

The Senate

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Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

Monitor 8 of 2024

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Membership of the committee

Current members

| | |
|---|-----------------------------------|
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| Senator the Hon Linda Reynolds CSC (Deputy Chair) | Western Australia, LP |
| Senator Catryna Bilyk | Tasmania, ALP |
| Senator David Pocock | Australian Capital Territory, IND |
| Senator Louise Pratt | Western Australia, ALP |
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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 24 May and 25 June 2024 | 183 |
| Instruments in this period exempt from disallowance | 35 |
| Chapter 1: New and ongoing matters | |
| New legislative instruments commented on in report | 0 |
| Ongoing legislative instruments commented on in report | 0 |
| Chapter 2: Concluded matters | |
| Legislative instruments of which the committee has concluded its examination following receipt of ministerial response | 2 |
| Chapter 3: Agency engagement | |
| New legislative instruments where the committee engaged with the relevant agency via its secretariat | 28 |
| Legislative instruments of which the committee has concluded its examination following receipt of agency response | 16 |
| Chapter 4: Undertakings | |
| New undertakings made by ministers or agencies to address the committee's scrutiny concerns | 8 |
| Undertakings which the committee was made aware had been implemented during this period | 15 |
| Outstanding undertakings | 32 |
| Chapter 5: Scrutiny of Commonwealth expenditure | |
| Advance to the Finance Minister determinations | 0 |
| Instruments specifying Commonwealth expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and the <i>Industry Research and Development Act 1986</i> | 6 |
| Levying of taxation in delegated legislation | 2 |
| Chapter 6: Exemptions from disallowance and sunseting | |
| Instruments that do not meet the committee's expectations regarding exemptions from disallowance under standing order 23(4A) | 18 |
| Instruments that do not meet the committee's expectations regarding exemptions from sunseting under standing order 23(3)(k) | 20 |

² This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Report snapshot, *Delegated Legislation Monitor 8 of 2024*; [2024] AUSStaCSDLM 77.

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).

1.2 The committee has resolved not to raise significant technical scrutiny concerns in relation to any instrument registered in this period or to request further information from relevant ministers about its technical scrutiny concerns in relation to ongoing matters.

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).

Jervis Bay Territory Rural Fires Rules 2024¹

| | |
|--------------------------------|---|
| FRL No. | F2024L00347 |
| Purpose | The purpose of the instrument is to make rules as permitted by the Jervis Bay Territory Rural Fires Ordinance 2014 (the Ordinance) to provide effective and efficient fire management services to the Jervis Bay Territory (JBT). The instrument replaces the Jervis Bay Territory Rural Fires Rule 2014 which sunsets on 1 October 2024. |
| Authorising legislation | <i>Jervis Bay Territory Rural Fires Ordinance 2014</i> |
| Portfolio | Infrastructure, Transport, Regional Development, Communications and the Arts |
| Disallowance | 15 sitting days after tabling (tabled in the Senate on 21 March 2024). Committee gave notice to disallow on 12 August 2024. |

Overview

2.2 The Jervis Bay Territory Rural Fires Rules 2024 (the instrument) is made under subsection 98(1) of the Jervis Bay Territory Rural Fires Ordinance 2014 (the Ordinance), to provide fire management services to the Jervis Bay Territory (JBT). The Ordinance provides the legislative framework for fire management services to the JBT. It establishes the JBT Rural Fire Service (RFS), the JBT Fire Management Committee and deals with other matters relating to bushfire prevention, such as preparation of JBT Bush Fire Management Plans and issuing of notices and fire permits.

2.3 Subsection 98(1) of the Ordinance enables the minister to make rules in relation to the issuing of fire permits, the classification of substances as combustible, the operation of committees, the service of notices or directions under the Ordinance, the conduct and discipline of members of the RFS, and the operations of rural fire brigades.

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Jervis Bay Territory Rural Fires Rules 2024, *Delegated Legislation Monitor 8 of 2024*; [2024] AUSStaCSDLM 78.

2.4 The committee first raised scrutiny concerns with this instrument on 17 May 2024 in *Delegated Legislation Monitor 5 of 2024*,² and the minister provided a response dated 26 June 2024.³ The committee raised further concerns on 3 July 2024 in *Delegated Legislation Monitor 7 of 2024*⁴ and the minister provided a response dated 26 July 2024.⁵

Scrutiny concerns

Conferral of discretionary powers⁶; adequacy of explanatory materials⁷

2.5 In *Delegated Legislation Monitor 5 of 2024*, the committee raised concerns with a number of broad discretionary powers contained in the instrument, but neither the instrument nor its explanatory statement provided an adequate explanation of the factors that may be considered in exercising the powers. The committee sought the minister's advice as to why it was considered necessary and appropriate for the minister to have broad discretionary powers under the instrument, referencing in particular subsections 7(2),⁸ 7(4),⁹ and 9(2).¹⁰ The committee also sought further detail regarding the factors the minister must take into account in determining that a person is not, or is no longer, a 'fit and proper person' under subsections 7(2) and 9(2), and the weight given to each of these factors. The committee further requested the minister's advice regarding the factors the minister may take into account in deciding whether to impose any conditions on a person's listing on a brigade register under subsection 7(4) and what such conditions are likely to include.

2.6 In her response of 26 June 2024, the minister advised it is necessary and appropriate for the minister to have broad discretionary powers to assess initial and ongoing suitability of applicants given the significant powers held by RFS members to respond to often fluid and unpredictable emergency situations. The minister further advised that the conditions the minister may take into account in determining

² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024) pp. 3-9.

³ See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (3 July 2024) p. 2-8.

⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 7 of 2024](#) (3 July 2024) pp. 3-13.

⁵ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

⁶ Senate standing order 23(3)(c).

⁷ Senate standing order 23(3)(g).

⁸ Subsection 7(2) of the instrument enables the minister to refuse to list a person's name on a brigade register if, 'in the Minister's opinion', the person is not a 'fit and proper person' to be a member.

⁹ Subsection 7(4) provides that a person's listing on a brigade register is subject to 'such conditions as may be imposed by the Minister'.

¹⁰ Subsection 9(2) enables the minister to remove the name of a person from a brigade register.

individual suitability are difficult to exhaustively define, necessitating broad discretion to consider all relevant matters. The minister also noted that the discretionary powers under the instrument are identical to those conferred on the New South Wales (NSW) minister.

2.7 The minister provided criteria that forms the basis for a NSW RFS applicant assessment as factors that may be taken into account in determining that a person is not, or is no longer, a 'fit and proper person'. The minister noted that the broad discretionary powers in the instrument for assessing a 'fit and proper person' are not limited to established criteria for the purpose of preserving the integrity of the JBT RFS in an unforeseen circumstance.

