

⁴⁰ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023, *Delegated Legislation Monitor 1 of 2024*; [2023] AUSStaCSDLM 5.

29 November 2023 in *Delegated Legislation Monitor 15 of 2023*.⁴¹ The Minister for Finance provided a response dated 12 December 2023 on behalf of the Attorney-General.⁴²

Scrutiny concerns

Availability of independent merits review;⁴³ adequacy of explanatory materials⁴⁴

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

1.79 As noted above, the instrument establishes legislative authority for government spending on the financial assistance scheme for respondents to applications brought under the Family Law (Child Abduction Convention) Regulations 1986.

1.80 The instrument's explanatory statement provides that independent merits review is not appropriate for decisions made under the instrument. The explanation includes that such decisions relate to the provision of a grant to one or more applicants over others and, due to the finite amount of funding for the program, any change to a decision for one applicant would affect the funding available for others. The explanatory statement cites the Administrative Review Council guidance document, *What decisions should be subject to merits review?* (ARC guide)⁴⁵ in support.

1.81 The ARC guide requires that for this justification to apply, there must be a finite amount of resources available, and an allocation *already made* to another party must be directly affected if the original allocation were to be overturned. As the committee was unclear how these requirements apply to funding decisions under the instrument, it sought the minister's advice as to whether further justification could be provided for excluding independent merits review, addressing the established grounds in the ARC guide.

⁴¹ Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 15 of 2023](#) (29 November 2023) pp. 2-4.

⁴² This correspondence was tabled with this Monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

⁴³ Senate standing order 23(3)(i).

⁴⁴ Senate standing order 23(3)(g).

⁴⁵ Administrative Review Council, [What decisions should be subject to independent merits review?](#) (1999), paragraphs [4.11]-[4.15].

*Minister's response*⁴⁶

1.82 In the response dated 12 December 2023, the Attorney-General advised that, as noted in the instrument's explanatory statement, a right to apply for review must be specifically assigned by legislation, citing the *Administrative Review Council Best Practice Guide 5 – Accountability* (Best Practice Guide 5).⁴⁷ The Attorney-General explained that because the scheme to which the instrument relates is non-statutory, there is therefore no overarching legislation able to provide a right to apply for review.

1.83 The Attorney-General also advised that decisions under the instrument are not appropriate for merits review because they require the allocation of finite resources between individual applicants for legal financial assistance. Further, an allocation already made to another party would be affected by overturning the original decision.

1.84 The response noted that each financial year a finite amount of funding is allocated to the program through the Budget. This appropriation is fixed, with any increase requiring consideration through Government budget processes. The Attorney-General explained that an increase in the amount allocated to a party as a result of merits review overturning an original decision, may result in other eligible and meritorious grants either needing to have funding removed or reduced so that the department does not overspend its appropriation.

1.85 As such, in the absence of a decision by the Government to provide additional funding, which could not be assured, it is likely that any increase to a funding decision would require the revisiting of existing grant arrangements with other applicants, and reducing, terminating, or overturning allocations, to fit within the funding envelope.

Committee view

1.86 In relation to the Attorney-General's advice that a right to review must be specifically assigned by legislation, the committee notes that subsection 25(1) of the *Administrative Appeals Tribunal Act 1975* states that:

- (1) An enactment may provide that applications may be made to the Tribunal:
 - (a) for review of decisions made in the exercise of powers conferred by that enactment; or
 - (b) for the review of decisions made in the exercise of powers conferred, or that may be conferred, by another enactment having effect under that enactment.

⁴⁶ This correspondence was tabled with this Monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

⁴⁷ Administrative Review Council, [Best Practice Guide 5 – Accountability](#) (2007).

1.87 Subsection 3(1) then defines ‘enactment’ to include ‘an instrument (including rules, regulations or by-laws) made under an Act...’. It therefore appears to the committee that because funding decisions are made under this instrument, provision for merits review of those decisions could also be made in the same instrument.

