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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 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 snapshot²

Scrutiny period	
Legislative instruments registered on the Federal Register of Legislation between 16 August and 3 September 2024	100
Instruments in this period exempt from disallowance	8
Chapter 1: New and ongoing matters	
New legislative instruments commented on in report	3
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Undertakings which the committee was made aware had been implemented during this period	12
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Instruments that do not meet the committee's expectations regarding exemptions from disallowance under standing order 23(4A)	6
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² This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Report snapshot, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLML110.

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.

Explosives Regulations 2024¹

FRL No.	F2024L01086
Purpose	The instrument repeals and replaces the Explosives Transport Regulations 2002 and the Explosives Areas Regulations 2003 with a single modernised instrument prescribing the control of Commonwealth explosives areas and the handling of explosives.
Authorising legislation	<i>Explosives Act 1961</i>
Portfolio	Defence
Disallowance	15 sitting days after tabling (tabled in the Senate on 9 September 2024). Notice of motion to disallow must be given by 25 November 2024.

Overview

1.3 The Explosives Regulations 2024 (the instrument) repeals and replaces the Explosives Transport Regulations 2002 and the Explosives Areas Regulations 2003, condensing them into a single instrument. The Explosives Transport Regulations 2002 prescribed matters relating to the handling of explosives and the Explosives Areas Regulations 2003 prescribed matters relating to the control of Commonwealth explosives areas. As the replacement instrument for these two sets of regulations, the instrument also makes provision in relation to these matters in addition to exemptions relating to the transport of explosives. The instrument also prescribes the powers, functions and duties of the Competent Authority and compliance auditors, which are

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Explosives Regulations 2024, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLM 111.

statutory positions to fulfill the duties and powers in relation to the transport of explosives.²

1.4 The instrument is made under section 21 of the *Explosives Act 1961* (the Act), which enables the making of regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Act prescribes matters relating to the handling of explosives and the control of Commonwealth explosives areas.

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

Scrutiny concerns

Delegation of administrative powers and functions;³ adequacy of explanatory materials⁴

1.6 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 an instrument confers the power to delegate administrative powers or functions on another person. Where this occurs, the committee expects that the explanatory statement should address the purpose and scope of the delegation, including why it is considered necessary. The explanatory statement should also provide an explanation of who will be exercising the delegated powers or functions, including whether they possess the appropriate qualifications and necessary skills, and the nature and source of any limitations and safeguards relevant to the delegation, including whether they are contained in law or policy.

1.7 In addition, where an instrument authorises a person to delegate administrative powers or functions to a member of the Australian Public Service (APS), the committee expects that the delegation will be limited to members of the Senior Executive Service (SES) or equivalent. If an instrument makes provision for the delegation of powers to APS officers below the SES level, the explanatory statement should provide a thorough justification.

1.8 Further, under Senate Standing Order 23(3)(g), the committee scrutinises instruments as to whether their explanatory statements provide sufficient information to gain a clear understanding of the instrument.

² As defined in the Australian Code for the Transport of Explosives by Road and Rail (third edition). Section 6 of the instrument provides that any reference to the Competent Authority in the Code is to be read as if it were a reference to the Competent Authority appointed under section 30 of the instrument.

³ Senate standing order 23(3)(c).

⁴ Senate standing order 23(3)(g).

1.9 Subsection 31(1) empowers the Competent Authority to delegate ‘all or any of the duties, functions and powers’ of the Competent Authority other than three powers listed in the provision to a person referred to in subsection 31(2).⁵ Subsection 31(2) lists the permissible cohort of delegates. Paragraph 31(2)(a) enables delegation to a person who is an APS employee of the Department of Defence classified as an Executive Level 2 (EL2) or equivalent, or higher, or acting in a position usually occupied by an APS employee who is so classified. Paragraphs 31(2)(b), (c) and (d) enable delegation to particular ranks of the Navy, Army and Air Force respectively.⁶

1.10 In this regard, the explanatory statement does not provide any justification for the delegation of powers to APS officers below the SES level under paragraph 31(2)(a), including whether EL2 or acting EL2 delegates would be required to possess particular skills, qualifications and experience to exercise the powers, functions or powers of the Competent Authority. It is also unclear to the committee the nature of the Australian Defence Force ranks that are prescribed as possible delegates under paragraphs 31(2)(b), (c) and (d). The explanatory statement does not provide explanation of these positions, including the equivalent APS rank, and whether delegates holding these positions would be required to possess the appropriate skills, qualifications and experience to exercise the Competent Authority’s duties, functions and powers.

1.11 The committee’s scrutiny concerns are heightened by the broad delegation of ‘any or all of the duties, functions and powers’ of the Competent Authority. While the provision excludes three powers that are not suitable for delegation, it nonetheless prescribes a broad delegation to the cohort of persons listed under subsection 31(2), including APS delegates below the SES level. In this regard, the explanatory statement does not address why it is necessary and appropriate to delegate the majority of the Competent Authority’s duties, functions and powers under the instrument.

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

- **why it is considered necessary and appropriate to delegate any or all of the duties, functions and powers of the Competent Authority under the instrument, other than the three powers listed in subsection 31(1);**
- **whether delegates under paragraph 31(2)(a) the instrument who are APS officers at the EL2 or acting EL2 level would be required to have the**

⁵ The three powers excluded from delegation under subsection 31(1) are the power to appoint a person to be a compliance auditor under section 32, the power to grant exemptions under section 19 and the power to make an order under section 43.

⁶ Paragraph 31(2)(b) enables delegation to an officer of the Navy who holds the rank of Captain or a higher rank; paragraph 31(2)(c) enables delegation to an officer of the Army who holds the rank of Colonel or a higher rank; paragraph 31(2)(d) enables delegation to an officer of the Air Force who holds the rank of Group Captain or a higher rank.

appropriate skills, qualifications and experience to exercise the Competent Authority's duties, functions and powers;

- **whether Australian Defence Force delegates under paragraphs 31(2)(b), (c) and (d) would be required to have the appropriate skills, qualifications and experience to exercise the Competent Authority's duties, functions and powers; and**
- **whether any safeguards or limitations apply to the exercise of these powers or functions, and whether these safeguards are contained in law or policy.**

Compliance with the Legislation Act 2003 - incorporation;⁷ incorporation by reference;⁸ adequacy of explanatory materials⁹

1.13 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* that the explanatory statement to an instrument that incorporates a document describe the document, the manner in which it is incorporated and how it may be obtained. The committee also assesses the incorporation of documents by reference under Senate standing order 23(3)(f).

1.14 The instrument includes several provisions in relation to the Australian Code for the Transport of Explosives by Road and Rail (AE Code), including modifying the AE Code in relation to Commonwealth explosives under Schedule 1. The instrument defines the AE Code under section 5 and includes a note that the document can be accessed on the Safe Work Australia website with a link provided. The explanatory statement provides that the instrument is necessary to give effect to the third edition of the AE Code as endorsed by the Workplace Relations Ministers' Council on 3 April 2009.

1.15 Further, subparagraph 11(1)(b)(iii) of the instrument makes provision in relation to the Manual of Tests and Criteria - Eighth Revised Edition (the Manual). The provision states that the Manual was published in October 2023 and includes a note that the document can be accessed on the United Nations iLibrary website with a link provided.

1.16 In this regard, it is unclear to the committee whether the AE Code and/or the Manual are formally incorporated by reference in the instrument, as the explanatory statement does not clarify whether the documents are incorporated and, if so, the manner in which either document is incorporated.

⁷ Senate standing order 23(3)(a).

⁸ Senate standing order 23(3)(f).

⁹ Senate standing order 23(3)(g).

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

- **whether the AE Code and the Manual are incorporated into the instrument and, if so;**
- **the manner of incorporation, including the relevant legislative authority if either of the documents are incorporated as in force from time to time; and**
- **whether the instrument's explanatory statement can be amended to clarify that the AE Code and/or the Manual have been incorporated under the relevant provisions and the manner of incorporation.**

Privacy;¹⁰ adequacy of explanatory materials¹¹

1.18 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy. The committee considers that provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary, rather than delegated, legislation.

1.19 Where an instrument nevertheless contains such provisions, the explanatory statement should explain the nature and scope of the provisions (including the nature and extent of the information that may be disclosed and the persons and/or entities to whom disclosure is permitted). The explanatory statement should also address why the provisions are considered necessary and appropriate, what safeguards are in place to protect personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* applies).

1.20 Subsection 19(8) of the instrument requires the Competent Authority to keep a record of each exemption relating to the transport of explosives granted under section 19 for 2 years after the day the exemption was granted. Further, a compliance auditor entering a premises to conduct an audit under section 33 is empowered to take copies of, or extracts from, any documents inspected under paragraph 33(3)(a),¹² and make sketches or take photographs of anything in or on the premises concerning the explosives.¹³

1.21 However, neither the instrument nor the explanatory statement address the nature and scope of the information contemplated to be collected and used for the purposes of keeping records under subsection 19(8), examining and copying documents under paragraph 33(3)(b), and making sketches or taking photographs

¹⁰ Senate standing order 23(3)(h).

¹¹ Senate standing order 23(3)(g).

¹² See paragraph 33(3)(b) of the instrument.

¹³ See paragraph 33(3)(d) of the instrument.

under paragraph 33(3)(d). The explanatory statement also does not clarify whether the information collected under these provisions may include personal information, if, and to whom, any personal information may be disclosed or whether there are any safeguards in place to protect the use, collection or disclosure of any personal information.

1.22 Further, a compliance auditor's power to inspect and audit a premises under section 33 extends to inspecting the premises or 'anything found there that is connected with, or has been, is being or is likely to be used for the purposes of, the transport of Commonwealth explosives by road or rail' pursuant to paragraph 33(3)(a) in addition to making sketches or taking photographs of 'anything in or on the premises concerning the explosives' pursuant to paragraph 33(3)(d). In this regard, the explanatory statement does not define or outline the scope of 'anything' under either of these provisions. The committee's concerns are heightened in this instance, noting that section 33 confers entry, search and seizure powers on compliance auditors, which can impact on the rights and interests of individuals.

1.23 Finally, while the instrument's statement of compatibility with human rights confirms that the right to privacy is engaged, the explanatory statement does not address privacy in any way. The committee emphasises its expectation that privacy information is included in the body of the explanatory statement, rather than solely in the statement of compatibility.

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

- **the nature and scope of personal information that may be collected, used or disclosed under subsection 19(8), paragraph 33(3)(b) and paragraph 33(3)(d) of the instrument, including whether this is likely to include personal information;**
- **whether any safeguards apply to protect any personal information collected, used or disclosed under subsection 19(8), paragraph 33(3)(b) and paragraph 33(3)(d) of the instrument and whether these are set out in law or policy, including whether the *Privacy Act 1988* applies; and**
- **the scope of 'anything' under paragraph 33(3)(a) and paragraph 33(3)(d) in relation to information used, collected or disclosed under paragraph 33(3)(b) and paragraph 33(3)(d).**

Significant matters in delegated legislation¹⁴

1.25 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. Where an instrument includes significant matters that the committee considers are more appropriate for primary legislation, the committee expects that its explanatory statement should

¹⁴ Senate standing order 23(3)(j).

explain why it is considered necessary and appropriate to include those matters in delegated legislation.

1.26 Section 20 of the Act provides that a person who contravenes, or fails to comply with, a provision of the regulations or an order made under the regulations commits an offence against the Act, punishable by imprisonment not exceeding 6 months, a fine not exceeding 10 penalty units, or a lesser penalty that is prescribed in regulations. Accordingly, the instrument contains a number of provisions that, if not complied with, constitutes an offence under section 20 of the Act. A note to each of these provisions clarifies that the penalties imposed for the offence are as provided in the Act. For example, section 24 of the instrument provides that a person must not enter or remain within a Commonwealth explosives area, a breach of which is an offence under the Act punishable by one of the penalties listed under section 20 of the Act.

1.27 The committee understands that, while section 20 of the Act creates the framework of the offences, it would otherwise have no effect without the instrument, as the relevant provisions in the instrument provide the substantive content of the offences and in effect creates them. Noting that non-compliance with the relevant provisions in the instrument constitutes a criminal offence, the committee considers these provisions contain significant matters that are generally better suited for primary legislation through which the content of the offences can be subject to parliamentary oversight. In this regard, the explanatory statement does not address why it is necessary and appropriate for the content of the offences to be set out in delegated legislation, rather than in the Act or alternative primary legislation.

1.28 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to provide for the content of offences in delegated legislation, rather than primary legislation.

Fair Work Legislation Amendment (Closing Loopholes) Regulations 2024¹

FRL No.	F2024L01031
Purpose	The purpose of the instrument is to amend the Fair Work Regulations 2009, the Independent Contractors Regulation 2016 and the Fair Work (Registered Organisations) Regulations 2009, to support the new framework for regulated workers under the <i>Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024</i> .
Authorising legislation	<i>Fair Work (Registered Organisations) Act 2009</i> <i>Fair Work Act 2009</i> <i>Independent Contractors Act 2006</i>
Portfolio	Employment and Workplace Relations
Disallowance	15 sitting days after tabling (tabled in the Senate on 22 August 2024). Notice of motion to disallow must be given by 21 November 2024.

Overview

1.29 Part 16 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (the Amendment Act) amended the *Fair Work Act 2009* (the FW Act) to empower the Fair Work Commission (the FWC) to exercise functions and powers that relate to regulated road transport contractors performing work in the road transport industry. This includes in relation to road transport contractual chains and participants within those chains, and employee-like workers performing digital platform work ('regulated workers').