2.8 The minister further advised that conditions imposed on a brigade register listing under subsection 7(4) may be made on the basis of physical limitations or health conditions that may impact a person's ability to safely fulfill fundamental requirements of certain roles, providing an example to illustrate how a member with asthma may have a condition imposed on their listing.

2.9 In *Delegated Legislation Monitor 7 of 2024*, the committee noted it remained unclear as to why it is considered necessary and appropriate for the minister to have broad discretionary powers under subsections 7(2) and 9(2), and accordingly sought further advice from the minister.

2.10 The committee considered the advice provided by the minister in relation to the justification for prescribing broad discretionary powers, and relevant factors and examples in exercising the discretions under subsection 7(4), was useful information to include in the explanatory statement to the instrument. The committee requested the minister's advice as to whether the explanatory statement could be amended to include the information.

*Minister's response*¹¹

2.11 In her response of 26 July 2024, the minister advised that she had approved a replacement explanatory statement to the instrument to provide further information requested by the committee, including the advice provided in her previous correspondence in relation to exercising the discretionary power under subsection 7(4) of the instrument.

2.12 The replacement explanatory statement notes that a person's listing on a brigade register may be subject to conditions under subsection 7(4), made on the basis of physical limitations or health conditions, and is fact and context dependent. As requested by the committee, the replacement explanatory statement also includes the example of a member with asthma having a condition imposed on their register listing.

¹¹ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

2.13 The minister's response also noted that the replacement explanatory statement included further justification for the broad discretionary powers under subsections 7(2) and 9(2) and examples where the powers could be used. Noting that the minister's response of 26 June 2024 advised that the broad discretionary powers conferred under the instrument are identical to those conferred on the NSW minister, the replacement explanatory statement states that it is essential that members of the JBT RFS operate under the same instructions and procedures as their NSW RFS counterparts, given the porous border between JBT and NSW, and that JBT brigade members operate as part of the NSW RFS group structure.

2.14 The replacement explanatory statement also reiterates the need for broad and flexible discretion noting the broad and significant powers conferred on JBT RFS members to exercise their duties, and notes that the consequent difficulty in exhaustively defining the powers necessitates a broad discretion to take all relevant matters into account. The replacement explanatory statement notes that considerations for assessing the initial and ongoing suitability of applicants and members includes ensuring they have the requisite qualities and retain requisite competencies, which can be difficult to exhaustively define but may include being of good character and having sound judgment.

2.15 The statement notes that in administering the JBT brigades by the NSW RFS, the NSW RFS assesses memberships, including new applications. These assessments are done on the basis of published criteria including criminal history and working with children checks. The criteria used to assess a 'fit and proper person' under subsections 7(2) and 9(2) are detailed in Service Standard 2.1.6 Volunteer Membership Applications. The replacement explanatory statement explains that it is necessary and appropriate for the minister to retain broad discretionary powers beyond these criteria in the event that an unforeseen adverse characteristic of the member could or does compromise the minister's confidence that the member can carry out their duties and appropriately exercise the powers conferred on them. The statement also notes that the broad discretions are similar to those held by entities that regulate membership of other professions or disciplines, such as professional firefighters.

2.16 The replacement explanatory statement advises that the minister's assessment of an applicant under subsection 7(2) will be made based on the person's application and the outcome of administrative processes such as a Police Check. The assessment may also rely on the applicant's honesty in relation to criminal history and other eligibility criteria, noting the minister is also empowered to accept the applicant as a probationary member.

2.17 The replacement explanatory statement further notes that persons applying to and joining the JBT RFS are informed of and participate in the aforementioned assessments and are aware of the potential for conditions to be imposed on their listing through Service Standard 2.1.6 and associated application forms and processes.

2.18 The replacement explanatory statement also advises that determining whether a person remains a 'fit and proper person' under section 9 may involve both objective and subjective considerations, as may be dependent on the context in which the individual is operating as there are a number of different types of roles that members may occupy. The replacement explanatory statement provides examples where a person may no longer be considered a 'fit and proper person', such as where they fail to maintain or undertake relevant training, or fail to uphold the brigade's Code of Conduct.

Committee view

2.19 The committee thanks the minister for progressing a replacement explanatory statement that includes further justification and explanation of the broad discretionary powers conferred under subsections 7(2), 7(4) and 9(2) of the instrument. The committee notes that the replacement explanatory statement includes the information requested in relation to the relevant factors and examples in exercising the discretion under subsection 7(4) of the instrument.

2.20 The committee acknowledges the further justification provided in relation to the broad discretionary powers under the instrument being identical to those provided to the minister for the NSW RFS. However, noting that this justification alone is not sufficient to meet its scrutiny principles, the committee recognises the further information included in the replacement explanatory statement on why it is considered necessary and appropriate for the minister to have broad discretionary powers under subsections 7(2) and 9(2). The committee notes the useful explanation as to what considerations may be relevant under subsection 7(2) to determine whether a person is 'fit or proper', including using criteria under Service Standard 2.1.6 and by administrative processes including a Police Check. The explanation provided in relation to assessing whether a person is no longer 'fit or proper' under subsection 9(2) is also useful, providing examples to demonstrate circumstances in which the minister may exercise this power.

2.21 Further, the committee welcomes the information provided in the replacement explanatory statement that justifies why it is necessary and appropriate for the minister's powers under the instrument to be broad and flexible. While difficulty in defining a power is not generally sufficient to meet the committee's expectations, the committee notes the possibility, as outlined in the replacement explanatory statement, of an unforeseen adverse characteristic coming to light that may compromise the minister's confidence in a brigade member, particularly noting the significant powers that a person can exercise as a brigade member and the similar flexibility in like professions.

2.22 In light of the replacement explanatory statement that includes further justification and information on the broad discretionary powers under subsections 7(2), 7(4) and 9(2), the committee concludes its examination of the instrument in relation to this issue.

Compliance with the Legislation Act 2003 - incorporation¹²; incorporated materials freely accessible;¹³ adequacy of explanatory materials¹⁴

2.23 The instrument makes provision in relation to 'Service Standards' and 'relevant Service Standards'. The committee raised concerns in relation to the Service Standards in *Delegated Legislation Monitor 5 of 2024*, as it was unclear in both the instrument and the explanatory statement whether the Service Standards were being formally incorporated and, if so, which standards, the manner of incorporation, and where they may be freely accessed and used.

2.24 In her response of 26 June 2024, the minister confirmed the Service Standards are not formally incorporated into the instrument. The minister advised that the NSW RFS Service Standards are used as operational policies of the JBT RFS and provided a link to the full set of Service Standards on the NSW RFS website. The response also included a list of the relevant Service Standards applicable to each of the provisions in the instrument that refer to the standards. The minister advised that amending the explanatory statement to include information about the location of Service Standards would be unlikely to assist for several reasons, including that the standards are not formally incorporated and may frequently change.