1.88 The committee welcomes the Attorney-General’s additional advice that decisions under the instrument are appropriate for exclusion from merits review on the grounds that there is an allocation of finite resources and that overturning a grant decision would impact an allocation already made. In particular, the committee notes the advice that absent a decision by Government to provide additional funding, which could not be assured, overturning a decision would likely require the revisiting of existing grant arrangements with other applicants and reducing, terminating, or overturning allocations. The committee further considers that this would be helpful information for inclusion in the instrument’s explanatory materials.

1.89 In light of the above, the committee:

- **requests the minister’s advice as to whether the instrument’s explanatory statement can be amended to include the additional justification provided for excluding independent merits review with reference to the relevant grounds in the Administrative Review Council’s guidance document, *What decisions should be subject to merits review?*; and**
- **notes that the definition of ‘enactment’ in the *Administrative Appeals Tribunal Act 1975* appears to enable the instrument itself to provide for independent merits review. The committee generally welcomes the inclusion of independent merits review, however, the committee does not intend to take any further action in relation to this issue.**

Chapter 2

Concluded matters

2.1 This Chapter details the committee's concluding comments on significant technical scrutiny issues in legislative instruments relating to the committee's principles in Senate standing order 23(3).

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

Chapter 3

Agency engagement

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

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

New matters

3.3 The committee commenced engaging with the relevant agency via its secretariat about the following instruments.¹

Instrument

Automatic Mutual Recognition (Victoria) (Notification Requirement — Building, Plumbing, Architecture and Land Surveying Industries) Amendment Determination 2023 [F2023L01611]

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

Discovery Program Grant Guidelines (2023 edition): Discovery Indigenous [F2023L01615]

Export Control (Animals) Amendment (Improving Regulatory Outcomes) Rules 2023 [F2023L01700]

High Court (2024 Sittings) Rules 2023 [F2023L01523]

High Court Amendment (2023 Measures No. 1) Rules 2023 [F2023L01525]

High Court Amendment (Fees) Rules 2023 [F2023L01522]

Industry Research and Development (Australian Centre for Quantum Growth Program and Critical Technologies Challenge Program) Instrument 2023 [F2023L01518]

National Measurement (Australian Certified Reference Materials) Determination 2023 [F2023L01537]

Radiocommunications Accreditation (Amateur Radio Examinations) Rules 2023 [F2023L01651]

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

Concluded matters

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

Instrument

Automatic Mutual Recognition (Victoria) (Notification Requirement — Building, Plumbing, Architecture and Land Surveying Industries) Amendment Determination 2023 [F2023L01611]

Discovery Program Grant Guidelines (2023 edition): Discovery Indigenous [F2023L01615]

High Court (2024 Sittings) Rules 2023 [F2023L01523]

High Court Amendment (2023 Measures No. 1) Rules 2023 [F2023L01525]

High Court Amendment (Fees) Rules 2023 [F2023L01522]

Industry Research and Development (Australian Centre for Quantum Growth Program and Critical Technologies Challenge Program) Instrument 2023 [F2023L01518]

Migration Amendment (Resolution of Status Visa) Regulations 2023 [F2023L01393]

National Measurement (Australian Certified Reference Materials) Determination 2023 [F2023L01537]

Radiocommunications Accreditation (Amateur Radio Examinations) Rules 2023 [F2023L01651]

Superannuation Legislation Amendment (CSS) Regulations 2023 [F2023L01454]

Telecommunications (Customer Service Guarantee) Record-Keeping Rules 2023 [F2023L01334]

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 in this reporting period and those that the committee is aware have been implemented since the last Monitor.

4.2 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.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
High Court (2024 Sittings) Rules 2023 [F2023L01523]	The High Court undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	8 December 2023
High Court Amendment (2023 Measures No. 1) Rules 2023 [F2023L01525]	The High Court undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	8 December 2023
High Court Amendment (Fees) Rules 2023 [F2023L01522]	The High Court undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	8 December 2023
National Measurement (Australian Certified Reference Materials) Determination 2023 [F2023L01537]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	11 December 2023
National Portrait Gallery of Australia Regulations 2023 [F2023L01184]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	23 November 2023