1.30 The new provisions inserted by Part 16 of Schedule 1 to the Amendment Act provide for regulations to prescribe a range of matters to support the new framework for regulated workers. This includes section 15RA and 15S (relating to the definitions of road transport contractual chain and the road transport industry) of the FW Act, and section 536KN (regarding further terms that may not be set out in a road transport minimum standards order). Further, the *Fair Work (Registered Organisations) Act 2009* (the RO Act) and accompanying Fair Work (Registered Organisations) Regulations 2009 (the RO Regulations) provide for the registration and regulation of

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Fair Work Legislation Amendment (Closing Loopholes) Regulations 2024, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDL M 112.

employee and employer organisations. The *Independent Contractors Act 2006* (the IC Act) and the accompanying Independent Contractors Regulation 2016 (the IC Regulation) provide for independent contractors to apply to the federal courts to review a services contract on the grounds that it is unfair or harsh.

1.31 The Fair Work Legislation Amendment (Closing Loopholes) Regulations 2024 (the instrument) amends the *Fair Work Regulations 2009* (the FW Regulations), the RO Regulations and the IC Regulation to support the new framework for regulated workers. This includes amendments to the FW Regulations to set out a non-exhaustive list of the types of conduct constituting 'serious misconduct' in relation to regulated workers, consequential amendments to the RO Regulations following passage of the Amendment Act, and amendments to the IC Regulation to specify an additional provision under the Australian Consumer Law (the ACL) that is considered an 'other review proceeding'.

Scrutiny concerns

Significant elements of a regulatory scheme;² exemption from the operation of primary legislation³

1.32 Senate standing order 23(3)(j) requires the committee to consider whether a legislative instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument contains significant elements of a regulatory scheme. Further, Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions from the operation of primary legislation.

1.33 The committee considers that such matters should generally be contained in primary, rather than delegated, legislation. However, where an instrument nonetheless includes significant elements of a regulatory scheme or creates exemptions from the operation of primary legislation, the committee considers that its explanatory statement should explain why it is considered necessary and appropriate to include those matters in delegated legislation.

1.34 In this instance, the instrument amends and inserts new provisions into the FW Regulations including as follows:

- Item 1 of Part 1 of Schedule 1 inserts new regulations 1.08A and 1.08B which have the effect of excluding the livestock industry, including transporting or otherwise dealing with livestock, from the definitions of 'road transport industry' and when a person is 'in a road transport contractual chain'.
- Item 2 of Part 1 of Schedule 1 inserts new sections 3A.02 and 3B.02, to prescribe (for the purposes of paragraphs 536KN(2)(b) and 536PR(4)(b) of

² Senate standing order 23(3)(j).

³ Senate standing order 23(3)(l).

the FW Act)⁴ certain additional terms that cannot be included in a road transport minimum standards order or road transport contractual chain order.

- Item 4 of Part 2 of Schedule 1 to the instrument repeals and substitutes regulation 1.07. New sub-regulations 1.07(2)-1.07(5) set out the types of conduct constituting 'serious misconduct' for employees, employee-like workers and regulated road transport contractors. This includes wilful or deliberate behaviour that is inconsistent with continuation of the employment or services contract or being intoxicated in the course of performing work. Sub-regulation 1.07(6) then defines when a worker is taken to be intoxicated. For employees, 'serious misconduct' is used for determining eligibility for notice of termination and redundancy under the National Employment Standards and notification requirements applying to dismissal of 15 or more employees. For regulated workers, this term is used to determine eligibility to obtain a remedy relating to unfair deactivation and termination and has the effect that a deactivation or termination for 'serious misconduct' will not be unfair (under subsections 546LH(2) and 536LM(2) of the FW Act).
- Item 22 of Part 5 of Schedule 1 inserts new regulations 6.01A, 6.01B and 6.01C to specify 'other deactivation proceedings', 'other termination proceedings' and 'other review proceedings'. This is enabled under subsections 734BA(3), 734BB(3) and 734C(3) of the FW Act and has the effect of preventing a person from commencing multiple proceedings in relation to unfair deactivation from a digital labour platform, unfair termination of a road transport services contract or seeking a remedy for an unfair contract term in a services contract.

1.35 Item 23 of Part 5 of Schedule 1 to the instrument amends section 8 of the IC Regulation to prescribe section 250 of the ACL (declarations relating to unfair contract terms in consumer and small business contracts) as 'other review proceedings' for the purposes of section 14 of the *Independent Contractors Act 2006* (the IC Act). This has the effect of preventing a person from making an unfair contracts application under section 12 of the Act when they have sought a similar remedy under a provision prescribed in section 8. The explanatory statement explains that this is intended to prevent double dipping between the ACL, FW Act and IC Act.

⁴ Paragraph 536KN(2)(b) of the *Fair Work Act 2009* provides that the regulations may prescribe one or more laws of the Commonwealth, a State or Territory as laws to which subparagraph 536KN(1)(a)(ii) does or does not apply. Subparagraph 536KN(1)(a)(ii) of the Act provides that a minimum standards order must not include terms about a matter relating to road transport that is otherwise comprehensively dealt with by another law or the Commonwealth, a State or Territory. Subparagraph 536PR(2)(a)(ii) and paragraph 536PR(4)(b) provide similarly in relation to minimum standards for persons in a road contractual chain.

1.36 Further, some of the exemptions and other measures contained in the instrument appear to be ongoing as the FW and RO Regulations are exempt from sunseting. The explanatory statement and, in some respects, the attached statement of compatibility with human rights, explains why the relevant provisions were considered necessary and appropriate. This includes – in the case of specifying other proceedings that cannot be progressed at the same time as an unfair deactivation or termination proceeding and provisions that are considered 'other review proceedings' – to prevent 'double dipping'.⁵ The explanatory statement does not otherwise explain why these provisions were considered necessary or appropriate for inclusion in the instrument, rather than in primary legislation. However, the explanatory statement notes that the relevant enabling Act authorises regulations to include the measures in the instrument. For example, it states that the IC Act enables the instrument to specify provisions that are considered 'other review proceedings'. The explanatory statement further notes that provisions excluding the livestock industry from the definition of 'in a road transport contractual chain' and 'road transport industry' are permitted by sections 15RA and 15S of the FW Act.

1.37 The committee notes that the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) has previously commented on the related Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 and the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (noting the latter bill became the Amendment Act) which recently passed the Parliament,⁶ in relation to provisions providing for the inclusion of significant matters in delegated legislation.⁷ The Scrutiny of Bills Committee raised concerns about provisions enabling the minister to make digital labour platform deactivation and road transport industry termination codes via delegated legislation. The committee considered that conditions as to the deactivation of such workers, including valid reasons for deactivation, are significant matters affecting the rights and liberties of individuals and therefore appropriate for primary, rather than delegated, legislation.⁸ The Scrutiny of Bills Committee raised further concerns that the bill empowered regulations to provide for internal merits review of decisions of the FWC under the FW Act to make or vary minimum standards

⁵ Explanatory statement, p. 8 and p. 23, paragraph [91].

⁶ The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 passed both Houses on 7 December 2023 and the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 passed both houses on 12 February 2024, to become the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*.

⁷ On 7 December 2023, the Senate agreed to divide the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 into two bills, with particular measures in the bill to be contained in the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (which became the Amendment Act).

⁸ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 13/23](#) (8 November 2023), p. 14.

orders, being a matter it considered more appropriate for parliamentary enactment⁹, however, the bill appears to have been amended to remove this particular provision.¹⁰ The committee supports the Scrutiny of Bills Committee's comments that these types of significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided, and notes that committee sought the minister's advice to this effect.

1.38 The committee considers that the measures included in the instrument constitute key definitions and significant elements of the regulatory scheme rather than merely matters of detail. For example, by excluding livestock transport workers from the road transport industry, they are not covered by new workplace rights in Chapters 3A and 3B of the FW Act, including in relation to terms under minimum standards orders and road transport contractual chain orders. Further, by setting out additional conduct that is 'serious misconduct', the instrument has the effect that certain protections for workers and contractors under the FW Act (such as the ability to apply to FWC for unfair deactivation or termination) will not apply. Therefore, as a matter of principle, these provisions appear to be more appropriate for inclusion in primary legislation due to the additional level of parliamentary oversight.

1.39 The committee reiterates its view that exemptions to primary legislation or significant elements of a regulatory scheme should be contained in primary, rather than delegated, legislation. Where such matters are nonetheless included in delegated legislation, the committee expects that they be time-limited or subject to sunset, to facilitate a minimum level of parliamentary oversight.

1.40 The committee has resolved to draw its concerns about the inclusion in delegated legislation of significant elements of a regulatory scheme and exemptions to primary legislation to the attention of the Senate under standing order 23(4).

⁹ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 16/23](#) (6 December 2023), pp. 18-19.

¹⁰ See also Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 3/24](#) (28 February 2024), pp. 53-54.

Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024¹¹

FRL No.	F2024L01056
Purpose	The purpose of the instrument is to establish a scheme for the administration of the Construction, Forestry and Maritime Employees Union Construction and General Division and its branches.
Authorising legislation	<i>Fair Work (Registered Organisations) Act 2009</i>
Portfolio	Employment and Workplace Relations
Disallowance	Exempt from disallowance.

Overview

1.41 The Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024 (the instrument) establishes a scheme (the Scheme) for the administration of the Construction, Forestry and Maritime Employees Union (CFMEU) Construction and General Division and its branches.

1.42 The instrument is made under subsection 323B(1) of the *Fair Work (Registered Organisations) Act 2009* (the Act), which empowers the minister to determine a scheme for the administration of the CFMEU Construction and General Division and its branches. The instrument comprises Annexures A, B and C, which determine the Scheme in full. Annexure A sets out the Scheme including the appointment, powers, functions and duties of the Administrator. Annexures B and C list the positions and names of incumbents of the CFMEU Construction and General Division and its branches.

1.43 The committee has identified several technical scrutiny concerns in the instrument outlined below.

Scrutiny concerns

*Retrospective effect*¹²

1.44 Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. This includes whether an instrument has retrospective effect.

¹¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Fair Work (Registered Organisations) (CFMEU Construction and General Division Administration) Determination 2024, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDL113.

¹² Senate standing order 23(3)(h).

1.45 If an instrument commences retrospectively, or has a retrospective effect, the committee expects the instrument's explanatory statement to explain the nature and scope of the provisions and why the retrospectivity is considered necessary and appropriate. The explanatory statement should also address whether any person has been, or may be, disadvantaged by the retrospectivity and, if so, what steps have been taken or will be taken to avoid such disadvantage.

1.46 Subclause 12(c) of Annexure A to the instrument provides that, notwithstanding anything in the National Rules or Divisional Rules,¹³ the power in subclause 12(a) may be exercised in relation to conduct that occurred before or after the commencement of the Scheme. Subclause 12(a) empowers the Administrator to suspend, remove, expel or disqualify a member or an office holder of the Administered Division or an Administered Divisional Branch whom the Administrator is satisfied is of bad character or for misconduct.

1.47 Pursuant to its guidelines under scrutiny principle (h), the committee interprets retrospectivity broadly. As subclause 12(c) captures conduct that occurred before the Scheme commenced, it appears to the committee that the provision is intended to operate retrospectively.

1.48 In light of the above, the committee requests the Attorney-General's advice as to:

- **whether subclause 12(c) of the instrument is intended to operate with retrospective effect as this is understood by the committee and reflected in principle (h) of its guidelines; and, if so,**
- **why retrospectivity is considered necessary and appropriate in relation to subclause 12(c); and**
- **whether any person has been, or may be, disadvantaged by the retrospectivity and, if so, what steps have been taken or will be taken to avoid such disadvantage.**

Conferral of discretionary powers;¹⁴ adequacy of explanatory materials¹⁵

1.49 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

¹³ Pursuant to clause 1 of the instrument, National Rules are the rules of the CFMEU as certified under section 161 of the *Fair Work (Registered Organisations) Act 2009* and Divisional Rules are the rules of the CFMEU Construction and General Division and Construction and General Divisional Branches as certified under section 161 of the *Fair Work (Registered Organisations) Act 2009*.

¹⁴ Senate standing order 23(3)(c).

¹⁵ Senate standing order 23(3)(g).

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

1.50 The committee considers that instruments conferring broad discretionary powers on a person should set out the factors that the person must or may consider in exercising the discretion. The explanatory statement should also address the purpose and scope of the power, why it is necessary, and explain who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee further expects the explanatory statement to outline the nature and source of any relevant safeguards and limitations on the exercise of the powers.

1.51 The instrument contains a number of broad provisions that confer discretionary powers on the Administrator, but neither the instrument nor its explanatory statement provide an explanation of the powers, including factors that may be considered in exercising the discretion. For example, clause 6 provides for various powers, functions and duties of the Administrator including the power to appoint one or more persons as Divisional Trustee of the Administered Division under subclause 6(1)(d). However, neither the instrument nor the explanatory statement explain the purpose and scope of this discretionary power, including any factors that the Administrator may or must consider in determining the appropriate appointee/s and whether to appoint one or multiple Divisional Trustees.

1.52 In light of the above, the committee requests the Attorney-General's advice on the following matters in relation to all discretionary powers conferred on the Administrator under the instrument:

- **the purpose and scope of each of the discretionary powers, including why it is considered necessary and appropriate for the Administrator to be conferred such broad discretion under the instrument;**
- **the factors the Administrator may or must take into account in exercising each of the discretionary powers, and the weight to be given to each of those factors;**
- **whether the Administrator possesses the appropriate qualifications and necessary skills to exercise the discretionary powers conferred on them; and**
- **the nature and source of any relevant safeguards and limitations on the exercise of the powers.**

Delegation of administrative powers and functions¹⁶

1.53 The committee's examination of an instrument under Senate standing order 23(3)(c) includes determining whether the instrument confers a power to delegate administrative powers and functions on another person. If an instrument provides for delegation, the committee expects that the explanatory statement will address the purpose and scope of the delegation, including why it is necessary. The committee also expects the explanatory statement will address who will exercise the delegated powers and functions, including whether they possess the appropriate qualifications and necessary skills, and the nature and source of any limitations and safeguards relevant to the delegation.

1.54 Subclause 6(3) of the instrument confers a power on the Administrator to delegate to a person nominated by the Administrator any of the powers, functions or duties of the Administrator under the Scheme or any of the powers or functions the Administrator may exercise under the Act.