2.25 In *Delegated Legislation Monitor 7 of 2024*, the committee acknowledged the minister's advice but maintained that specifying the applicable Service Standards and including a link to the relevant website would assist readers to understand the law. The committee therefore requested the minister's further advice as to whether the explanatory statement could be amended to specify the applicable Service Standards relevant to the instrument and include a link to the set of Service Standards on the NSW RFS website.

Minister's response¹⁵

2.26 The minister advised that the replacement explanatory statement to the instrument includes the additional information requested by the committee in relation to the Service Standards.

2.27 The names of the applicable Service Standards are listed under the explanation for each relevant provision at Attachment A of the replacement explanatory statement. The link to the NSW RFS website, as applicable at the date of the explanatory statement's publication, is also listed numerous times. The explanatory statement also contextualises the Service Standards by noting the standards are

¹² Senate standing order 23(3)(a).

¹³ Senate standing order 23(3)(f).

¹⁴ Senate standing order 23(3)(g).

¹⁵ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

accurately referenced at the time of publication but may change during the period the instrument is in effect.

2.28 Further, the replacement explanatory statement clarifies that the authority to make the standards has been delegated by the minister to the Commissioner of the NSW RFS.

Committee view

2.29 The committee thanks the minister for amending the explanatory statement to provide further information in relation to the Service Standards. The committee welcomes the inclusion of several references to the relevant Service Standards under the applicable provisions in the replacement explanatory statement, including a link to the NSW RFS website.

2.30 The committee also notes that the replacement explanatory statement explains how the Service Standards have the force of the law and apply to the instrument. The replacement explanatory now meets the committee's expectations for adequate explanatory materials as the applicability of the Service Standards is clear and accessible to readers of the law.

2.31 In light of the replacement explanatory statement including further information on Service Standards as requested by the committee, the committee concludes its examination of the instrument in relation to this issue.

Privacy¹⁶

2.32 Section 13 of the instrument provides that if a rural fire brigade attends a fire, incident or other emergency, the officer in charge must ensure that the minister receives a written report on the fire, incident or emergency. Section 21 of the instrument requires the minister to keep a register of the name of each member of the RFS who is given a commendation or award for long service, bravery or other forms of meritorious service and details of the commendation or award. The committee initially raised scrutiny concerns in *Delegated Legislation Monitor 5 of 2024* in relation to privacy under sections 13 and 21, as it appeared that the provisions may involve the collection, use or disclosure of personal information, yet the explanatory statement to the instrument did not address this or any safeguards on the handling of such information.

2.33 The minister provided a response on 26 June 2024 advising that section 13 reports may include personal information. Templates provided to brigades for the purpose of documenting incidents under section 13 include fields that capture particular information including appliance crew members' names, and the names of members who either attended in private vehicles or remained at the station. The minister further advised that section 13 reports may include other personal information such as the name and contact details of an informant where an incident

¹⁶ Senate standing order 23(3)(h).

is reported through Triple Zero. The minister provided a list of the three applicable privacy-specific Service Standards that prescribe how the NSW RFS, and therefore the JBT RFS, collect, handle, retain, disclose, assessment and use personal information. The minister also advised that the *Privacy Act 1988* (Privacy Act) applies, including for information collected to maintain the register of bravery awards under section 21 of the instrument.

2.34 The committee subsequently sought the minister's advice as to whether the explanatory statement to the instrument could be amended to include the information provided in the minister's response in relation to the nature and scope of the information that may be collected, used or disclosed under sections 13 and 21, and any applicable privacy safeguards.

Minister's response

2.35 In her response of 26 July 2024, the minister advised that the replacement explanatory statement to the instrument includes the additional information requested by the committee in relation to privacy under sections 13 and 21.

2.36 The replacement explanatory statement notes the templates that are used to document incidents under section 13, and examples of the template fields that may be relevant including the name of crew members attending the scene and remaining at the station. The statement also notes that incident reports may include personal information and includes examples of such information, as provided in the minister's previous correspondence. The three applicable Service Standards are listed, and the safeguards are outlined including the applicability of the Privacy Act and the Australian Privacy Principles. The explanation for section 21 notes that the same Service Standards and safeguards apply to maintain the awards register.

Committee view

2.37 The committee thanks the minister for amending the explanatory statement to include the information relating to privacy under sections 13 and 21 in the replacement explanatory statement.

2.38 The committee welcomes the additional information now included in the explanatory statement in relation to the kind of personal information that may be collected, used or disclosed under sections 13 and 21, and notes the important safeguards that apply include the Privacy Act.

2.39 In light of the amendments made to the explanatory statement to explain the nature and scope of information collected, and relevant safeguards, the committee concludes its examination of the instrument in relation to this matter.

Procedural fairness¹⁷; clarity of drafting¹⁸; adequacy of explanatory materials¹⁹

2.40 In *Delegated Legislation Monitor 5 of 2024*, the committee raised scrutiny concerns regarding the disciplinary action process under section 11 of the instrument, which enables the ‘appropriate disciplinary authority’ to take disciplinary action if an RFS member commits a breach of discipline on the grounds set out in subsection 11(1). The committee raised concerns with the limited 14-day time frame for making an appeal and the lack of clarity in both the instrument and explanatory statement relating to whether the member has an adequate opportunity to state their case prior to the appropriate disciplinary authority making a decision to take disciplinary action. As the explanatory statement failed to address whether procedural fairness was provided for in relation to disciplinary decisions under section 11, the committee sought the minister’s advice on the availability of procedural fairness, or justification for its exclusion. The committee also sought clarification on the meaning of the terms ‘careless’ and ‘inefficient’ under paragraph 11(b) of the instrument and whether the explanatory statement can be amended to define these terms.

2.41 In the minister’s response of 26 June 2024, the minister advised that procedural fairness applies in relation to disciplinary decisions under section 11, and that it would be undertaken by the NSW RFS pursuant to the operating procedures detailed in Service Standard 1.1.2 Discipline, which is accompanied by a guide on natural justice. The minister also advised the procedural fairness protections afforded under Service Standard 1.1.2, including a hearing before the decision is made that is appropriate to the circumstances and full disclosure before the decision is made.

2.42 The minister also advised that the terms ‘careless’ and ‘inefficient’ are to be read with their ordinary meanings and are not further defined by legislation or related materials. The minister noted it would not be appropriate to clarify or further define the terms to avoid unintentionally changing their ordinary and well-understood meanings, and to avoid inconsistent definitions with the NSW RFS arrangements which may lead to practical injustice through inconsistent treatment of NSW and JBT members.