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

Instrument	Undertaking	Date implemented
High Court (2024 Sittings) Rules 2023 [F2023L01523]	The High Court undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	11 December 2023
High Court Amendment (2023 Measures No. 1) Rules 2023 [F2023L01525]	The High Court undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	13 December 2023
High Court Amendment (Fees) Rules 2023 [F2023L01522]	The High Court undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	11 December 2023
National Portrait Gallery of Australia Regulations 2023 [F2023L01184]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	27 November 2023

Part II—Matters of interest to the Senate

Chapter 5

Expenditure and taxation in delegated legislation

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

Commonwealth expenditure

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

5.2 Instruments made under the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified. The committee has resolved to draw these instruments to the Senate's attention under Senate standing order 23(4).¹

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

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2023 [F2023L01673]	\$2.1 million over five years from 2019-24	Grants to the Australian Red Cross Society
	\$21.2 million over five years from 2023-24	Support for victims of identity crime and misuse
Financial Framework (Supplementary Powers) Amendment (Climate Change, Energy, the Environment and Water Measures No. 5) Regulations 2023 [F2023L01675]	\$103.9 million over five years from 2023-24	Community Energy Upgrades Fund
	\$2.0 million over two years from 2023-24	Emergency Services Training for Electric Vehicles program
Financial Framework (Supplementary Powers) Amendment (Employment and Workplace Relations Measures No. 3) Regulations 2023 [F2023L01674]		Reducing silicosis and other silica-related diseases by increasing awareness program:
	\$9.3 million over two years from 2023-24	Communications Strategy on a prohibition on the use of engineered stone
	\$1.2 million over two years from 2023-24	Safe Work Australia social partners grant

¹ Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

Industry Research and Development (Australian Centre for Quantum Growth Program and Critical Technologies Challenge Program) Instrument 2023 [F2023L01518]	\$19.8 million	Australian Centre for Quantum Growth Program
	\$40.2 million	Critical Technologies Challenge program
Industry Research and Development (Critical Minerals Office Pilot Program) Instrument 2023 [F2023L01619]	\$1.39 million from 2023-24	Critical Minerals Office Pilot Program
Industry Research and Development (International CCUS Research Partnerships Program) Instrument 2023 [F2023L01644]	\$9.5 million	International CCUS Research Partnerships Program
Industry Research and Development (Welding Simulators, Automation and Next Gen Technology Training Program) Instrument 2023 [F2023L01711]	\$293,000	Welding Simulators, Automation and Next Gen Technology Training Program

Levying of taxation in delegated legislation

5.4 The committee considers that one of the most fundamental functions of the Parliament is to levy taxation. The committee's longstanding view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax (in accordance with Senate standing order 23(3)(j)). Where a tax is imposed in delegated legislation, the committee's concerns are heightened if it is not limited by a cap in the relevant enabling Act.

5.5 As the levying of taxation in delegated legislation is a systemic technical scrutiny matter, the committee has resolved to draw the following instruments to the attention of the Senate under standing order 23(4).

Instrument	Limit on the taxation amount in primary legislation?
Education Services for Overseas Students (TPS Levies) (Risk Rated Premium and Special Tuition Protection Components) Instrument 2023 [F2023L01665]	No
Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations 2023 [F2023L01678]	No
Fishing Levy Amendment (2023-2024 Levy Amounts) Regulations 2023 [F2023L01687]	No
Radiocommunications (Receiver Licence Tax) Amendment Determination 2023 (No. 1) [F2023L01707]	No

Instrument	Limit on the taxation amount in primary legislation?
Radiocommunications (Transmitter Licence Tax) Amendment Determination 2023 (No. 3) [F2023L01705]	No

Chapter 6

Exemptions from disallowance and sunseting

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

Exemptions from disallowance

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

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
Agricultural and Veterinary Chemicals (MRL Standard for Residues of Chemical Products) Amendment Instrument (No. 2) 2023 [F2023L01546]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Commonwealth Securities (Treasury Portfolio Agency) (Consequential) Instrument 2023 [F2023L01701]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Financial Sector (Collection of Data) (reporting standard) determination No. 132 of 2023 [F2023L01608]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Financial Sector (Collection of Data) (reporting standard) determination No. 133 of 2023 [F2023L01606]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015

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.