1.55 Neither the instrument nor the explanatory statement explain the nature and scope of the delegation power under subclause 6(3), including the cohort of persons who may be delegates. The committee notes that the scope of delegation appears particularly broad, as the delegate can exercise any of the Administrator's powers, functions or duties under the Scheme or the Act. The committee also considers that 'a person nominated by the Administrator' authorises a broad cohort of potential delegates in the absence of any limitations imposed by the instrument, such as requiring a nominated person to possess appropriate skills and qualifications to exercise the powers, functions or duties of the Administrator.

1.56 In light of the above, the committee requests the Attorney-General's advice as to:

- **why it is necessary and appropriate to delegate the powers, functions or duties of the Administrator under the Scheme or the Act;**
- **who is likely to be delegated the powers, functions or duties of the Administrator, including whether that person will be required to have the appropriate skills, qualifications and experience; and**
- **the nature and source of any safeguards or limitations relevant to the delegation, including whether they are contained in law or policy.**

Privacy¹⁷

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

¹⁶ Senate standing order 23(3)(c).

¹⁷ Senate standing order 23(3)(h).

enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary, rather than delegated, legislation.

1.58 Where an instrument nevertheless contains such provisions, the explanatory statement should explain the nature and scope of the provisions, including the nature and extent of the information that may be disclosed and the persons and/or entities to whom disclosure is permitted. The explanatory statement should also address why the provisions are considered necessary and appropriate, what safeguards are in place to protect personal information, and whether these safeguards are set out in law or in policy (including whether the *Privacy Act 1988* (the Privacy Act) applies).

1.59 It appears to the committee that there are provisions in the instrument that may permit the collection, use or disclosure of information which may contain personal information. For example, subclause 9(1)(d) enables the Administrator to keep and maintain a copy of the register of members of the CFMEU as it relates to the Administered Division and to each of the Administered Divisional Branches. It appears to the committee that keeping and maintaining a register of members is likely to include the collection, use or disclosure of members' personal information. A further example is clause 12, which enables the Administrator to take disciplinary action against a CFMEU member or office holder. It appears to the committee that, in undertaking the disciplinary process, the Administrator may collect, use or disclose personal information of the member or office holder subject to the action.

1.60 However, it is unclear from the explanatory statement the extent to which the instrument requires the collection, use or disclosure of personal information, including but not limited to, subclause 9(1)(d) and clause 12 of the instrument.

1.61 Further, the committee notes Annexures B and C to the instrument lists the full names and positions of office holders in the CFMEU. The explanatory statement is also silent on why it was considered necessary and appropriate to publish the names of office holders and what safeguards are in place to protect the personal information of the office holders listed in the annexures.

1.62 In light of the above, the committee requests the Attorney-General's advice as to:

- **the nature and scope of any personal information that may be collected, used or disclosed under the instrument, referencing all relevant provisions;**
- **why the provisions are considered necessary and appropriate, including the publication of office holders' names and positions in Annexures B and C; and,**
- **whether any safeguards apply to protect any personal information collected, used or disclosed under the instrument, and whether these are set out in law or policy, including whether the *Privacy Act 1988* applies.**

Procedural fairness;¹⁸ adequacy of explanatory materials¹⁹

1.63 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness. The common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who may be adversely affected by a decision to be given an adequate opportunity to state their case before the decision is made.

1.64 Further, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument. Where an instrument limits or does not provide for procedural fairness, the committee expects the explanatory statement to provide a comprehensive justification for the exclusion or limitation.

1.65 Subsection 323B(4) of the Act provides that the minister is not required to observe any requirements of the natural justice hearing rule in making a decision under section 323B to determine a scheme for the administration of the CFMEU Construction and General Division and its branches. However, the committee notes that subsection 323B(4) does not preclude the minister from incorporating natural justice in making a decision under section 323B.

1.66 The committee further notes that, where an instrument confers discretionary powers, natural justice is expected to apply unless explicitly excluded by the instrument. Accordingly, the committee understands that natural justice can be observed in the exercise of discretionary decision-making under the instrument despite the operation of subsection 323B(4) of the Act.

1.67 In this regard, the explanatory statement does not address how the requirements of natural justice apply to the various kinds of decisions the Administrator is empowered to make under the instrument.

1.68 The committee notes that the Scrutiny of Bills Committee, in its reporting on the Fair Work (Registered Organisations) Amendment (Administration) Bill 2024 (the Amendment Bill), also raised concerns with section 323B as inserted into the Act. It drew its concerns to the attention of the Senate in relation to the broad drafting of the provision providing that any decisions made by the minister, which may affect individual rights and liberties, set out in the relevant legislative instrument would not be subject to the fair hearing rule.²⁰ In this regard, the committee's scrutiny concerns

¹⁸ Senate standing order 23(3)(h).

¹⁹ Senate standing order 23(3)(g).

²⁰ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 9 of 2024](#) (14 August 2024) p. 8–15.

are heightened as this issue was already raised in relation to the recent Amendment Bill.

1.69 In light of the above, the committee requests the Attorney-General's advice as to how the requirements of natural justice apply to each of the decision-making powers of the Administrator under the instrument where the decision may have an adverse effect on a person.

Availability of independent merits review;²¹ adequacy of explanatory materials²²

1.70 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 which have the capacity to affect a person's rights, liberties, obligations or interests, those decisions should ordinarily be subject to independent merits review.

1.71 The committee expects that the explanatory statement to an instrument that confers discretionary powers would address whether independent merits review is available. If merits review is excluded, the explanatory statement should justify its exclusion by reference to the Administrative Review Council's guide '*What decisions should be subject to merit review?*'.²³

1.72 In this regard, the explanatory statement does not address whether independent merits review is available for various decisions made by the Administrator under the instrument, including disciplinary action under clause 12. The committee particularly notes the importance of independent review of disciplinary decisions, such as those under clause 12, given the potential significance of the Administrator's powers in impacting the rights and interests of members, office holders and employees of the CFMEU.

1.73 In light of the above, the committee requests the Attorney-General's advice as to:

- **whether independent merits review is available for the various decisions the Administrator is empowered to make under the instrument; and**
- **if merits review is not available, justification for the exclusion of the decisions from merits review by reference to the Administrative Review Council's guide '*What decisions should be subject to merit review?*'.**

²¹ Senate standing order 23(3)(i).

²² Senate standing order 23(3)(g).

²³ Administrative Review Council, [What decisions should be subject to merit review?](#) (1999).

Significant matters in delegated legislation²⁴

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

1.75 In this regard, the instrument sets out the entire Scheme for the administration of the CFMEU Construction and General Division and its branches, including broad and significant discretionary powers that are conferred on the Administrator. The committee considers that significant matters of this kind are more appropriate for inclusions in primary legislation.

1.76 The committee notes that the instrument is made under subsection 323B(1) of the Act, which enables the minister to determine a scheme for the administration of the CFMEU Construction and General Division and its branches. Subsection 323B(3) sets out particulars for what must be included in the scheme, which enable the provision of the significant matters that are set out in the instrument.

1.77 Nonetheless, the committee expects the explanatory statement to justify why it is necessary and appropriate to provide for significant matters in delegated legislation rather than in primary law. The committee's concern is heightened because of subsection 323B(1) of the Act, which requires the minister, in determining a scheme, to have regard to Parliament's intention in enacting the primary legislation and be satisfied that the scheme is in the public interest.

1.78 The Scrutiny of Bills Committee previously raised similar scrutiny concerns to the attention of the Senate in relation to the insertion of section 323B by the Amendment Bill. As section 323B enabled the minister to determine a scheme for the administration of the CFMEU Construction and General Division and its branches, the committee considered that this provision enabled significant matters to be included in delegated legislation.²⁵ The Scrutiny of Bills Committee also highlighted that delegated legislation made under section 323B is not subject to disallowance and therefore subject to limited parliamentary oversight.

1.79 In light of the above, the committee requests the Attorney-General's advice as to why it is considered necessary and appropriate to provide for significant matters, being the Scheme, in delegated legislation rather than primary legislation.

²⁴ Senate standing order 23(3)(j).

²⁵ Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 9 of 2024](#) (14 August 2024) p. 8–15; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 11 of 2024](#) (11 September 2024) p. 22.

Parliamentary oversight²⁶

1.80 Senate standing order 23(3)(m) requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. This scrutiny principle is underpinned by the committee's concern to ensure adequate parliamentary oversight and protect and promote fundamental rule of law principles.

1.81 Clause 16 of the instrument provides that the CFMEU shall indemnify the Administrator in respect of any and all claims, proceedings or complaints made in connection to the Administrator's exercise or non-exercise of any functions, powers and duties under the Scheme. Subclause 16(1) clarifies that this indemnification continues after the Administrator ceases to act in the role in relation to the exercise or non-exercise of functions, powers and duties that occurred at a time when the Administrator still had functions, powers and duties under the Scheme.

1.82 The committee understands this provision to offer broad and complete indemnification of the Administrator with no requirement that the Administrator act in good faith. The committee therefore considers this provision to be exceptional and that it requires justification for its inclusion in the instrument. The committee notes that the explanatory statement does not provide any explanation of, or justification for, clause 16, including why it is necessary and appropriate to be included in the instrument. Further, it is unclear to the committee whether the indemnification is intended to cover criminal or civil penalties, and accordingly would expect the explanatory statement to address this.

1.83 In light of the above, the committee requests the Attorney-General's advice as to:

- **why it is necessary and appropriate to include the broad indemnification offered to the Administrator under clause 16 in the instrument; and**
- **whether further detail can be provided about the scope of the indemnification, including whether it is intended to cover criminal or civil penalties that could otherwise be imposed on the Administrator.**

Consultation on specific instrument²⁷

1.84 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. The committee's expectations under this principle are further supported by the requirement in section 17 of the *Legislation Act 2003* (Legislation Act) that, prior to an

²⁶ Senate standing order 23(3)(m).

²⁷ Senate standing order 23(3)(d).

instrument being made, the rule-maker must be satisfied that any consultation that was appropriate and reasonably practicable was undertaken.

1.85 Where no consultation has been undertaken on the specific instrument, or with the persons likely to be affected by it, the committee expects the explanatory statement to provide justification as to why no such consultation was undertaken.

1.86 In this instance, the explanatory statement to the instrument states that, given the urgent need to determine whether to place the CFMEU Construction and General Division and its branches into administration, and being satisfied it is in the public interest to do so, it was not reasonably practicable to undertake consultation. The explanatory statement also notes that the urgency is reflected in subsection 323B(4) of the Act, which provides that the minister is not required to observe any requirements of the natural justice hearing rule in making a decision under section 323B.

1.87 The committee notes that, despite the Act providing that the fair hearing rule does not need to be observed, the consultation requirement under section 17 of the Legislation Act is a separate obligation on the rule-maker and unrelated to natural justice. It also does not abrogate the committee's role to scrutinise each instrument under standing order 23(3)(d).

1.88 Accordingly, the committee has resolved to draw the Attorney-General's justification for not undertaking consultation with persons likely to be affected by the instrument to the attention of the Senate under standing order 23(4).

Adequacy of explanatory materials²⁸

1.89 Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument. The committee has long emphasised the importance of explanatory statements as a point of access to understanding the purpose, operation and effect of an instrument, including how an individual's rights and interests may be affected. The committee is particularly concerned with the quality of explanatory statements to instruments that are not subject to disallowance. The committee's expectations in relation to the adequacy of explanatory materials apply regardless of whether the instrument is subject to the disallowance process.

1.90 In this instance, the single-page explanatory statement briefly addresses the legislative authority for the instrument, its purpose and reasoning for not undertaking a consultation process. However, it fails to provide any information about the operation of the instrument including by reference to specific provisions. This information is particularly important to enable users of the law to accurately understand the instrument's operation and effect, and how it may impact those likely

²⁸ Senate standing order 23(3)(g).

to be affected by the instrument. Consequently, the committee highlights its scrutiny concerns regarding the explanatory statement under scrutiny principle (g) in addition to raising it in conjunction with principles (c), (h) and (i).

1.91 Accordingly, the committee has resolved to draw its concerns regarding the adequacy of the explanatory statement to the attention of the Senate under standing order 23(4).

Ongoing matters

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

Migration (Designated Migration Law—Visa Condition 8208) Determination (LIN 24/009) 2024²⁹

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	<i>Migration Act 1958</i>
Portfolio	Home Affairs
Disallowance	Exempt from disallowance

Overview

1.93 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 obligation’ or ‘do anything else related to’ making a decision, exercising a power or complying with an obligation in relation to visa condition 8208.³⁰

1.94 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.³¹ As

²⁹ 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 12 of 2024*; [2024] AUSStaCSDLM 114.

³⁰ *Migration Act 1958*, subsection 495A(1).

³¹ Migration Regulations 1994, Schedule 8, subclause 8208(1).

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.

1.95 The committee first raised scrutiny concerns with the instrument on 28 March 2024 in *Delegated Legislation Monitor 4 of 2024*,³² and the minister provided a response dated 19 September 2024.³³ As the committee retains scrutiny concerns about the below matters, it has resolved to raise them with the Minister for Home Affairs.

Scrutiny concerns

Automated decision-making;³⁴ conferral of discretionary powers;³⁵ adequacy of explanatory materials³⁶

1.96 In *Delegated Legislation Monitor 4 of 2024*,³⁷ the committee raised concerns that the instrument facilitates automated decision-making of discretionary powers in relation to visa condition 8208.

1.97 The minister's decision to approve a 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 under paragraph 8208(1)(a) of the Regulations. Accordingly, the committee noted 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.

1.98 As the entirety of visa condition 8208 is determined to be designated migration law under the instrument, it appeared to the committee 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) could be exercised by a computer program.

³² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024), pp. 3-7.

³³ This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

³⁴ Senate standing order 23(3)(c).

³⁵ Senate standing order 23(3)(c).

³⁶ Senate standing order 23(3)(g).

³⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024), pp. 3-7.

1.99 Accordingly, the committee raised scrutiny concerns as the explanatory statement does not detail the aspects of a decision under paragraph 8208(1)(a) that will, or may, be made by a computer program or the information that would inform the computer program in making the decision. The explanatory statement also does not justify why it is necessary and appropriate to use automated decision-making in this circumstance, or applicable safeguards on the automated exercise of discretionary power, such as the correction of errors made by a computer program. Accordingly, the committee sought the minister's advice in relation to these details. The committee also sought the minister's advice as to whether consideration was given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide*.³⁸

*Minister's response*³⁹

1.100 In his correspondence of 19 September 2024, the minister provided general background about the operation of visa condition 8208 including that, while it is imposed on all Subclass 500 (Student) visas, its effect is limited to student visa holders who may or may not be currently studying in the postgraduate research sector, and who intend to change their course of study to critical technology. The minister referred to Migration (Critical Technology – Kinds of Technology) Specification (LIN 24/010) 2024, which, as mentioned in the explanatory statement, specifies the kinds of technology that are critical technology for the purposes of visa condition 8208. The minister also listed in his response the kinds of technology covered under critical technology, including biotechnologies.

1.101 Further, the minister provided advice about the operation of the legislative framework for automated decision-making including that subsection 495A(1) of the Act enables the minister to arrange for the use of a computer program to make a decision, exercise a power or obligation, or do anything else relating to a decision, power or obligation, under the designated migration law. However, the minister highlighted that nothing in subsection 495A(1) compels the minister to arrange for such use of computer programs, therefore the purpose of the instrument is to extend the scope of the designated migration law to include visa condition 8208 rather than to mandate the use of automated decision-making for decisions made in relation to this visa condition.

1.102 The minister confirmed that where the Department of Home Affairs (the department) is considering arranging for the automation of certain decisions or processes under subsection 495A(1) of the Act in relation to the designated migration law, it does so with regard to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide* (the Ombudsman's guide).⁴⁰

³⁸ Commonwealth Ombudsman, [Automated Decision-making Better Practice Guide](#), 2019.

³⁹ This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

⁴⁰ Commonwealth Ombudsman, [Automated Decision-making Better Practice Guide](#) (2019).

1.103 The response also advised on the use of business rules for the automation of decision-making, which are developed and considered by technical experts and processing and subject matter experts, and may be subject to legal advice with any updates or changes made ahead of settling and implementing arrangements under subsection 495A(1) of the Act. The minister noted that careful consideration is given to whether business rules are suited to automated decision-making, with appropriate objective criteria capable of being automated. The minister also noted that the department is working with the Attorney-General's Department and other Commonwealth departments and agencies to develop a consistent framework for automated decision-making in government services.

1.104 In relation to the committee's request for advice as to the scope and nature of decision-making under the instrument, the minister emphasised that, currently, decisions relating to visa condition 8208 are made by the minister or their delegate, supported by appropriate policy and procedural instructions and training including under the department's Policy and Procedure Control Framework and are not made by the operation of a computer. The minister advised that the minister or delegate's decision is also informed by consideration of information provided by the visa holder to support their application and information held by the department through open-source or engagement with other relevant agencies. The minister further advised that, in the event the decision-maker is considering refusing a visa holder's application, procedural fairness is afforded to the applicant, including through the application of the fair hearing rule. In such a case, the applicant would be provided with information concerning the decision, reasons for the decision, and the availability of merits review.

1.105 Regarding why it was considered necessary and appropriate for the instrument to provide for automated decision-making, the minister advised that the department has long-standing arrangements under section 495A of the Act in relation to automation of certain processes and decisions for visa applications. The response included examples of such automation, including 'auto-grant', an automated process by which an electronic visa application is checked and may be automatically granted.

1.106 The minister also advised that ministerial accountability for administrative action taken by a computer program is ensured as, pursuant to subsection 495A(2) of the Act, actions made by a computer program would be taken to be those of the minister. The minister stated that a computer program would be bound by the same laws as the minister when making decisions and therefore, in practical terms, this means that consideration must be given in relation to the suitability of a particular kind of decision to automation, having regard to departmental guidelines on automation of administrative decisions, functional and technical specifications and business rules, any related legal advice, and broader guidance including the Ombudsman's guide.

1.107 The minister also advised of a safeguard in place to ensure the minister or their delegate exercises their discretionary power under subclause 8208(1) of the

Regulations personally and without fetter. Subsection 495(2) of the Act provides that a decision made by a computer program covered by an arrangement under subsection 495A(1) is taken to be a decision of the minister. The minister noted that it is a standard administrative law principle that a decision-maker is not fettered in exercising their discretion.

1.108 The minister also provided mechanisms used to identify errors in automated decision-making and, where errors arise, mechanisms to correct those errors. The response noted that, under subsection 495B(1) of the Act, the minister may substitute a more favourable decision than that of a computer program, providing a safeguard on potential computer-related errors. The minister further advised that, in the event that decisions to approve course changes under condition 8208 are automated, such decisions would be subject to ongoing monitoring and quality assurance. In this regard, the department implements and maintains a randomised quality assurance process for any automated decision-making to ensure the decision is made consistent with the legislative framework and business rules. Where errors are identified, the department reviews and can update underlying system rules to ensure errors are addressed and are not replicated in future.

1.109 Further, the minister stated that the availability of merits review is not altered or affected whether the decision is made by the minister, the minister's delegate or a computer program. In relation to visa condition 8208, merits review is made available under Part 5 of the Act, by paragraph 4.02(4)(u) of the Regulations, where the minister makes a decision not to approve a visa holder changing course. Further, in the event that such a decision is made, the visa holder will be provided with a record of the decision, including reasons for the decision and details of available merits review. The minister also reiterated that the minister may substitute a computer-based decision pursuant to subsection 495B of the Act.

Committee view

1.110 The committee thanks the minister for the detailed information provided about the nature and operation of visa condition 8208 and the kinds of technology that are critical technology. The minister's response also provides contextual information about the process of applying for approval to undertake critical technology-related study. The committee considers that this information would be useful for inclusion in the explanatory statement, to provide guidance for users of the law about visa condition 8208 and change of course applications.

1.111 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 in relation to the nature of visa condition 8208 and change of course applications.

1.112 The committee further notes the minister's advice that neither section 495A of the Act nor the instrument compels the minister to arrange for the use of a computer program to make decisions or do anything related to a decision under the designated

migration law. The committee also notes the minister's advice that decisions made under subclause 8208(1) of the Regulations are currently made by the minister or their delegate and not by a computer program.

1.113 However, by determining decisions in relation to condition 8208 to be part of the 'designated migration law', the instrument enables such decisions to be made by a computer, despite the current absence of a computer program to make a decision in the minister or their delegate's place. The committee is therefore concerned about the nature and scope of decisions that it is contemplated could be made under the instrument in future, and whether any safeguards would apply. In this regard, the committee wishes to emphasise that it only has one opportunity to examine a legislative instrument, which occurs at the time it is registered. Accordingly, it is important that the committee is satisfied that its expectations are met in relation to instruments at this time, even though they may not be operating in practice or have any practical effect.

1.114 Therefore, the committee is seeking further detail below as to what is contemplated for the potential future use of automated decision-making for the discretionary decision under condition 8208.

1.115 The committee welcomes the minister's advice about the factors to be taken into consideration in determining whether a decision is suitable for automation, including guidelines, specifications, business rules, legal advice, and the Ombudsman's guide. However, it remains unclear to the committee to whether the particular decisions made under subclause 8208(1) of the Regulations are considered appropriate for automation. If these decisions have been deemed suitable for automation, it is also unclear how this was determined, and the nature and scope of the proposed automation including which aspects of the decision would be made by a computer program and the extent to which these aspects involve discretion.

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

- **whether decisions relating to visa condition 8208 have been deemed suitable for automation, and if so;**
- **how this was determined, and the nature and scope of the proposed automation including which aspects of the decision would be made by a computer program and the extent to which these decisions involve discretion.**

1.117 The committee notes the minister's advice that the information a minister or delegate will consider in making a decision under subclause 8208(1) of the Regulations includes business rules, policy and procedural guidance such as the department's Policy and Procedure Control Framework, information provided by the visa holder and information held by the department. However, the minister's response does not address whether it is envisaged that a computer program would also consider these rules, guidance and information in making an automated decision under

subclause 8208(1) of the Regulations. Consequently, it remains unclear to the committee what aspects of a decision under subclause 8208(1) are contemplated to be automated, and what information would inform an automated decision.

1.118 In light of the above, the committee requests the minister's advice as to how a proposed computer program would make a decision in relation to visa condition 8208 and what factors or criteria the computer program would take into account in making the decision.

1.119 The committee acknowledges the minister's advice that it is necessary and appropriate for the instrument to provide for automated decision-making as the department has long-standing arrangements for automating processes and decisions relating to visa applications. However, the committee considers this response relates to the use of automated decision-making in migration law more broadly. Therefore, it remains unclear why it is necessary and appropriate to provide for automated decision-making of decisions relating to visa condition 8208 through the instrument's expansion of the scope of designated migration law.

1.120 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to provide for automated decision-making of decisions relating to visa condition 8208 through the instrument's operation of expanding the scope of designated migration law.

1.121 In relation to the minister's advice that a computer program would be bound by the same laws as the minister when making decisions, the committee notes that all computer programs across the statute book are subject to the same laws as human decision-makers. Accordingly, the committee does not consider this to be a safeguard to the migration automated decision-making framework.

1.122 Further, the committee notes the minister's advice in relation to the operation of subsection 495(2) of the Act as a safeguard in place to ensure the minister or their delegate exercises their discretionary power under subclause 8208(1) of the Regulations personally and without fetter, as it provides that a decision made by a computer program is taken to be a decision of the minister. The committee also notes the minister's advice that the administrative law principle that a decision-maker is not fettered in exercising their discretion operates as a further safeguard. However, the committee does not consider these to be sufficient safeguards on discretionary decision-making, on the basis that they are not unique to the power under subclause 8208(1) but would apply to all discretionary provisions across the statute book. It also remains unclear how these safeguards, and any other applicable safeguards, would operate in practice where a subclause 8208(1) decision is made by a computer program, as opposed to the minister or their delegate.

1.123 While the minister's response also notes that procedural fairness, including the fair hearing rule, is afforded to a visa holder where their application to undertake critical technology-related study is refused, the response also fails to address if, and

how, this safeguard would operate where a decision is automated. The committee emphasises the importance of ensuring sufficient safeguards on the use of automated decision-making, as it may fetter a discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of each individual case.

1.124 In light of the above, the committee requests the minister's advice as to how the safeguards provided in the minister's response would operate in practice where a computer program makes a decision relating to visa condition 8208, and whether there are any specific safeguards that apply, or are envisaged to apply, to an automated decision made in relation to visa condition 8208.

1.125 The committee thanks the minister for his advice on the ongoing monitoring and quality assurance processes that operate as mechanisms to identify errors in automated decision-making, which would be utilised if decisions to approve course changes under visa condition 8208 are automated. The committee also notes the minister's advice that, where errors are identified, the department's mechanisms to correct these errors are reviewing and, where necessary, updating system rules to ensure the errors do not replicate in future automated decisions. The committee considers these appropriate mechanisms to support the operation of the minister's power to substitute a decision under subsection 495B(1) of the Act. The committee considers that the nature and source of any safeguards relevant to the exercise of administrative powers, including in relation to the use of automated decision-making, would be useful to include in the explanatory statement, in line with its expectations.

1.126 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 in relation to the mechanisms used to identify errors in automated decision-making and, where errors arise, the mechanisms to correct those errors.

1.127 Finally, the committee thanks the minister for his advice about the operation of merits review as a safeguard on decisions made under subclause 8208(1) of the Regulations. The minister advised on the arrangements for circumstances where the minister makes a decision not to approve a course change, including that the visa holder is provided with a written statement of reasons for the decision. As the minister also advised that a decision of a computer program is taken to be a decision of the minister pursuant to subsection 495(2) of the Act, the committee understands that a decision of the computer program would be merits reviewable in the same way as a decision made by the minister personally or their delegate. The committee considers this information would be useful to include in the explanatory statement to assist those that may be affected by the instrument to understand their review rights in relation to visa condition 8208 decisions.

1.128 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 in relation to how merits review is intended to operate as a safeguard on visa condition 8208

decisions, including that applicants will be provided with a written statement of reasons for relevant decisions.

Therapeutic Goods Legislation Amendment (Vaping Reforms) Regulations 2024⁴¹

FRL No.	F2024L00839
Purpose	The purpose of this instrument is to amend the Therapeutic Goods Regulations 1990 and Therapeutic Goods (Medical Devices) Regulations 2002 to support the national vaping reforms set out in the Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act 2024 (the Amendment Act).
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Portfolio	Health and Aged Care
Disallowance	15 sitting days after tabling (tabled in the Senate on 3 July 2024). The committee gave notice of motion to disallow on 17 September 2024.

Overview

1.129 The Therapeutic Goods Legislation Amendment (Vaping Reforms) Regulations 2024 (the instrument) support the national vaping reforms set out in the *Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act 2024* (the Amendment Act) which restricts the importation, domestic manufacture, supply, commercial possession and advertisement of vaping goods.

1.130 In particular, the instrument amends the Therapeutic Goods Regulations 1990 (the TG Regulations) and Therapeutic Goods (Medical Devices) Regulations 2002 (the MD Regulations) to specify commercial quantities and units of vaping goods for the purposes of new offences and civil penalty provisions introduced by the Amendment Act for possessing vaping goods. The instrument also provides transitional arrangements under which certain therapeutic vaping goods that would otherwise be unlawful upon commencement of the Amendment Act can be dealt with and allows for the supply or export of compliant vaping goods that were imported or manufactured prior to 1 March 2024, as part of transitional arrangements to assist sponsors to comply with the reforms.