2.43 In *Delegated Legislation Monitor 7 of 2024*, the committee sought the minister’s advice as to whether the explanatory statement could be amended to include information provided by the minister on the provision of procedural fairness in relation to decisions to take disciplinary action under section 11. The committee noted it retained concerns about the application of the terms ‘careless’ and ‘inefficient’ to disciplinary actions as it remained unclear how the terms would be interpreted in practice. The committee considered that it would be useful to provide examples of a situation where a JBT RFS member may be deemed ‘careless’ or

¹⁷ Senate standing order 23(3)(h).

¹⁸ Senate standing order 23(3)(e).

¹⁹ Senate standing order 23(3)(g).

'inefficient' for the purpose of disciplinary action under paragraph 11(1)(b) of the instrument and sought advice as to whether such examples could be provided. The committee emphasised that such examples would not be intended to limit or define the meaning of the terms, but be provided for illustrative purposes.

Minister's response²⁰

2.44 On 26 July 2024, the minister advised that the replacement explanatory statement to the instrument included the additional information requested by the committee in relation to the provision of procedural fairness under section 11 of the instrument.

2.45 The replacement explanatory statement explains that any disciplinary action under section 11 would follow a documented process as currently detailed in Service Standard 1.1.2, which includes standard operating procedures and is accompanied by a guide on natural justice. The statement clarifies that the Service Standard and related procedures and guides afford procedural fairness and lists the protections available to the member as provided in the minister's previous correspondence.

2.46 The minister advised in her response that the replacement explanatory statement also provides examples of conduct in which a brigade member may be deemed 'careless' and 'inefficient' for the purposes of disciplinary action under paragraph 11(1)(b) of the instrument. The replacement explanatory statement notes that the terms are not further defined and are read with their ordinary meaning and in context of the full phrase in which they appear in the instrument. It is noted that 'negligent, careless, inefficient or incompetent' conduct is rare, but may affect the operational capacity of the RFS and the public's confidence. A non-exhaustive list of examples of conduct that may be 'negligent, careless, inefficient or incompetent' is provided, including where a member performs a task contrary to standard operating procedure, accepted practice or reasonable direction which could reasonably, or did, result in injury or damage.

2.47 The replacement explanatory statement notes that disciplinary action for conduct under paragraph 11(1)(b) may be more applicable to senior RFS members who voluntarily assume higher levels of responsibility and are therefore responsible for large groups of volunteers during emergency operations or make decisions which may have major impacts on communities.

Committee view

2.48 The committee thanks the minister for including the information relating to procedural fairness in the replacement explanatory statement. The replacement explanatory statement clarifies that procedural fairness applies to disciplinary decisions under section 11, and details the protections available to brigade members

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

subject to disciplinary actions, pursuant to Service Standard 1.1.2 and related procedures and guides.

2.49 The committee notes the further information provided in relation to the terms 'careless' and 'inefficient'. The committee notes the examples provided, which, without limiting the application of paragraph 11(1)(b), provide some guidance as to what types of conduct may be deemed 'negligent, careless, inefficient or incompetent' for the purpose of disciplinary action under the instrument. The committee considers it useful that the replacement explanatory statement contextualises this conduct by clarifying that disciplinary actions may be more applicable to senior RFS members.

2.50 In light of the inclusion of information relating to procedural fairness, and examples of conduct that may be deemed 'careless' or 'inefficient' in the replacement explanatory statement, the committee concludes its examination of the instrument in relation to this issue.

2.51 In addition, the committee concludes its examination of the instrument and has also resolved to withdraw the notice of motion to disallow the instrument.

Migration Amendment (Bridging Visas) Regulations 2024²¹

| | |
|--------------------------------|--|
| FRL No. | F2024L00441 |
| Purpose | The Migration Amendment (Bridging Visas) Regulations 2024 amend the Migration Regulations 1994 to clarify the circumstances in which the Minister may grant a Bridging R (Class WR) visa without application to certain eligible non-citizens who may be unlawful non-citizens at the time of grant, or who already hold a visa other than a substantive visa, a criminal justice visa or an enforcement visa. |
| Authorising legislation | <i>Migration Act 1958</i> |
| Portfolio | Home Affairs |
| Disallowance | 15 sitting days after tabling (tabled in the Senate on 14 May 2024). Notice of motion to disallow must be given by 19 August 2024. |

Overview

2.52 The Migration Amendment (Bridging Visas) Regulations 2024 (the instrument) amend the Migration Regulations 1994 (the Migration Regulations) to remove one of the two requirements for the Minister for Immigration, Citizenship and Multicultural Affairs (the minister) to grant an eligible non-citizen a further Bridging R (Class WR) visa (BVR). The instrument is one of a number of pieces of legislation made in relation to the High Court judgment of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 delivered on 8 November 2023.²²

2.53 The instrument also amends regulation 2.04 of the Migration Regulations to clarify that, while the circumstances in which a visa may be granted are generally set out in Schedule 2 to the Migration Regulations, this is subject to other provisions of the Migration Regulations that may deal with the circumstances applicable to the grant, such as regulation 2.25AB.

²¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Bridging Visas) Regulations 2024, *Delegated Legislation Monitor 8 of 2024*; [2024] AUSStaCSDLM 79.

²² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

2.54 The committee initially raised scrutiny concerns with the instrument on 26 June 2024 in *Delegated Legislation Monitor 6 of 2024*,²³ and the minister provided a response dated 15 July 2024.²⁴

Scrutiny concerns

Consultation with persons affected²⁵

2.55 In *Delegated Legislation Monitor 6 of 2024*, the committee raised scrutiny concerns about whether persons likely to be affected by the instrument were consulted, and the level of detail provided in relation to consultation in the explanatory statement.

2.56 The explanatory statement indicated that the Department of Home Affairs consulted with other Commonwealth agencies as well as the Office of Impact Analysis (OIA). The explanatory statement did not specify which Commonwealth agencies were consulted, nor whether those likely to be affected by the instrument were adequately consulted. The committee was particularly concerned about the latter as it had raised similar concerns regarding the explanation of consultation undertaken in relation to the Migration Amendment (Bridging Visa Conditions) Regulations 2023. Both instruments are likely to affect the NZYQ-affected cohort; however, neither instrument's explanatory statement indicated whether consultation was undertaken with this group.

2.57 The committee also noted that it does not consider consultation with the OIA to be an adequate substitution for consulting with individuals affected by the instrument and relevant experts, and that any requirement to consult with the OIA is separate to the consultation requirements under section 17 of the *Legislation Act 2003*.

2.58 The committee therefore sought the minister's advice as to which Commonwealth agencies were consulted and whether any persons likely to be affected by the instrument, any experts or any stakeholders representing the NZYQ-affected cohort were consulted and, if so, who or, if not, why not.