Instrument	Source of exemption
Financial Sector (Collection of Data) (reporting standard) determination No. 134 of 2023 [F2023L01621]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Financial Sector (Collection of Data) (reporting standard) determination No. 135 of 2023 [F2023L01616]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Food Standards (Application A1264 – Food derived from drought-tolerant and herbicide-tolerant soybean line IND-00410-5) Variation [F2023L01562]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Food Standards (Application A1265 – 2'-FL/DFL, LNT, 6'-SL sodium salt and 3'-SL sodium salt as nutritive substances in infant formula products) Variation [F2023L01561]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Food Standards (Application A1266 – Endo-1,4-beta-xylanase from GM <i>Trichoderma reesei</i> (gene donor: <i>Fusarium verticillioides</i>) as a processing aid) Variation [F2023L01554]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Food Standards (Proposal P1062 – Defining added sugars for claims) Variation [F2023L01624]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Housing Australia Investment Mandate Amendment (Social Housing, Affordable Housing and Acute Housing Needs) Direction 2023 [F2023L01637]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
National Reconstruction Fund Corporation (Investment Mandate) Direction 2023 [F2023L01564]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Northern Australia Infrastructure Facility Investment Mandate Direction 2023 [F2023L01671]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Superannuation (prudential standard) determination No. 2 of 2023 [F2023L01528]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015

Exemptions from sunseting

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

6.9 The sunseting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of

Legislation after 1 January 2005 are automatically repealed ten years after registration. 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
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;

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.

- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

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

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.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
Agricultural and Veterinary Chemicals (MRL Standard for Residues of Chemical Products) Amendment Instrument (No. 2) 2023 [F2023L01546]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Charter of the United Nations (Listed Persons and Entities) Amendment (No. 3) Instrument 2023 [F2023L01524]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Commonwealth Securities (Treasury Portfolio Agency) (Consequential) Instrument 2023 [F2023L01701]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 5) Determination 2023 [F2023L01521]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 6) Determination 2023 [F2023L01694]	Subsection 54(1) of the <i>Legislation Act 2003</i>

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.

Instrument	Source of exemption
Federal Financial Relations (National Health Reform Payments for 2022-23) Determination 2023 [F2023L01631]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 6) Determination 2023 [F2023L01618]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Specific Purpose Payments for 2022-23) Determination 2023 [F2023L01610]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Financial Sector (Collection of Data) (reporting standard) determination No. 132 of 2023 [F2023L01608]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Financial Sector (Collection of Data) (reporting standard) determination No. 133 of 2023 [F2023L01606]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Financial Sector (Collection of Data) (reporting standard) determination No. 134 of 2023 [F2023L01621]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Financial Sector (Collection of Data) (reporting standard) determination No. 135 of 2023 [F2023L01616]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Food Standards (Application A1264 – Food derived from drought-tolerant and herbicide-tolerant soybean line IND-00410-5) Variation [F2023L01562]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Food Standards (Application A1265 – 2'-FL/DFL, LNT, 6'-SL sodium salt and 3'-SL sodium salt as nutritive substances in infant formula products) Variation [F2023L01561]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Food Standards (Application A1266 – Endo-1,4-beta-xylanase from GM <i>Trichoderma reesei</i> (gene donor: <i>Fusarium verticillioides</i>) as a processing aid) Variation [F2023L01554]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Food Standards (Proposal P1062 – Defining added sugars for claims) Variation [F2023L01624]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Marine Order 12 (Construction — subdivision and stability, machinery and electrical installations) 2023 [F2023L01541]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Marine Order 71 (Masters and deck officers) 2023 [F2023L01533]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

Instrument	Source of exemption
National Reconstruction Fund Corporation (Investment Mandate) Direction 2023 [F2023L01564]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Northern Australia Infrastructure Facility Investment Mandate Direction 2023 [F2023L01671]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Superannuation (prudential standard) determination No. 2 of 2023 [F2023L01528]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

**Senator the Hon Linda Reynolds CSC
Deputy Chair**