1.131 The committee raised scrutiny concerns with the instrument on 11 September 2024, in *Delegated Legislation Monitor 10 of 2024*,⁴² and the minister

⁴¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Therapeutic Goods Legislation Amendment (Vaping Reforms) Regulations 2024, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLM 115.

⁴² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 3-10.

provided a response dated 26 September 2024.⁴³ As the committee retains scrutiny concerns with the below matters, it has resolved to raise them with the Minister for Health and Aged Care.

Scrutiny concerns

Broad discretionary powers;⁴⁴ conferral of coercive powers⁴⁵

1.132 Items 4 and 28 in Part 1 of Schedule 1 to the instrument introduce conditions to the exemptions contained in the MD Regulations and TG Regulations which allow for the lawful importation, manufacture and supply of unregistered therapeutic vaping devices and therapeutic vaping goods.

1.133 In *Delegated Legislation Monitor 10 of 2024*, the committee raised concerns that the provisions containing these conditions contain broad discretionary powers, which also appear to be coercive in nature, as they appear to require the production of documents and samples, and to allow entry and access to premises.⁴⁶

1.134 These conditions require that sponsors of therapeutic vaping devices or therapeutic vaping goods must:

- if requested by the Secretary, give the Secretary a 'reasonable number' of samples of the device or goods, within the period requested by the Secretary (at least five working days);⁴⁷
- allow—or, if they are not the manufacturer, have procedures in place to ensure that the manufacturer allows—an authorised officer to enter 'at any reasonable time', 'any premises', including premises outside Australia, at which the sponsor or any other person 'deals with' the devices or goods;⁴⁸
- allow—or, if they are not the manufacturer, have procedures in place to ensure that the manufacturer allows—an authorised officer, while on those premises to inspect the premises and devices or goods and examine, take measurements of, conduct or require testing on them or on 'any thing' on those premises that 'relates to' the device or goods, as well as make any image or recording of those premises or 'any thing' on those premises;⁴⁹ and

⁴³ This correspondence was tabled with this monitor and will be available via the [Delegated Legislation Monitors](#) page on the committee's website.

⁴⁴ Senate standing order 23(3)(c).

⁴⁵ Senate standing order 23(3)(h).

⁴⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 10 of 2024* (11 September 2024), pp. 4-7.

⁴⁷ Item 4, paragraph (fa); item 28, paragraph (fa).

⁴⁸ Item 4, subparagraphs (fb)(i) and (fd)(i); item 28, subparagraphs (fb)(i) and (fd)(i).

⁴⁹ Item 4, subparagraphs (fb)(ii), (fb)(iii), (fd)(ii) and (fd)(iii); item 28, subparagraphs (fb)(ii), (fb)(iii), (fd)(ii) and (fd)(iii).

- if requested by the authorised officer, produce—or, if they are not the manufacturer, have procedures in place to ensure that the manufacturer produces—such documents 'relating to' the device or goods as the officer requires and allow them to copy the documents.⁵⁰

1.135 The committee was unclear as to the scope of these discretionary provisions, including the factors that would be taken into account in deciding whether to request the production of samples or documents, what is meant by terms such as 'deals with' and 'relates to' and in what circumstances the Secretary or an authorised officer may enter premises outside of Australia. The committee was also unclear as to why these provisions were considered necessary and appropriate or how the public interest was served by their inclusion in the instrument. The committee further noted that it was unclear from the instrument and explanatory statement who is an 'authorised officer' who may require the production of samples or enter premises, or whether they possess the appropriate skills and qualifications to do so. Accordingly, the committee sought the minister's advice in relation to these matters. In addition, the committee sought the minister's advice as to whether the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the AGD guide)⁵¹ was considered in drafting these provisions.

*Minister's response*⁵²

Nature and scope of the discretionary powers

1.136 In his response of 26 September, the minister advised that the powers inserted by items 4 and 28 allow the Secretary to effectively monitor the quality, safety and performance of therapeutic vaping goods that are permitted to be supplied in Australia and to ensure compliance with regulatory requirements under the Act, the TG Regulations and the MD Regulations. Notably, as no therapeutic vapes have currently been evaluated by the Therapeutic Goods Administration (TGA) for inclusion on the Australian Register of Therapeutic Goods for smoking cessation or management of nicotine dependence, the TGA relies on sponsors to provide a notice under the exemptions in the TG and MD Regulations stating that the vaping goods comply with applicable standards and that their only indications are for smoking cessation or management of nicotine dependence. Following this notification, the Secretary may determine that the supply of those goods notified be stopped or should cease because their supply compromises public health and safety, and/or that the goods do not conform with an applicable standard or the essential principles. The minister advised that without the regulatory powers in items 4 and 28, there is a risk that the Secretary

⁵⁰ Item 4, paragraphs (fc) and (fe); item 28, paragraphs (fc) and (fe).

⁵¹ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (24 May 2024).

⁵² This correspondence was tabled with this monitor and will be available on the [Delegated Legislation Monitors](#) page on the committee website.

will have insufficient information to monitor quality, safety and performance of therapeutic vapes and make determinations where necessary. The ability to make such determinations to protect public health and safety is compromised without powers to require the production of documents and samples from sponsors of therapeutic vapes and to allow entry and access to premises.

1.137 The minister added that patients, pharmacists and prescribers rely on the TGA's monitoring activities to provide confidence in the quality, safety and performance of therapeutic goods supplied in Australia and that, without powers to support the TGA to test the accuracy of statements made by sponsors in notifications for such vapes, they may continue to be supplied in the pharmaceutical supply chain without appropriate checks or balances.

1.138 Finally, the minister advised that the nature and volume of information, and the level of access to premises that may be required by an authorised officer or person is 'intended to be directly related to the risk associated with relevant therapeutic vapes'.

Why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument

1.139 The minister also advised that the powers inserted by items 4 and 28 are based on the statutory conditions in subsection 28(5) (conditions of registration or listing) and section 41FN (conditions applying automatically to goods in the Register) of the Act, with respect to sponsors importing or supplying other medicines and medical devices in Australia. He indicated that the notification system under the instrument is analogous to the registration and inclusion frameworks under the Act and that the public interest and confidence in the regulatory scheme is served by ensuring that sponsors of therapeutic vaping goods are subject to many of the same conditions that the Act automatically applies to sponsors of other medicines and medical devices with general marketing approval in Australia.

'Authorised officers' that exercise power under the provisions and entry to premises outside of Australia

1.140 The minister advised that the terms 'authorised officer' and 'authorised person' used in the instrument are defined in the Act, the TG Regulations and the MD Regulations, as persons authorised by the Secretary to exercise powers under certain provisions. This includes persons employed by a Commonwealth department or state and territory departments with responsibility for health and law enforcement. The minister also advised that, 'In practice authorised officers and authorised persons exercising powers under these provisions have the relevant training, skills and experience to carry out regulatory compliance action'. Further, under the Act, TG Regulations and MD Regulations, these persons must carry and present identity cards to persons prior to entry into premises and must comply with applicable Commonwealth, state and territory codes of conduct.

1.141 In response to the committee's queries regarding the legislative authority for authorised officers to enter premises outside of Australia, the minister advised that most therapeutic vaping goods are manufactured overseas and imported. He added that, while it is anticipated that the production of information and samples will obviate the need for authorised officers or persons to enter and inspect premises outside Australia, the power would remain available if needed.

Consideration of the Attorney General's Department's Guide to Framing Commonwealth Offences

1.142 Finally, the minister indicated that the AGD guide was considered when drafting the provisions of items 4 and 28, in particular, paragraph 8.6 of the guide which relates to the limited circumstances where consent or a warrant to enter and search premises may not be necessary.

1.143 In this regard, the minister stated that there were exceptional circumstances to authorise entry without consent or warrant, namely:

- entry onto premises under the instrument is analogous to the discussion of entry onto licensed premises at paragraph 8.6;
- entry onto premises where therapeutic goods are dealt with or manufactured is a condition of participating in the regulatory scheme for therapeutic goods; and
- the powers under items 4 and 28 are limited in nature and do not confer broad powers to seize documents and other evidential material, in contrast to ordinary search and seizure powers.

Committee view

Nature and scope of the discretionary powers

1.144 The committee welcomes the minister's advice as to the nature and scope of the discretionary powers, including the intention to ensure compliance with regulatory requirements under the Act and the TG Regulations and MD Regulations. The committee considers that the information provided about the intention of the instrument to ensure compliance with regulatory requirements under the Act, and the TG and MD Regulations to be helpful information for inclusion in the instrument's explanatory statement, to provide guidance for users of the law as to the purpose and intent of the regulatory framework.

1.145 However, the committee does not consider the advice that, without the powers to require production of documents and samples and to allow entry and access, the Secretary will have insufficient information to monitor quality, safety and performance of vapes to be an adequate justification for the manner of acquiring such information through such broad, coercive powers to require the production of documents and samples and enter premises. The committee's concerns are heightened in this regard as the explanatory statement does not outline the nature and source of any

constraints or limitations on these powers and the minister's response provides limited information in this regard. This is of particular concern as coercive powers have the potential to significantly trespass on individuals' rights and liberties.

1.146 In addition, it remains unclear to the committee what specific factors are likely to be taken into account in exercising the discretion under each of the discretionary powers in items 4 and 28. While the minister advised that the nature and volume of information and level of access to premises is intended to be 'directly related to the risk associated with relevant therapeutic vapes', the committee would appreciate more specificity as to what this entails and the factors to be taken into account in exercising each of the broad discretionary powers in items 4 and 28. The committee considers that it would also be helpful for users of the law if examples were provided in this respect.

Why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument

1.147 The committee acknowledges the minister's advice that it serves the public interest and confidence in the regulatory scheme that sponsors of therapeutic vaping goods are subject to many of the same conditions as those which the Act automatically applies to sponsors of other medicines and medical devices. However, the committee does not consider this to be a sufficient justification for inclusion of the provisions in delegated, rather than primary, legislation.

1.148 While it may be in the public interest that these conditions are similar in nature, the committee notes that there is an additional level of parliamentary oversight attached to primary legislation which does not apply to the delegated legislation. The committee's concerns are heightened as the conditions in the instrument contain broad discretionary and coercive powers with the potential to significantly impact on rights and liberties. The fact that the conditions in items 4 and 28 are almost identical in their terms to those in subsection 28(5) and section 41FN of the Act further suggests that these provisions are appropriate for inclusion in primary, rather than delegated, legislation.

'Authorised officers' that exercise power under the provisions and entry to premises outside of Australia

1.149 The committee thanks the minister for his advice that the terms 'authorised officer' and 'authorised person' used in the instrument are defined in the Act, the TG Regulations and the MD Regulations, as persons authorised by the Secretary to exercise powers under certain provisions. The committee considers that this information should be included in the explanatory statement, in line with its expectations under Senate standing order 23(3)(e). Further, the committee considers that the minister's advice that such persons must carry and present identity cards and comply with relevant codes of conduct to be an important safeguard on the exercise of discretionary powers and appropriate for inclusion in the explanatory statement.

1.150 However, while the minister advised that 'in practice' such persons have the relevant training, skills and experience to carry out regulatory compliance action, the committee remains unclear as to exactly what training, skills and experience such persons possess. It is also unclear on what legal basis authorised officers could enter premises outside of Australia, if such power were needed.

Consideration of the Attorney General's Department's Guide to Framing Commonwealth Offences

1.151 While the committee welcomes the minister's advice that the AGD guide was considered in drafting the provisions, in line with its expectations as reflected in its guidelines, the committee retains concerns about the justification provided.

1.152 It is not clear to the committee that this justification meets the requirements of the AGD guide. In this regard, the AGD guide states that, where such powers are provided for, senior executive authorisation should be required and rigorous reporting requirements should be imposed, which helps to ensure a sufficient level of accountability is maintained. Additionally, the guide notes the views of the Senate Standing Committee for the Scrutiny of Bills that such authorisation should only be sought if avenues for obtaining a warrant by remote means have proven 'absolutely impractical' in the particular circumstances.⁵³ The committee's concerns about these matters are heightened noting that the minister has not provided advice about constraints applying to the discretionary, coercive powers.

1.153 It is also not clear how the provisions of items 4 and 28 do not confer broad powers to seize documents and other evidential material in contrast to ordinary search and seizure powers, noting the broad discretionary terms in those provisions, including for example, subparagraphs (fb)(ii), (fb)(iii), (fd)(ii) and (fd)(iii) which require manufacturers to allow – or have procedures in place allowing – authorised officers to enter premises and take measurements of or conduct testing on 'any thing' on the premises relating to the device or goods, as well as making an image or recording of the premises or 'any thing' on the premises.

1.154 In light of the above the committee requests the minister's further advice as to whether the instrument's explanatory statement can be amended to include the information provided regarding:

- **the intention of the instrument, including the powers in items 4 and 28 in Part 1 of Schedule 1, to ensure compliance with regulatory requirements under the legislative framework;**
- **the definition of 'authorised officer' and 'authorised person', as set out in the *Therapeutic Goods Act 1989*, *Therapeutic Goods Regulations 1990* and *Therapeutic Goods (Medical Devices) Regulations 2002*; and**

⁵³ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (24 May 2024), pp. 78-80.

- that 'authorised persons' and 'authorised officers' must present identity cards and comply with applicable Commonwealth, state and territory codes of conduct.