Minister's response²⁶

2.59 In his response of 15 July 2024, the minister advised that the approach to the amendments given effect by the instrument were informed by advice from the Department of Home Affairs and the Australian Border Force, noting these agencies

²³ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024) pp.10-14.

²⁴ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

²⁵ Senate standing order 23(3)(d).

²⁶ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

are informed by experience in administering the scheme since it was first implemented in November 2023. The amendments were also informed by legal advice obtained from the Australian Government Solicitor. As previously advised in the minister's response to the committee's scrutiny concerns in relation to the Migration Amendment (Bridging Visa Conditions) Regulations 2023,²⁷ the Department of Home Affairs undertook three roundtable discussions with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross to discuss matters relating to implementing a legislative response to the NZYQ case, management of the NZYQ-affected cohort and hear stakeholder views on these and related matters.

2.60 The minister further advised that no consultation was undertaken with the NZYQ-affected cohort or their representatives, or other external stakeholders in relation to the instrument, on the basis that the instrument does not fundamentally change any 'client-facing' elements of the BVR scheme. The minister stated that the instrument does not alter the conditions imposed on a BVR, nor does it affect the relevant existing statutory procedural fairness mechanism or access to merits review for decisions under section 76E of the *Migration Act 1958* (the Migration Act) to grant a further BVR that is subject to curfew, electronic monitoring or certain financial reporting conditions.

Committee view

2.61 The committee thanks the minister for his advice on the Commonwealth agencies that were consulted on the instrument, being the Australian Border Force, the Australian Government Solicitor, and internally within the Department of Home Affairs.

2.62 The committee notes the minister's previous advice that the roundtable discussions with three stakeholder bodies were held on 17 November 2023, 13 December 2023 and 24 January 2024.²⁸ Noting the instrument was made later with a registration date of 11 April 2024, the committee is uncertain as to whether the roundtable discussions involved consultation on the instrument itself, or the legislative response to the NZYQ decision more generally. While the committee welcomes ongoing engagement with relevant stakeholders, if only the latter occurred, the committee does not consider the three roundtable discussions undertaken to constitute consultation in relation to the specific instrument.

2.63 The committee notes the minister's advice that it was not necessary to undertake consultation with the NZYQ-affected cohort in relation to this instrument as it does not impact any 'client-facing' aspects of the legislative scheme. The

²⁷ See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation (26 June 2024) p.1-2.

²⁸ See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation (26 June 2024) p.1-2.

committee acknowledges the technical nature of the amendments made by the instrument, which do not appear to impact on the rights and interests of the NZYQ-affected cohort.

2.64 The committee also notes that the minister's response suggests a view that it is appropriate to consult with an affected cohort where an instrument changes 'client-facing' elements. Accordingly, it is unclear to the committee why the minister did not consider it necessary or appropriate to consult on the Migration Amendment (Bridging Visa Conditions) Regulations 2023, which appeared to give effect to client-facing changes.

2.65 Nonetheless, in light of the minister's advice on the consultation undertaken in relation to the instrument, and the justification provided for not undertaking consultation with the NZYQ-affected cohort or their representatives, the committee concludes its examination of the instrument in relation to this issue.

Availability of independent merits review²⁹; adequacy of explanatory materials³⁰

2.66 In *Delegated Legislation Monitor 6 of 2024*,³¹ the committee also raised concerns as the explanatory statement to the instrument does not address whether merits review is available for a decision made under regulation 2.25AB of the Migration Regulations, despite that the instrument amends the operation of regulation 2.25AB.

2.67 The committee noted that, under paragraph 338(4)(c) of the Migration Act, a decision under a provision of the Migration Regulations prescribed for the purposes of subsection 76E(4) of the Migration Act is subject to independent merits review. Sub-regulation 2.25AD(2) of the Migration Regulations prescribes regulation 2.25AB for the purposes of subsection 76E(4) of the Migration Act. It therefore appeared to the committee that merits review is available for a regulation 2.25AB decision.

2.68 The committee also noted that its concerns were heightened as similar scrutiny concerns were raised in relation to the Migration Amendment (Bridging Visas) Regulation 2023 in *Delegated Legislation Monitor 1 of 2024*,³² and the committee subsequently requested the minister amend the explanatory statement to that instrument to clarify which decisions were subject to independent merits review in *Delegated Legislation Monitor 5 of 2024*.³³

²⁹ Senate standing order 23(3)(i).

³⁰ Senate standing order 23(3)(g).

³¹ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024) pp. 10-14.

³² Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2024* (7 February 2024) pp. 3-8.

³³ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2024* (17 May 2024) pp. 10-17.

*Minister's response*³⁴

2.69 In his response, the minister undertook to arrange for the explanatory statement to the instrument to be revised to set out the framework for procedural fairness and merits review in relation to decisions made under regulation 2.25AB. The minister noted that the instrument does not make any changes to the existing natural justice framework but acknowledged that the committee's request that the explanatory statement be amended was intended to ensure the explanatory statement includes detail about how regulation 2.25AB operates within the existing framework.

2.70 The minister advised that when he grants an NZYQ-affected non-citizen a BVR, the non-citizen is given written notice of the decision to grant the BVR, and conditions imposed on that BVR. If the BVR is subject to conditions relating to curfew, electronic monitoring or certain financial reporting obligations, subsection 76E(3) of the Migration Act requires the minister to give the non-citizen notice of the decision and invite them to make representations to the minister as to why the BVR should not be subject to one or more of the conditions. The minister noted this is to ensure the non-citizen is afforded statutory procedural fairness. The minister further advised that if he is satisfied under paragraph 76E(4)(b) of the Migration Act that those conditions are not reasonably necessary for the protection of any part of the Australian community, the minister is required under subsection 76E(4) to grant a further BVR that is not subject to those conditions.

2.71 The minister also advised that he is required, under subsection 76E(5) of the Migration Act, to give the non-citizen written notice of the decision made in accordance with subsection 76E(4) and the reasons for the decision. If the minister decides not to grant a BVR that is not subject to any one or more of the conditions, that decision is merits reviewable by the Administrative Appeals Tribunal under paragraph 338(4)(c) of the Migration Act.

2.72 The minister's response noted additional safeguards that apply to a decision made under regulation 2.25AB in the form of independent oversight and investigation of complaints about administrative action taken by the Department of Home Affairs, including the Australian Border Force, by the Commonwealth Ombudsman, as well as the availability of judicial review.

Committee view

2.73 The committee welcomes the minister's now implemented undertaking to amend the explanatory statement to clarify the safeguards that apply to the exercise of the minister's power under regulation 2.25AB, including the availability of merits

³⁴ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

review. The committee appreciates the timely manner in which this undertaking was implemented.