1.155 In addition, the committee requests the minister's advice as to:

- whether further, specific detail can be provided about the factors to be taken into account in exercising the discretionary powers in items 4 and 28 and whether relevant examples can be provided;
- any constraints on the grant and exercise of the discretionary powers in items 4 and 28 in Part 1 of Schedule 1 to the instrument;
- whether further justification can be provided as to why it is considered to be necessary and appropriate to include the conditions in items 4 and 28 in delegated legislation; and
- whether further justification can be provided as to how consideration was given to the matters in the *Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Availability of independent merits review⁵⁴

1.156 In *Delegated Legislation Monitor 10 of 2024*, the committee noted its expectations that, where instruments confer broad discretionary powers, their explanatory statement should set out whether independent merits review is available of decisions made in connection with exercise of the powers. This is because such broad, discretionary and coercive powers have the potential to seriously trespass on individuals' rights and liberties. Accordingly, the committee sought the minister's advice as to whether independent merits review was available in this instance.⁵⁵

Minister's response⁵⁶

1.157 The minister advised in his response that independent merits review is not available with respect to decisions made by the Secretary under items 4 and 28, but that judicial review remains available. The minister explained that this reflects a balanced compromise between the needs to effectively monitor the quality, safety and performance of unregistered therapeutic vaping goods and a person's right of review, noting that analogous powers ordinarily apply to other medicines and medical devices regulated under the Act.

⁵⁴ Senate standing order 23(3)(i).

⁵⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 5-7.

⁵⁶ This correspondence was tabled with this monitor and will be available on the [Delegated Legislation Monitors](#) page on the committee website.

1.158 The minister also provided justifications for excluding merits review, including with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (the ARC guide).⁵⁷ That is because decisions, such as those to require the sponsor to provide the Secretary with a reasonable number of samples of a therapeutic vaping device, are preliminary in nature and have no substantive effect but could assist in making determinations or taking further compliance and enforcement action.⁵⁸ Further, where the department holds significant concerns about the quality, safety or performance of therapeutic vaping goods, the exercise of merits review rights could delay timely regulatory, compliance or enforcement action, particularly where the goods pose a grave or imminent risk to public health and safety.

1.159 The minister also drew the committee's attention pages 27 to 28 of the Explanatory Memorandum to the Therapeutic Goods Amendment (2022 Measures No. 1) Bill 2022⁵⁹ which excludes merits review for investigative, compliance and post-market surveillance purposes. The minister indicated that these observations were equally applicable to items 4 and 28 in the instrument.

Committee view

1.160 The committee thanks the minister for his advice about the justification for excluding merits review of decisions under items 4 and 28, with reference to the ARC guide. In particular, the committee notes the advice that decisions to require the provision of information or documents are preliminary to making further determinations or taking compliance or enforcement action. The committee also welcomes the availability of judicial review.

1.161 However, the committee reiterates its expectations that, where independent merits review is not available for decisions under an instrument, its explanatory statement should explain the characteristics of the decisions that justify their exclusion with reference to the ARC guide.

⁵⁷ Administrative Review Council, [What decisions should be subject to merits review?](#) (1999).

⁵⁸ Administrative Review Council, [What decisions should be subject to merits review?](#) (1999), paragraphs [4.3]-[4.7].

⁵⁹ In summary, this justification includes that requiring the provision of information or documents under the Act could delay and undermine timely investigation of potential contraventions of the Act and subsequent regulatory action; and refers to a risk that exercise of review rights may be undertaken to frustrate or delay an investigation into a potential contravention. Further, the explanatory memorandum notes that amendments removing merits review under the Act will not affect the existing availability of merits review rights for any regulatory action taken in connection with the provision of information or documents in response to a notice requiring the provision of such information or documents. For example, merits review would still apply to a decision to cancel registration of a medicine following the provision of this information or documents.

1.162 Accordingly, the committee requests the minister's advice as to whether the explanatory statement can be amended to include the justifications provided for excluding merits review for decisions under items 4 and 28 in Part 1 of Schedule 1 to the instrument.

*Privacy*⁶⁰

1.163 In *Delegated Legislation Monitor 10 of 2024*, the committee raised privacy concerns as many of the conditions inserted into the MD Regulations and TG Regulations by the instrument appeared to provide for the production to, and copying of, documents by 'authorised officers'. However, it was not clear from the explanatory statement, the nature and scope of the information that may be collected used and/or disclosed under the instrument including whether it may contain personal information and, if so, how such personal information may be used or collected. The committee also raised concerns that the explanatory statement did not explain any safeguards in place to protect the use, collection and/or disclosure of any personal information.⁶¹

*Minister's response*⁶²

1.164 In his response, the minister advised that the documents or information that are likely to be required to be produced or collected are those relevant to a sponsor's compliance with the relevant exemption. While the minister stated that these will ordinarily relate to the activities of commercial entities, he also indicated that they may include some personal information of individuals associated with those entities. For example, such documents or information may include certificates of analysis or product specifications, including formulation details and performance data.

1.165 In addition, the minister advised that where personal information is required to be produced or collected under the instrument, the collection, storage, use and/or disclosure of such personal information would be subject to the requirements and limitations in the *Privacy Act 1988* and that the department adheres to the Australian Privacy Principles, Australian Government Agencies Privacy Code and the department's Privacy Policy.

Committee view

1.166 The committee thanks the minister for his advice as to the nature and scope of information that may be collected, used and/or disclosed under the instrument as well as the details of applicable privacy safeguards. The committee considers it would be helpful to set out in the explanatory statement, this detail about the nature and scope of the relevant information, and the applicable privacy safeguards. This will provide

⁶⁰ Senate standing order 23(3)(h).

⁶¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 7-8.

⁶² This correspondence was tabled with this monitor and will be available on the [Delegated Legislation Monitors](#) page on the committee website.

clarity to users of the law as to their rights and obligations in terms of what specific information may be collected as well as safeguards applying where personal information is involved.

1.167 In light of the above the committee requests the minister's advice as to whether the explanatory statement can be amended to include the details provided about the nature and scope of personal information that may be collected, used and/or disclosed under the instrument, as well as applicable safeguards, including under the *Privacy Act 1988* and the department's Privacy Policy.

Retrospective effect⁶³

1.168 In *Delegated Legislation Monitor 10 of 2024*, the committee identified that items 3 and 33 of the instrument appeared to have retrospective effect, as reflected in its guidelines.⁶⁴ This is because while (as outlined in the explanatory statement) the provisions operate prospectively, they attach new conditions in relation to goods that were imported or manufactured before 1 March 2024.

1.169 Item 3 amends the sponsor notice requirements in table item 2.17 in the MD Regulations, so that these requirements apply to goods imported or manufactured before 1 March 2024. Item 33 is a transitional provision which amends Regulation 11.73 of the MD Regulations, so that amendments made by the instrument apply to therapeutic goods imported before, on or after 1 March 2024. The effect of these provisions together is to extend the exemption in table item 2.17 so that a sponsor notice must be provided in relation to goods imported or manufactured before 1 March 2024, before the device can be supplied to the consumer.

1.170 Accordingly, the committee sought the minister's advice as to whether these provisions are intended to operate retrospectively as per the committee's understanding, why the retrospective effect is considered necessary and appropriate, whether any person was disadvantaged and steps taken to avoid any such disadvantage.

Minister's response⁶⁵

1.171 In his response, the minister stated that the provisions are not intended to apply retrospectively. However, he noted that arrangements under the Therapeutic Goods (Vaping Goods Possession and Supply) Determination 2024 are intended to mitigate the effects of these provisions. The possession of previously excluded goods by individuals, retailers and other entities is permitted for certain periods of time to

⁶³ Senate standing order 23(3)(h).

⁶⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 8-9; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#) (3rd Edition) (July 2024), p. 28.

⁶⁵ This correspondence was tabled with this monitor and will be available on the [Delegated Legislation Monitors](#) page on the committee website.

facilitate the use, disposal or exportation of the goods; return to wholesalers and sponsors through the pharmaceutical supply chain; or surrender to the goods to the Department of Health and Aged Care (the department).

Committee view

1.172 The committee reiterates that items 3 and 33 appear to fall within its understanding of provisions that operate retrospectively, as they attach new conditions or requirements to processes which commenced under a previous legal framework, by applying new conditions in relation to goods imported or manufactured prior to 1 March 2024. However, while noting this, the committee thanks the minister for his advice that arrangements under the Therapeutic Goods (Vaping Goods Possession and Supply) Determination 2024 are intended to mitigate the effects of items 3 and 33 by enabling possession for a limited period of time to enable disposal, return or surrender of vaping goods. This is detail that the committee would expect to be included in the instrument's explanatory statement.

1.173 In light of the above the committee requests the minister's advice as to whether the explanatory statement can be amended to include the details provided as to how arrangements under the Therapeutic Goods (Vaping Goods - Possession and Supply) Determination 2024 are intended to mitigate the effects of the retrospective effect of relevant provisions of the instrument.

Immunity from liability⁶⁶

1.174 In *Delegated Legislation Monitor 10 of 2024*, the committee raised concerns and sought the minister's advice about the scope of immunity from liability under the instrument and whether further justification could be provided as to why this immunity was considered necessary and appropriate.⁶⁷ Item 22 in Part 1 of Schedule 1 to the instrument inserts a new regulation 46B into the TG Regulations to prescribe a person to whom powers or functions are delegated under subsection 57(1A) of the Act for the purposes of paragraph (b) of the definition of 'protected person' in subsection 62(3).⁶⁸ Subsection 57(1A) of the Act enables the Secretary to delegate certain powers relating to enforcement and forfeiture of things seized under search warrant to an officer of: a Department of State of a State; a Department or administrative unit of the Public Service of a Territory; or an authority of a State or a Territory; that has functions relating to therapeutic goods, health or law enforcement.

⁶⁶ Senate standing order 23(3)(h).

⁶⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 9-10.

⁶⁸ See item 22 of Schedule 1, Part 1 of the instrument.

*Minister's response*⁶⁹

1.175 In his response, the minister advised that 'protected persons' include persons employed by a Commonwealth department and persons employed by state and territory departments with responsibility for health and law enforcement, who have been delegated powers under Chapter 5A, section 52AAA and/or section 52AAB of the Act. He added that this 'includes persons at both junior and senior levels'.

1.176 In terms of a justification for the immunity, the minister indicated that the Amendment Act implemented a federal cooperative scheme between the Commonwealth, states and territories with respect to regulation of vaping goods. This new framework authorises state and territory officials to undertake regulatory, compliance and enforcement action. Noting that in practice, compliance may be undertaken by a range of state and territory agencies and officers at a range of levels, he advised that it was necessary that the immunity extend to all classes of persons in subsection 57(1A) of the Act. The minister further noted that, effective regulation, compliance and enforcement is shared between the Commonwealth, states and territories as states and territories have enacted corresponding laws that apply the Commonwealth *Therapeutic Goods Act 1989*.

Committee view

1.177 The committee thanks the minister for his advice that regulation, compliance and enforcement in relation to vaping goods is shared between the Commonwealth and the states. However, in terms of the scope of 'protected persons', the minister's advice restates the definition under the Act. It remains unclear to the committee which particular persons are likely to fall within the scope of 'protected persons' noting the breadth of the definition in subsection 57(1A) and paragraph 62(3)(b) of the Act, and specifically what is contemplated by 'junior and senior levels'.

1.178 Additionally, while the minister's advice broadly explains why it is necessary to enable compliance to be undertaken by a range of state and territory agencies and by officers at a range of levels, it remains unclear to the committee why immunity from liability is considered necessary in relation to each specific class of persons specified in subsection 57(1A) of the Act. In this regard, the committee reiterates its expectations that where an instrument includes provisions providing for immunity from criminal liability, the explanatory statement should explain both the nature and scope of the immunity and why its breadth is considered necessary and appropriate, in relation to each specific class of person to whom it applies.

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

- **whether further advice can be provided as to the scope of the immunity from liability under new regulation 46B inserted by the instrument and**

⁶⁹ This correspondence was tabled with this monitor and will be available on the [Delegated Legislation Monitors](#) page on the committee website.

the specific individuals it is contemplated are likely to be included as 'protected persons' under subsection 57(1A) and paragraph 62(3)(b) of the *Therapeutic Goods Act 1989*; and

- whether further justification can be provided as to why the immunity from liability is considered necessary and appropriate including with reference to the classes of individuals it may apply to.

Clarity of drafting⁷⁰

1.180 In *Delegated Legislation Monitor 10 of 2024*, the committee raised concerns about two possible drafting errors and sought the minister's advice as to whether these could be corrected. Namely, the instrument's explanatory statement describes the instrument as making amendments to support vaping reforms introduced by the 'Therapeutic Goods and Other Legislation (Vaping Reforms) Act 2024',⁷¹ and includes numerous subsequent references to the 'Amendment Act'. It appeared to the committee that this was intended to refer to the *Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act 2024*. The explanatory statement also states under the heading to item [28] (page 17): 'Item 25 repeals paragraphs (g) and (h) of item 15 and inserts new paragraphs (fa), (fb), (fc), (fd), (fe), (g) and (h).' It appeared that this was intended to refer to item 28.⁷²

Minister's response⁷³

1.181 In his response, the minister confirmed that the department is currently taking steps to correct these drafting errors.

Committee view

1.182 The committee welcomes the minister's undertaking to amend the instrument to correct the drafting error but wishes to reiterate the importance of accurate drafting in delegated legislation.

1.183 In light of the above the committee concludes its examination of the instrument in relation to this issue.

⁷⁰ Senate standing order 23(3)(e).

⁷¹ Explanatory statement, pp. 1 and 25.

⁷² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 9-10.

⁷³ This correspondence was tabled with this monitor and will be available on the [Delegated Legislation Monitors](#) page on the committee website.

Therapeutic Goods (Vaping Goods—Possession and Supply) Determination 2024

Therapeutic Goods (Vaping Goods—Possession and Supply) Amendment Determination 2024⁷⁴

FRL No.	F2024L00847 ; F2024L00890
Purpose	<p>F2024L00847: The purpose of the instrument is to determine specified vaping goods, or specified classes of vaping goods, that may be supplied or possessed in Australia, and specified persons, or specified classes of persons who may possess or supply those goods. The instrument also specifies the circumstances in which those persons may do so, and any applicable conditions that must be complied with.</p> <p>F2024L00890: The purpose of the instrument is to amend the Therapeutic Goods (Vaping Goods – Possession and Supply) Determination 2024 to extend the notification requirements, by one month, that apply to specified persons intending to surrender vaping goods to the Department of Health and Aged Care and to persons possessing a particular commercial quantity of vaping goods; to extend the expiration of the application of some items relating to possession and/or supply, and to make some minor amendments to defined terms and ensure consistency with the regulatory framework in the Act.</p>
Authorising legislation	<i>Therapeutic Goods Act 1989</i>
Portfolio	Health and Aged Care
Disallowance	<p>F2024L00847: 15 sitting days after tabling (tabled in the Senate on 3 July 2024). Committee gave notice of motion to disallow on 17 September 2024.</p> <p>F2024L00890: 15 sitting days after tabling (tabled in the Senate on 12 August 2024). Committee gave notice of motion to disallow on 19 September 2024.</p>

Overview

1.184 Division 1 of Part 4A-2 of the *Therapeutic Goods Act 1989* (the Act) sets out offences and civil penalties for the importation, manufacture, supply and commercial

⁷⁴ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Therapeutic Goods (Vaping Goods—Possession and Supply) Determination 2024, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLM 116.

possession of vaping goods, unless an exception applies. In addition to specific statutory authorisations and permissions, section 41R of the Act enables the minister to determine, by legislative instrument, that specified vaping goods or a specified class of vaping goods may be supplied or possessed in Australia by a specified person or class thereof; in the circumstances, and subject to any conditions specified in, the determination.

1.185 The Therapeutic Goods (Vaping Goods-Possession and Supply) Determination 2024 (the instrument) is made under section 41R of the Act to authorise specified persons to possess and supply specified vaping goods in certain circumstances, subject to specified conditions. The Therapeutic Goods (Vaping Goods – Possession and Supply) Amendment Determination 2024 (the amendment instrument) amends the instrument, including to extend the notification requirements for specified persons intending to surrender vaping goods and extend the operation of some items relating to possession and/or supply.

1.186 The committee raised scrutiny concerns with these instruments on 11 September 2024, in *Delegated Legislation Monitor 10 of 2024*,⁷⁵ and the minister provided a response dated 26 September 2024.⁷⁶ As the committee retains scrutiny concerns with the below matters, it has resolved to raise them with the Minister for Health and Aged Care.

Scrutiny concerns

Matters more appropriate for inclusion in primary legislation;⁷⁷ exemptions from the operation of primary legislation;⁷⁸ adequacy of explanatory materials⁷⁹

1.187 In *Delegated Legislation Monitor 10 of 2024*,⁸⁰ the committee raised concerns as the instrument (as amended) creates exceptions to offence provisions in the Act. Specifically, Division 1 of Part 4A-2 of the Act sets out offences and civil penalty provisions relating to importation, manufacture, supply and possession of commercial vaping goods, unless an exception applies. The Act sets out some exceptions but provides for further exceptions to be included in a determination made by the minister under section 41R of the Act.

1.188 The instrument is made pursuant to section 41R of the Act and determines that specified vaping goods or a class of vaping goods may be supplied or possessed in

⁷⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 11-20.

⁷⁶ This correspondence was tabled with this monitor and will be available via the [Delegated Legislation Monitors](#) page on the committee's website.

⁷⁷ Senate standing order 23(3)(j).

⁷⁸ Senate standing order 23(3)(l).

⁷⁹ Senate standing order 23(3)(g).

⁸⁰ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp. 12-14.

Australia by specified persons, or a class thereof, in the circumstances and subject to the conditions specified. The instrument therefore has the effect of creating exemptions to offence provisions in the Act. A number of the exceptions in the instrument also provide a time-limited amnesty period enabling the disposal or depletion of existing stock where supply was previously lawful.⁸¹

1.189 However, neither instrument's explanatory statement sets out why it was considered necessary and appropriate to include the detail of these exemptions in delegated legislation, rather than primary legislation. Accordingly, the committee sought the minister's advice about why these exemptions were appropriate for delegated legislation.⁸²

*Minister's response*⁸³

1.190 In his response of 26 September 2024, the minister noted that the content of the exceptions to the offences and civil penalty provisions in Division 1 of Part 4A-2 is principally specified in the Act but that some content may be determined by the minister in an instrument, made under section 41R of the Act.

1.191 He further advised that it was considered necessary and appropriate to include the exceptions in delegated legislation, citing paragraph 2.3.4 of the Attorney-General's Department's (the AGD guide),⁸⁴ which recognises that this may be appropriate where such content involves a level of detail, or of such a technical nature, that it is not appropriate for the Act. The minister noted that the regulation of vaping goods is complex and subject to overlapping Commonwealth, state and territory laws which may change from time to time. Therefore, it is necessary and appropriate to have a power to include exceptions in delegated legislation, to deal with unintended situations that arise as a result. The minister also explained that the exceptions are highly detailed and, in contrast to other exceptions in the Act, are technical and peculiar to vaping goods. Finally, the minister indicated that most of the exceptions in the instrument are transitional and time limited.

1.192 Further, the minister explained that the instrument itself, determined under section 41R of the Act, is driven by public health objectives, including to ensure that:

⁸¹ See Schedule 1, item 1 and Schedule 2, items 1 and 5 (as amended by Schedule 1, item 13 of the Therapeutic Goods (Vaping Goods – Possession and Supply) Amendment Determination 2024).

⁸² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), p. 14.

⁸³ This correspondence was tabled with this monitor and will be available via the [Delegated Legislation Monitors](#) page on the committee's website.

⁸⁴ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (24 May 2024).

- unused stock of vaping goods in the community may be surrendered, exported, disposed of and/or destroyed in controlled circumstances that minimise the risk of diversion;
- the Department of Health and Aged Care (the department) has oversight of the supply and possession of lawful vaping goods by certain persons who do not otherwise hold a licence or authority to do so; and
- adequate protection is afforded to certain persons where supply or possession without a licence or authority outweighs public health and safety concerns, such as supply or possession for scientific research or testing.

Committee view

1.193 The committee thanks the minister for his advice about the necessity and appropriateness of including the exceptions in delegated legislation. While the committee would not normally consider it to be an adequate justification alone that this is authorised by the Act, in this case, the Act itself contains some exceptions and enables the instrument to set out additional exceptions. The committee notes this instance is distinct from cases where the Act operates as framework legislation that contains the broad principles of a legislative scheme and relies on delegated legislation to set out significant elements of its scope and operation.

The committee welcomes the minister's advice about why it is considered appropriate for additional exceptions to be included in the instruments, including that it is necessary and appropriate to enable delegated legislation to deal with unintended situations arising because of the complex interaction between, or changes to, overlapping Commonwealth, state and territory laws applying to regulation of vaping; and that the exceptions are highly detailed and technical in nature. Further, the committee notes that a number of the exceptions are time-limited and that the instrument itself is subject to sunset, facilitating a minimum level of parliamentary oversight. Accordingly, the committee considers that the explanation provided by the minister would be helpful for inclusion in the instrument's explanatory statement.

1.194 Finally, the committee thanks the minister for his advice that the instrument is driven by public health objectives, including to minimise diversion of unlawful vaping goods in the community. While this appears to be a justification for the exceptions themselves rather than their inclusion in delegated legislation, the committee considers that this would nonetheless be useful information for inclusion in the explanatory statement to provide further guidance to those subject to the law about the background to the legislative scheme.

1.195 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 detail provided as to:

- why it is considered necessary and appropriate to include the additional exceptions to the offences in Division 1 of Part 4A-2 of the *Therapeutic Goods Act 1989* in delegated legislation, rather than primary legislation; and
- how the Therapeutic Goods (Vaping Goods—Possession and Supply) Determination 2024 (as amended by the Therapeutic Goods (Vaping Goods—Possession and Supply) Amendment Determination 2024) is driven by public health objectives.

Broad discretionary powers;⁸⁵ coercive powers;⁸⁶ clarity of drafting;⁸⁷ adequacy of explanatory materials;⁸⁸ availability of independent merits review⁸⁹

1.196 Schedules 1 and 2 of the instrument specify vaping goods, the persons who may possess or supply such goods, the circumstances in which they may do so, and any applicable conditions. However, a number of these conditions (set out in table items 3-6 of Schedule 1 and items 4-11 and 13 of Schedule 2, as amended by items 18 and 21 of the amendment instrument) include broad, discretionary powers which also appear to be coercive in nature as they require or enable production, seizure and inspection of documents and information.

1.197 For example, a number of the table items in Schedules 1 and 2 of the instrument impose conditions on persons who possess or supply vaping goods that, if requested by the department, must provide 'any information' that it requires about:

- the goods;
- the person's possession of the goods, and any other persons involved in the activities; and
- 'any other matter' that the department determines is relevant.⁹⁰

1.198 Accordingly, in *Delegated Legislation Monitor 10 of 2024*, the committee sought the minister's advice as to whether further detail could be provided about the nature and scope of the conditions in the relevant table items, factors that are likely to be taken into account in determining what is 'any other matter' considered relevant and relevant examples, why the provisions are necessary and appropriate for inclusion in delegated legislation, which officers are authorised to exercise the powers, the

⁸⁵ Senate standing order 23(3)(c).

⁸⁶ Senate standing order 23(3)(h).

⁸⁷ Senate standing order 23(3)(e).

⁸⁸ Senate standing order 23(3)(g).

⁸⁹ Senate standing order 23(3)(i).

⁹⁰ See Schedule 1: table items 3-6, and Schedule 2: table items 4-11 and 13 (as amended by the Therapeutic Goods (Vaping Goods—Possession and Supply) Amendment Determination 2024).

availability of independent merits review and whether the AGD guide was consulted in drafting the relevant provisions.⁹¹

*Minister's response*⁹²

1.199 In his response, the minister advised that he could arrange for amendments to repeal the conditions about which the committee had raised concerns. These are conditions requiring production, seizure and inspection of documents and information to the department; at the request of a customs officer, authorised officer or authorised person; and requiring persons to notify state or territory police where they reasonably suspect that vaping goods have been lost or stolen.

1.200 The minister also provided advice that conditions enabling the provision of information to the department and the notification to state and territory police where goods were reasonably suspected to have been stolen, were included to mitigate the risk of diversion of vaping goods to the black market. However, it was considered that the risk may be managed in guidance.

Committee view

1.201 While noting the minister's advice as to why these conditions were considered necessary and appropriate, the committee welcomes the minister's advice that he was willing to repeal the conditions about which the committee had raised concerns in relation to broad discretionary and coercive powers. The committee particularly welcomes this approach noting the potential that such provisions have to seriously trespass on personal rights and liberties.

1.202 In his response, the minister specified the provisions which he could arrange to be repealed. However, one of the provisions he referred to as requiring production, seizure and inspection of documents and information was 'paragraph (d) in column 5 to item 12 of Schedule 2' (at subparagraph 6(m) of the response). It appears to the committee that this is an error and the minister intended to refer to 'paragraph (d) in column 5 to item 13 of Schedule 2.'

1.203 In light of the above, the committee requests the minister's confirmation that:

- **the minister will amend the instrument to repeal the conditions listed at paragraphs 6 to 8 of the minister's response; and**
- **the minister intended to refer to 'paragraph (d) in column 5 to item 13 of Schedule 2' rather than item 12.**

⁹¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), p. 17.

⁹² This correspondence was tabled with this monitor and will be available via the [Delegated Legislation Monitors](#) page on the committee's website.

Privacy⁹³

1.204 In *Delegated Legislation Monitor 10 of 2024*, the committee raised concerns that many of the conditions in the instrument appeared to enable or require the collection and/or disclosure or production of records which may contain personal information and, in one case, individuals' sensitive health information.⁹⁴ However, the committee was concerned that explanatory statement did not adequately address whether these records that must be collected or disclosed are likely to contain personal information and, if so, what safeguards apply. In this regard, the committee noted that the statement of compatibility with human rights, attached to the explanatory statement, states: 'The majority of information required to be provided to the Department, or provided as part of a record, as part of complying with the Determination will be business related information rather than personal information...However, in a small number of instances, persons may be engaged in unlawful dealings with vaping goods as part of the lawful supply chain...as a small business, meaning that their business records may necessarily involve disclosing personal information such as their name.'⁹⁵

Minister's response⁹⁶

1.205 In his response, the minister restated the intention to repeal conditions requiring the production, seizure and/or inspection of documents and information to the department, customs officers or authorised officers and persons, and notification to state and territory police where goods were suspected to have been lost or stolen.

1.206 However, the minister clarified, for completeness, that if personal information is provided to the department, the collection, storage, use and disclosure of such personal information would be subject to the requirements and limitations in the *Privacy Act 1988* and that the department adheres to the Australian Privacy Principles, Australian Government Agencies Privacy Code and the department's Privacy Policy.

Committee view

1.207 The committee welcomes the minister's advice in response to its concerns relating to the collection, use and disclosure of information, and notes that it appears that the provisions which raised these concerns are intended to be repealed. However, the committee welcomes the minister's advice that if personal information is provided to the department, the collection, storage, use and disclosure of such personal information would be subject to the Privacy Act, including the Australian Privacy

⁹³ Senate standing order 23(3)(h).

⁹⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), pp.17-20. The relevant provisions are summarised at paragraph [1.57] on p. 18 and paragraph [1.58] on p. 19.

⁹⁵ Explanatory statement, p. 17.

⁹⁶ This correspondence was tabled with this monitor and will be available via the [Delegated Legislation Monitors](#) page on the committee's website.

Principles, the Australian Government Agencies Privacy Code and the department's privacy policy. The committee considers these to be important safeguards on an individual's rights and liberties.

1.208 In light of the information provided in relation to privacy safeguards applying to the department, the committee concludes its examination of the instrument in relation to this issue.

Clarity of drafting⁹⁷

1.209 In *Delegated Legislation Monitor 10 of 2024*, the committee raised concerns about a possible drafting error and sought the minister's advice as to whether this error could be corrected. Namely, subparagraph (h)(iii) in column 5 of table item 6 in Schedule 2 to the instrument refers to 'the written agreement referred to in paragraph (f) of Column 5' which it appeared may be intended to instead refer to paragraph (f) of Column 4.⁹⁸

Minister's response⁹⁹

1.210 In his response, the minister confirmed that the department is currently taking steps to amend this drafting error.