2.74 The committee thanks the minister for his advice in relation to the safeguards and limitations on decisions made under regulation 2.25AB, including the availability of independent merits review by the Administrative Appeals Tribunal. The committee also notes the other safeguards applicable to decisions made under regulation 2.25AB, being oversight and investigation by the Commonwealth Ombudsman, and judicial review.

2.75 In light of the minister's now implemented undertaking to amend the explanatory statement to explain the safeguards applicable to the exercise of the minister's power under regulation 2.25AB, the committee concludes its examination of the instrument in relation to this issue.

Significant matters in delegated legislation³⁵

2.76 The instrument amends the requirements for a non-citizen to be granted a visa under regulation 2.25AB of the Migration Regulations. The explanatory statement provides that it is appropriate for matters dealt with in the Migration Regulations to be implemented in regulations, rather than by parliamentary enactment. The explanatory statement also noted that it is the consistent practice of the Government to provide for detailed matters of visa settings in the Migration Regulations as opposed to the Migration Act itself, to enable adaptive and effective management of Australia's visa program.

2.77 The committee noted in *Delegated Legislation Monitor 6 of 2024*³⁶ that it has consistently raised similar concerns about the inclusion of significant migration and visa related matters in Home Affairs portfolio delegated legislation due to the impact on parliamentary oversight, including in relation to the Migration Amendment (Bridging Visa Conditions) Regulations 2023.

2.78 The committee resolved to draw its concerns about significant matters in delegated legislation related to visa arrangements to the attention of the Senate under standing order 23(4).

Minister's response³⁷

2.79 In his response, the minister acknowledged the committee's resolution to draw its scrutiny concerns to the attention of the Senate. The minister reiterated that it has been the consistent practice of the Government to provide for detailed matters of visa settings in the Migration Regulations rather than the Migration Act itself and noted

³⁵ Senate standing order 23(3)(j).

³⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024) pp. 10-14.

³⁷ This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

that the Migration Act expressly provides for such matters to be prescribed in regulation. The minister advised that providing for these matters in delegated legislation gives the Government the ability to effectively manage the operation of Australia's visa system and respond quickly and effectively to emerging needs, including in response to the NZYQ decision.

Committee view

2.80 The committee notes the minister's further advice on the provision of significant matters relating to visa arrangements in delegated legislation. The committee reiterates that, as a matter of principle, significant matters should ordinarily be included in primary legislation, due to the additional level of parliamentary oversight attached.

2.81 In light of the minister's now implemented undertaking to amend the instrument's explanatory statement, the committee has also resolved to conclude its examination of the instrument.

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

Aged Care (Subsidy, Fees and Payments) Amendment (Multi-Purpose Services Subsidy Increase No. 2) Determination 2024 [F2024L00709]

Australian Passports (Application Fees) Amendment Determination 2024 [F2024L00618]

Australian Passports (Fees) Amendment Determination 2024 [F2024L00619]

Australian Passports Amendment (2024 Measures No. 1) Determination 2024 [F2024L00620]*

CASA EX32/24 — Flight Crew Licensing and Other Matters (Miscellaneous Exemptions) Instrument 2024 [F2024L00614]

Commonwealth Procurement Rules 1 July 2024 [F2024L00627]

Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2024 [F2024L00663]

Family Law Amendment (Arbitration) Regulations 2024 [F2024L00668]

Farm Household Support Secretary's Rules 2024 [F2024L00767]

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Agency engagement, *Delegated Legislation Monitor 8 of 2024*; [2024] AUSStaCSDLM 80.

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

Instrument

Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 12) Determination 2024 [F2024L00704]

Financial Stability Standards for Securities Settlement Facilities Determination 2024 [F2024L00683]

Financial Stability Standards for Securities Settlement Facilities Revocation 2024 [F2024L00682]

Food Standards (Application A1254 – Rosemary Extract as a Food Additive – extension of use) Variation [F2024L00577]

Food Standards (Application A1273 – Steviol glycosides as a food additive in Food for special medical purposes) Variation [F2024L00578]

Food Standards (Application A1275 – Transglutaminase from GM Bacillus licheniformis as a processing aid) Variation [F2024L00579]

Food Standards (Application A1276 – Food derived from herbicide-tolerant soybean line MON94313) Variation [F2024L00586]

Food Standards (Application A1277 – 2'-FL from GM Escherichia coli K-12 (gene donor: Helicobacter enhydrae) in infant formula products) Variation [F2024L00587]

Migration (Required Medical Assessment) Amendment Instrument (LIN 24/032) 2024 [F2024L00628]*

National Land Transport (Roads to Recovery Conditions) Determination 2024 [F2024L00670]

Native Title (Recognition as Representative Body – Central Land Council) Instrument 2024 [F2024L00699]

Native Title (Recognition as Representative Body – Northern Land Council) Instrument 2024 [F2024L00700]

Offshore Electricity Infrastructure (Declared Area OEI-02-2024) Declaration 2024 [F2024L00685]

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2024 Measures No. 1) Regulations 2024 [F2024L00730]

Private Health Insurance (Medical Devices and Human Tissue Products) Rules (No. 1) 2024 [F2024L00770]

Social Security (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024 [F2024L00780]

Social Security (Exempt Lump Sum – Youpla Support Program) Determination 2024 [F2024L00779]

Social Security (Family Law Affected Income Streams) Amendment (Military Invalidation Pension Income Streams) Principles 2024 [F2024L00588]

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

Concluded matters

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

Instrument

Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards Amendment Instrument (No. 1) 2024 [F2024L00521]

Corporations and Competition (CS Services) Instrument 2024 [F2024L00537]

Defence (Non-foreign work restricted individual) Determination 2024 [F2024L00519]

Defence (Non-relevant foreign country) Determination 2024 [F2024L00518]

Defence (Visiting Forces) Amendment (Australia Timor Leste Defence Cooperation Agreement) Regulations 2024 [F2024L00456]

Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2024 [F2024L00663]

Financial Accountability Regime Act (Information for register) Regulator Rules 2024 [F2024L00285]

Higher Education Provider Approval (No. 12 of 2006) Amendment Instrument 2024 [F2024L00554]

Industry Research and Development (Defence Industry Export Program) Instrument 2024 [F2024L00353]

Intellectual Property Laws Amendment (Regulator Performance) Regulations 2024 [F2024L00525]

Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024 [F2024L00417]

Mutual Recognition Amendment (Automatic Deemed Registration Notification — Western Australia) Determination 2024 [F2024L00538]

National Health (Chairperson of the Pharmaceutical Benefits Remuneration Tribunal) Appointment 2024 [F2024L00493]

National Land Transport (Roads to Recovery Conditions) Determination 2024 [F2024L00670]

National Land Transport (Roads to Recovery List) Determination 2024 [F2024L00567]

Social Security (Family Law Affected Income Streams) Amendment (Military Invalidation Pension Income Streams) Principles 2024 [F2024L00588]