Committee view

1.211 The committee welcomes the minister's undertaking to amend the instrument to correct the drafting error but wishes to reiterate the importance of accurate drafting in delegated legislation.

1.212 In light of the above, the committee concludes its examination of the instrument in relation to this issue.

⁹⁷ Senate standing order 23(3)(e).

⁹⁸ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2024](#) (11 September 2024), p. 20.

⁹⁹ This correspondence was tabled with this monitor and will be available 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 engagement¹

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.² Engagement on instruments marked with an asterisk was on an advice only basis.

Instrument

Amendment of List of Exempt Native Specimens – Western Australian West Coast Demersal Gillnet and Demersal Longline Interim Managed Fishery, and the Southern Demersal Gillnet and Demersal Longline Managed Fishery, August 2024 [F2024L01029]*

ASIC Corporations and Credit (Reference Checking and Information Sharing Protocol) Instrument 2024/647 [F2024L00996]*

Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2024 [F2024L01011]

Gene Technology (Inclusion on the GMO Register) Determination (No. 1) 2024 [F2024L01026]

Industry Research and Development (WHS Accreditation Scheme Residential Builders Assistance Grant Program) Instrument 2024 [F2024L01071]*

List of Threatened Ecological Communities Amendment (EC184) Instrument 2024 [F2024L01090]*

Marriage (Recognised Denominations) Amendment Proclamation 2024 [F2024L01003]

Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024 [F2024L01105]

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Agency engagement, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLM 117.

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

Instrument

Taxation Administration Amendment (Disclosure of Information to Operation Protego Integrity Taskforce) Regulations 2024 [F2024L01018]

Telecommunications (Interception and Access) (Emergency Service Facilities — New South Wales) Amendment Instrument (No.1) 2024 [F2024L01084]*

Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2024 [F2024L01009]

Concluded matters

3.4 The committee has concluded its consideration of the following instruments after engagement with relevant agencies via its secretariat.³

Instrument

ASIC Corporations (mFund) Instrument 2024/18 [F2024L00376]

Australian Apprenticeship Support Loans Rules 2023 [F2023L01729]

Australian Broadcasting Corporation (Election of Staff-elected Director) Regulations 2023 [F2023L01736]

Defence Trade Legislation Amendment Regulations 2024 [F2024L00904]

Financial Framework (Supplementary Powers) Amendment (Finance Measures No. 2) Regulations 2024 [F2024L00859]

List of Threatened Species Amendment (382) Instrument 2024 [F2024L00880]

List of Threatened Species Amendment (400) Instrument 2024 [F2024L00885]

Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Repeal Instrument (LIN 24/003) 2024 [F2024L00100]

Ozone Protection and Synthetic Greenhouse Gas Management (Refrigerant Handling Licences—Qualifications and Standards) Determination 2024 [F2024L00944]

Public Governance, Performance and Accountability Amendment (Law Enforcement Agencies) Rules 2024 [F2024L00983]

Therapeutic Goods (Excluded Goods) Amendment (Vaping) Determination 2024 [F2024L00843]

Work Health and Safety Amendment (Penalties and Engineered Stone and Crystalline Silica Substances) Regulations 2024 [F2024L00766]

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

Chapter 4

Undertakings¹

4.1 This Chapter identifies the new undertakings that have been made in relation to instruments considered in this report and those that the committee is aware have been implemented as at 2 October 2024.

4.2 The committee expects undertakings to be implemented in a timely manner and to be kept informed on their progress until implemented. This Chapter lists undertakings that are outstanding for more than 90 days as at 2 October 2024.

4.3 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.² 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.³

New undertakings

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

Instrument	Undertaking	Date made
Ozone Protection and Synthetic Greenhouse Gas Management (Extinguishing Agent Handling Licences—Qualifications and Standards) Determination 2024 [F2024L00945]	The department has undertaken to progress amendments to the explanatory statement in response to the committee's scrutiny concerns regarding principles (f) and (k).	20 September 2024
Ozone Protection and Synthetic Greenhouse Gas Management (Refrigerant Handling Licences—Qualifications and Standards) Determination 2024 [F2024L00944]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns under principle (k).	20 September 2024
Public Governance, Performance and Accountability Amendment (Law Enforcement Agencies) Rules 2024 [F2024L00983]	The department undertook to provide information relating to scrutiny principle (k) in explanatory statements for future instruments that amend the Public Governance, Performance and Accountability Rule 2024.	24 September 2024

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Undertakings, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLM 118.

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

³ See the [Index of Instruments](#) page on the committee's website.

Instrument	Undertaking	Date made
Therapeutic Goods (Excluded Goods) Amendment (Vaping) Determination 2024 [F2024L00843]	The department provided an undertaking from the Therapeutic Goods Administration to progress amendments to the explanatory statement in response to the committee's scrutiny concerns regarding principle (h).	19 September 2024
Therapeutic Goods (Vaping Goods— Possession and Supply) Determination 2024 [F2024L00847]; Therapeutic Goods (Vaping Goods—Possession and Supply) Amendment Determination 2024 [F2024L00890]	The minister undertook to amend the explanatory statement in response to the committee's concerns regarding principle (e).	26 September 2024
Therapeutic Goods Legislation Amendment (Vaping Reforms) Regulations 2024 [F2024L00839]	The minister undertook to amend the explanatory statement in response to the committee's concerns under principle (e).	26 September 2024

Implemented undertakings

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

Instrument	Undertaking	Date implemented
Australian Prudential Regulation Authority Supervisory Levies Determination 2024 [F2024L00813]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns regarding principle (d).	20 September 2024
Health Insurance (prudential standard) determination No. 2 of 2023 [F2023L00719]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024
Health Insurance (prudential standard) determination No. 4 of 2023 [F2023L00733]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024
Health Insurance (prudential standard) determination No. 5 of 2023 [F2023L00734]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024
Health Insurance (prudential standard) determination No. 6 of 2023 [F2023L00738]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024

Instrument	Undertaking	Date implemented
Health Insurance (prudential standard) determination No. 7 of 2023 [F2023L00689]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024
Health Insurance (prudential standard) determination No. 8 of 2023 [F2023L00691]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024
Health Insurance (prudential standard) determination No. 9 of 2023 [F2023L00695]	The Department of the Treasury undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 September 2024
National Land Transport (Roads to Recovery Conditions) Determination 2024 [F2024L00670]	The department made an undertaking to progress a replacement explanatory statement to address the committee's scrutiny concerns.	13 September 2024
National Land Transport (Roads to Recovery List) Determination 2024 [F2024L00567]	The department has undertaken to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	13 September 2024
Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024 [F2024L00491]	The minister undertook to amend the explanatory statement to address the committee's scrutiny concerns regarding principles (c) and (h).	20 September 2024
Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No. 2) [F2022L01321]	The Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	27 April 2024

Outstanding undertakings

4.6 The following undertakings remain outstanding more than 90 days after they were made.

Instrument	Undertaking	Date made
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024 [F2024L00088]	The Attorney-General undertook to codify in the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 relevant exemptions intended to be enduring and to time limit those retained in delegated legislation.	20 March 2024
Bankruptcy Amendment (Service of Documents) Regulations 2022 [F2022L00528]	The Attorney-General undertook to amend the principal regulations in response to the committee's scrutiny concerns.	18 October 2022
Bankruptcy Regulations 2021 [F2021L00261]	The Assistant Minister to the Attorney-General undertook to advise the committee of the outcome of the government's targeted review of the appropriateness of modifying provisions currently prescribed in the instrument.	26 July 2021
Bankruptcy Regulations 2021 [F2021L00261]	The Assistant Minister to the Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	17 August 2021
Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023 [F2023L00193]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31 July 2023
Corporations Amendment (Litigation Funding) Regulations 2022 [F2022L01614]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31 July 2023
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 [F2021L01823]	The department undertook to progress amendments to the explanatory statement to disclose the funding information.	19 October 2022
Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	29 November 2022
Higher Education Standards Framework (Threshold Standards) 2021 [F2021L00488]	The Department of Education, Skills and Employment undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	9 August 2021

Instrument	Undertaking	Date made
Intellectual Property Laws Amendment (Regulator Performance) Regulations 2024 [F2024L00525]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns regarding principles (g) and (k).	4 July 2024
National Anti-Corruption Commission Regulations 2023 [F2023L00759]	The Attorney-General undertook to amend the explanatory statement in response to the committee's scrutiny concerns	16 October 2023
Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023 [F2023L01182]	The Department of Employment and Workplace Relations undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	31 October 2023
Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 [F2022L01629]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31 July 2023
Veterans' Affairs (Treatment Principles – Extend Support Provided Under the Psychiatric Assistance Dog Program) Amendment Determination 2022 [F2022L00921]	The Department of Veterans' Affairs undertook to consider the committee's scrutiny concerns as part of a review of the Act.	7 September 2022

Part II—Matters of interest to the Senate

Chapter 5

Expenditure and taxation in delegated legislation¹

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.² 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).³

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 (Climate Change, Energy, the Environment and Water Measures No. 1) Regulations 2024 [F2024L01012]	\$5.0 million over four years from 2023-24	First Nations Water Security
Financial Framework (Supplementary Powers) Amendment (Climate Change, Energy, the Environment and Water Measures No. 1) Regulations 2024 [F2024L01012]	\$2.8 million over four years from 2024-25, and \$0.4 million ongoing	Voluntary Emissions Reporting Standards for Agriculture and Land Program
Financial Framework (Supplementary Powers)	Not disclosed	Falepili Union: Mobility with Dignity Program

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Expenditure and taxation in delegated legislation, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDL M 119.

² Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the [committee's website](#).

³ Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

Amendment (Foreign Affairs and Trade Measures No. 2) Regulations 2024 [F2024L01011]	\$40.0 million over four years from 2024-25	Marine Resources Initiative
Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 3) Regulations 2024 [F2024L01069]	Not disclosed	Support for non-citizens during overseas crisis
Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 3) Regulations 2024 [F2024L01013]	\$10.3 million over three years from 2024-25	Aged Care Transition to Practice Program
	\$2.0 million over three years from 2024-25	Aged Care Skills Development Program
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 4) Regulations 2024 [F2024L01014]	Not disclosed	Strategic Fleet Pilot Program
	First Nations Digital Support Hub: \$4.0 million over two years from 2024-25	Measures to Progress First Nations Digital Inclusion:
	Network of Digital Mentors: \$18.0 million over three years from 2024-25	
	Regional Airports Program: \$40.0 million over three years from 2024-25	Supporting Regional Aviation Programs
	Remote Airstrip Upgrade Program: \$50.0 million over three years from 2024-25	
	Remote Aerodrome Inspection Program: \$0.5 million per year ongoing funding from 2024-25 and indexed funding from 2025-26	
	\$8.6 million in 2024-25	Revive Live Program
Financial Framework (Supplementary Powers) Amendment (Treasury Measures No. 2) Regulations 2024 [F2024L01007]	\$0.5 million over 2 years from 2024-25	Capacity building for Aboriginal and Torres Strait Islander Community Controlled Housing Organisations

Industry Research and Development (WHS Accreditation Scheme Residential Builders Assistance Grant Program) Instrument 2024 [F2024L01071]	\$6.0 million across the 2024-25 financial year	WHS Accreditation Scheme Residential Builders Assistance Grant Program
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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?
Migration (Visa Pre-application Process) Charge Amendment (Work and Holiday Visa) Regulations 2024 [F2024L01106]	Yes

Chapter 6

Exemptions from disallowance and sunseting¹

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.²

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;³

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Exemptions from disallowance and sunseting, *Delegated Legislation Monitor 12 of 2024*; [2024] AUSStaCSDLM 120.

² 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](#).

³ 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.

- 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*;⁴
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money, including Advance to the Finance Minister determinations; or
- otherwise contains a matter requiring parliamentary oversight.

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.⁵

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
Federal Financial Relations (General Purpose Financial Assistance—2024-25 Payment No. 2) Determination 2024 [F2024L01015]	Subsection 9(5) of the <i>Federal Financial Relations Act 2009</i> Subsection 44(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2024-25 Payment No. 3) Determination 2024 [F2024L01109]	Subsection 16(5) of the <i>Federal Financial Relations Act 2009</i> Subsection 44(1) of the <i>Legislation Act 2003</i>

⁴ 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.

⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) pp. 43–45; 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
Gene Technology (Inclusion on the GMO Register) Determination (No. 1) 2024 [F2024L01026]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 2) 2024 [F2024L01054]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Telecommunications (Complaints Handling Industry Standard Amendment) Direction 2024 [F2024L01061]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
Telecommunications (Customer Communications for Outages Industry Standards) Direction 2024 [F2024L01060]	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. Sunseting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

6.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.⁶

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

⁶ For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

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

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁷
- is exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003*;⁸
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

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

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.⁹

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

⁸ 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.

⁹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 3rd edition (July 2024) pp. 37–38; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 87–88 and 99–123.

Instruments which do not meet the committee's expectations

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

Instrument	Source of exemption
Environment Protection and Biodiversity Conservation (National Recovery Plan for the Forty-spotted Pardalote (<i>Pardalotus quadragintus</i>)) Instrument 2024 [F2024L01094]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Environment Protection and Biodiversity Conservation (National Recovery Plan for the Malleefowl (<i>Leipoa ocellata</i>)) Instrument 2024 [F2024L01095]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Federal Financial Relations (General Purpose Financial Assistance—2024-25 Payment No. 2) Determination 2024 [F2024L01015]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2024-25 Payment No. 3) Determination 2024 [F2024L01109]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 2) 2024 [F2024L01054]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Telecommunications (Complaints Handling Industry Standard Amendment) Direction 2024 [F2024L01061]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Telecommunications (Customer Communications for Outages Industry Standards) Direction 2024 [F2024L01060]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

Senator the Hon Linda Reynolds CSC
Deputy Chair