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 8 August 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 8 August 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 |
|---|--|--------------|
| Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards Amendment Instrument (No. 1) 2024 [F2024L00521] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 10 July 2024 |
| Defence (Non-foreign work restricted individual) Determination 2024 [F2024L00519] | The department undertook to progress amendments to the explanatory statement in response to the committee's concerns. | 12 July 2024 |
| Defence (Non-relevant foreign country) Determination 2024 [F2024L00518] | The department undertook to progress amendments to the explanatory statement in response to the committee's concerns. | 12 July 2024 |
| Environment Protection and Biodiversity Conservation (Recovery Plans) Revocation Instrument 2024 [F2024L00602] | The department undertook to progress amendments to the explanatory statement in response to the committee's concerns. | 19 July 2024 |
| Jervis Bay Territory Rural Fires Rules 2024 [F2024L00347] | The minister undertook to amend the explanatory statement in response to the committee's scrutiny concerns. | 26 July 2024 |

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Undertakings, *Delegated Legislation Monitor 8 of 2024*; [2024] AUSStaCSDLM 81.

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 |
|---|---|------------------|
| Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629] | The minister undertook to amend the explanatory statement in response to the committee's scrutiny concerns. | 15 July 2024 |
| National Land Transport (Roads to Recovery Conditions) Determination 2024 [F2024L00670] | The department undertook to progress a replacement explanatory statement in response to the committee's concerns. | 2 August 2024 |
| National Land Transport (Roads to Recovery List) Determination 2024 [F2024L00567] | The department undertook to progress amendments to the explanatory statement in response to the committee's concerns. | 10 July 2024 |

Implemented undertakings

4.5 During this period, the committee has been made aware that the following undertakings have been implemented.

| Instrument | Undertaking | Date implemented |
|---|--|-------------------------|
| Aged Care Legislation Amendment (Registered Nurses) Principles 2023 [F2023L00389] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 1 July 2024 |
| Aged Care Legislation Amendment (Residential Aged Care Funding) Instrument 2022 [F2022L01276] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 1 July 2024 |
| Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards 2022 [F2022L00137] | The department undertook to progress amendments to the instrument in response to the committee's scrutiny concerns. | 8 May 2024 |
| Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards 2022 [F2022L00137] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 8 May 2024 |
| Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards Amendment Instrument (No. 1) 2024 [F2024L00521] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 7 August 2024 |
| Defence (Visiting Forces) Amendment (Australia Timor Leste Defence) | The department undertook to progress amendments to the explanatory statement | 10 July 2024 |

| | | |
|--|--|--------------|
| Cooperation Agreement) Regulations 2024 [F2024L00456] | in response to the committee's scrutiny concerns. | |
| Financial Accountability Regime Act (Information for register) Regulator Rules 2024 [F2024L00285] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 24 July 2024 |
| Jervis Bay Territory Rural Fires Rules 2024 [F2024L00347] | The minister undertook to amend the explanatory statement in response to the committee's scrutiny concerns. | 29 July 2024 |
| Migration (English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Amendment (Pathway Programs) Specification 2024 [F2024L00471] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 18 July 2024 |
| Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629] | The minister undertook to amend the explanatory statement in response to the committee's scrutiny concerns. | 3 July 2024 |
| Migration Amendment (Bridging Visas) Regulations 2024 [F2024L00441] | The minister undertook to amend the explanatory statement in response to the committee's scrutiny concerns. | 30 July 2024 |
| Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024 [F2024L00417] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 3 July 2024 |
| Part 101 Manual of Standards (Chief Remote Pilot Licence Instructor and Other Matters) Amendment Instrument 2024 [F2024L00433] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 June 2024 |
| Safety, Rehabilitation and Compensation (Defence-related Claims)—Guide to the Assessment of the Degree of Permanent Impairment 2023 [F2023L00364] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 5 July 2024 |
| Work Health and Safety (Operation Sovereign Borders) Declaration 2024 [F2024L00425] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 10 July 2024 |

Outstanding undertakings

4.6 As at 8 August 2024, 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 <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> relevant exemptions intended to be enduring and to time limit those retained in delegated legislation. | 20 March 2024 |
| Australian National University (Governance) Statute 2023 [F2023L00867] | The minister advised that the Australian National University had undertaken to progress amendments to the instrument in response to the committee's concerns. | 26 September 2023 |
| Australian National University (Governance) Statute 2023 [F2023L00867] | The minister advised that the Australian National University had undertaken to progress amendments to the explanatory statement in response to the committee's concerns. | 1 November 2023 |
| 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 |
| Civil Aviation Safety Amendment (Flight Operations—Parts 119 and 138) Regulations 2022 [F2022L01612] | The minister undertook to table the report into the review of the Franchise Disclosure Register provisions. | 20 January 2023 |
| 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 |

| Instrument | Undertaking | Date made |
|---|---|------------------|
| Environment Protection and Biodiversity Conservation (National Recovery Plan for Leadbeater's Possum (<i>Gymnobelideus leadbeateri</i>)) Instrument 2024 [F2024L00270] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 3 May 2024 |
| Environment Protection and Biodiversity Conservation (National Recovery Plan for the Swift Parrot (<i>Lathamus discolor</i>)) Instrument 2024 [F2024L00482] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 2 May 2024 |
| Environment Protection and Biodiversity Conservation (Recovery Plan for the Spiny Rice-flower (<i>Pimelea spinescens</i> subsp. <i>spinescens</i>)) Instrument 2024 [F2024L00346] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 3 May 2024 |
| Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 [F2024L00286] | The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns. | 10 May 2024 |
| Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 11) Determination 2023 [F2023L00559] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 19 July 2023 |
| Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 [F2021L01823] | The Attorney-General undertook to amend the principal regulations in response to the committee's scrutiny concerns. | 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 |
| Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 [F2021L00843] | The minister undertook to amend the principal instrument in response to the committee's scrutiny concerns. | 9 February 2022 |
| Health Insurance (prudential standard) determination No. 2 of 2023 [F2023L00719] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |
| Health Insurance (prudential standard) determination No. 4 of 2023 [F2023L00733] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |

| Instrument | Undertaking | Date made |
|---|--|------------------|
| Health Insurance (prudential standard) determination No. 5 of 2023 [F2023L00734] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |
| Health Insurance (prudential standard) determination No. 6 of 2023 [F2023L00738] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |
| Health Insurance (prudential standard) determination No. 7 of 2023 [F2023L00689] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |
| Health Insurance (prudential standard) determination No. 8 of 2023 [F2023L00691] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |
| Health Insurance (prudential standard) determination No. 9 of 2023 [F2023L00695] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 27 July 2023 |
| Higher Education Standards Framework (Threshold Standards) 2021 [F2021L00488] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 9 August 2021 |
| 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 |
| Road Vehicle Standards Amendment (2023 Measures No. 1) Rules 2023 [F2024L00086] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 20 March 2024 |
| Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023 [F2023L01182] | The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns. | 31 October 2023 |
| 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. | 13 December 2022 |
| 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 |

| Instrument | Undertaking | Date made |
|--|--|------------------|
| Vehicle Standard (Australian Design Rule 106/00 – Side Underrun Protection) 2023 [F2023L01317] | The department undertook to progress amendments to the explanatory statement in response to the committee’s scrutiny concerns. | 31 October 2023 |
| Veterans’ Affairs (Treatment Principles – Extend Support Provided Under the Psychiatric Assistance Dog Program) Amendment Determination 2022 [F2022L00921] | The department 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 (Attorney-General's Portfolio Measures No. 1) Regulations 2024 [F2024L00715] | \$2.5 million in 2024-25 | Expensive Commonwealth Criminal Cases Fund |
| Financial Framework (Supplementary Powers) Amendment (Finance Measures No. 1) Regulations 2024 [F2024L00717] | \$6.6 million over three years from 2023-24 | Australian Political Parties for Democracy program |
| Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 2) Regulations 2024 [F2024L00716] | \$1.0 million in 2023-24 | Aged Care Workforce Bonus Payment |

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 8 of 2024*; [2024] AUSStaCSDLM 82.

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](#).

| | | |
|---|--|---|
| Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) Regulations 2024 [F2024L00718] | \$23.0 million over four years from 2023-24 | Grants to Free TV Australia Ltd |
| Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 3) Regulations 2024 [F2024L00719] | \$70.4 million over five years from 2023-24 | Working for Women Program |
| | \$24.3 million over four years from 2023-24 and \$5.9 million per year ongoing | Support for Trafficked People Program |
| Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 2) Regulations 2024 [F2024L00720] | \$1.0 million over three years from 2023-24 | Australian Orphanage Museum |
| | \$13.9 million over two years from 2024-25 | Improving parenting confidence and supporting and promoting shared care |
| | \$12.1 million over five years from 2023-24 and \$3.8 million per year ongoing | Forced Marriage Specialist Support Program |

Levying of taxation in delegated legislation

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

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

| Instrument | Limit on the taxation amount in primary legislation? |
|--|--|
| Australian Crime Commission (National Policing Information Charges) Determination 2024 [F2024L00684] | No |
| Australian Passports (Application Fees) Amendment Determination 2024 [F2024L00618] | 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 8 of 2024*; [2024] AUSStaCSDLML 83.

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 |
|---|---|
| Automatic Mutual Recognition (New South Wales) (Exemption—12-months) Declaration 2024 [F2024L00805] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2024 [F2024L00663] | Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 |

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 |
|--|---|
| Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 12) Determination 2024 [F2024L00704] | Subsection 9(5) of the <i>Federal Financial Relations Act 2009</i> |
| Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 13) Determination 2024 [F2024L00632] | Subsection 16(5) of the <i>Federal Financial Relations Act 2009</i> |
| Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 14) Determination 2024 [F2024L00777] | Subsection 16(5) of the <i>Federal Financial Relations Act 2009</i> |
| Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2024 [F2024L00653] | Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Food Standards (Application A1254 – Rosemary Extract as a Food Additive – extension of use) Variation [F2024L00577] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1273 – Steviol glycosides as a food additive in Food for special medical purposes) Variation [F2024L00578] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1275 – Transglutaminase from GM <i>Bacillus licheniformis</i> as a processing aid) Variation [F2024L00579] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1276 – Food derived from herbicide-tolerant soybean line MON94313) Variation [F2024L00586] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1277 – 2'-FL from GM <i>Escherichia coli</i> K-12 (gene donor: <i>Helicobacter enhydrae</i>) in infant formula products) Variation [F2024L00587] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Local Government (Financial Assistance) (Final Factor for 2023-24 and Estimated Factor for 2024-25) Determination 2024 [F2024L00812] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Mutual Recognition Amendment (Automatic Deemed Registration Notification – Western Australia) Determination 2024 [F2024L00538] | Subsection 44(1) of the <i>Legislation Act 2003</i> |
| Superannuation (prudential standard) determination No. 3 of 2024 [F2024L00637] | Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (prudential standard) determination No. 4 of 2024 [F2024L00638] | Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 |

| Instrument | Source of exemption |
|---|---|
| Superannuation (PSS) Maximum Benefits (2024-2025) Determination 2024 [F2024L00642] | Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (PSS) Productivity Contribution (2024-2025) Determination 2024 [F2024L00641] | Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Torres Strait Prawn Fishery (Bycatch Reduction Devices) Instrument 2024 [F2024L00600] | Subsection 44(1) of the <i>Legislation Act 2003</i> |

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.

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

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](#).

- 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 |
|--|---|
| Agricultural and Veterinary Chemicals Code (Interchangeable Constituent) Determination 2024 [F2024L00654] | Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2024 [F2024L00663] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 12) Determination 2024 [F2024L00704] | Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 13) Determination 2024 [F2024L00632] | Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 14) Determination 2024 [F2024L00777] | Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2024 [F2024L00653] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1254 – Rosemary Extract as a Food Additive – extension of use) Variation [F2024L00577] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1273 – Steviol glycosides as a food additive in Food for special medical purposes) Variation [F2024L00578] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1275 – Transglutaminase from GM <i>Bacillus licheniformis</i> as a processing aid) Variation [F2024L00579] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1277 – 2'-FL from GM <i>Escherichia coli</i> K-12 (gene donor: <i>Helicobacter enhydrae</i>) in infant formula products) Variation [F2024L00587] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Food Standards (Application A1276 – Food derived from herbicide-tolerant soybean line MON94313) Variation [F2024L00586] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i> |

| Instrument | Source of exemption |
|--|--|
| International Organisations (Privileges and Immunities) (Declaration of Organisation for Joint Armament Co-operation) Regulations 2024 [F2024L00731] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Local Government (Financial Assistance) (Final Factor for 2023-24 and Estimated Factor for 2024-25) Determination 2024 [F2024L00812] | Subsection 54(1) of the <i>Legislation Act 2003</i> |
| Marine Order 55 (Vessels carrying industrial personnel) 2024 [F2024L00648] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2024 Measures No. 1) Regulations 2024 [F2024L00730] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (CSS) Productivity Contribution (2024-2025) Declaration 2024 [F2024L00640] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (prudential standard) determination No. 3 of 2024 [F2024L00637] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (prudential standard) determination No. 4 of 2024 [F2024L00638] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (PSS) Maximum Benefits (2024-2025) Determination 2024 [F2024L00642] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |
| Superannuation (PSS) Productivity Contribution (2024-2025) Determination 2024 [F2024L00641] | Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 |

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