

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

Monitor 5 of 2023

10 May 2023

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ISSN: 2652-4139 (print)

ISSN: 2652-4147 (online)

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This report can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 50.

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

# Membership of the committee

## Current members

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Senator David Van (Deputy Chair)	Victoria, LP
Senator Catryna Bilyk	Tasmania, ALP
Senator David Pocock	Australian Capital Territory, IND
Senator Louise Pratt	Western Australia, ALP
Senator Paul Scarr	Queensland, LP

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# Introduction<sup>1</sup>

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

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

This Monitor details matters relating to the committee's scrutiny of **220** legislative instruments registered on the Federal Register of Legislation between **16 March 2023** and **16 April 2023**. This includes **200** disallowable instruments and **20** instruments exempt from disallowance.<sup>2</sup> It also details the committee's ongoing consideration of instruments registered in previous periods.

## 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;

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1 This section can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Introduction, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLML 51.

2 These figures include two disallowable legislative instruments that were registered in the previous scrutiny period without explanatory statements: the CASA EX18/23 — CASR Subpart 99.B DAMP Requirements for Foreign Air Transport AOC Holders Exemption 2023 [F2023L00144] and the CASA EX30/23 — Part 145 Exposition (CAR Maintenance Activities) Exemption 2023 [F2023L00152]. These instruments were scrutinised in this Monitor.

- (d) those likely to be affected by the instrument were adequately consulted in relation to it;
- (e) its drafting is defective or unclear;
- (f) it, and any document it incorporates, may be freely accessed and used;
- (g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;
- (h) it trespasses unduly on personal rights and liberties;
- (i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;
- (j) it contains matters more appropriate for parliamentary enactment;
- (k) in the case of an instrument exempt from sunseting, it is appropriate for the instrument to be exempt from sunseting;
- (l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and
- (m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

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

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

## **Nature of the committee's scrutiny**

### ***Technical legislative scrutiny***

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

### ***Resolving minor technical scrutiny concerns***

After scrutinising a legislative instrument, the committee may initially engage in informal correspondence with agencies via its secretariat to gather information or seek clarification to identify and resolve minor technical scrutiny concerns. This



engagement with agencies assists the committee in deciding whether it is necessary to seek further advice from the relevant minister about those concerns. Agency correspondence is not published; however, the relevant instruments are listed on the committee's website and in Chapter 3 of the Monitor.

### *Resolving significant technical scrutiny concerns*

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

### *Undertakings*

As a result of raising its scrutiny concerns with the relevant minister or agency, the committee may seek an undertaking for specific action to address its scrutiny concerns. The committee summarises outstanding and implemented undertakings in Chapter 4 of the Monitor. The committee will record relevant undertakings on the [Index of Undertakings](#) on its website.

### ***Matters of interest to the Senate***

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

### **Disallowance process<sup>3</sup>**

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

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

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

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.

### ***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.

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

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# Chapter 1

## New and ongoing matters

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

### New matters

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

### Public Service Regulations 2023<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2023L00368</a>
<b>Purpose</b>	Remakes the Public Service Regulations 1999.
<b>Portfolio</b>	Prime Minister and Cabinet
<b>Authorising legislation</b>	<i>Public Service Act 1999</i>
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 9 May 2023). Notice of motion to disallow must be given by 7 August 2023. <sup>2</sup>

### Overview

1.3 The Public Service Regulations 2023 (the instrument) remakes the Public Service Regulations 1999 (the 1999 regulations), which sunset on 1 April 2023. The explanatory statement indicates that the instrument introduces 'streamlining, clarification, and technical amendments' to the 1999 regulations. The committee has identified several technical scrutiny concerns in the instrument, detailed below.

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Public Service Regulations 2023, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 52.

2 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

## Scrutiny concerns

### ***Delegation of administrative powers and functions***<sup>3</sup>

1.4 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations, or interests unduly dependent on insufficiently defined administrative powers. This includes where administrative powers and functions are delegated under the instrument.

1.5 Section 105 of the instrument provides that the Australian Public Service (APS) Commissioner, Merit Protection Commissioner and Agency Heads may delegate any of their powers and functions in the instrument.

1.6 Section 105 confers broad powers on the relevant decision-makers to delegate and then subdelegate their powers with few limitations:

- subsection 105(1) provides that the APS Commissioner may delegate any of their powers or functions to 'a person';
- subsection 105(2) provides that the Merit Protection Commissioner may delegate any of their powers or functions to APS employees; and
- subsections 105(3)–(4) provide that an Agency Head may delegate their powers or functions to 'a person', who must not be an 'outsider' unless the APS Commissioner gives prior written consent.

1.7 Where an instrument delegates administrative powers or functions, the committee expects that the explanatory statement will describe the purpose and scope of each delegation. Further, the explanatory statement should address who will be exercising the delegated powers and functions, as well as the nature and source of any limitations or safeguards.

1.8 The explanatory statement for the instrument does not appear to explain why the delegation powers in section 105 are necessary or address who these delegated powers or functions will be exercised by and whether that delegate will be required to possess specific skills, qualifications, and/or experience. It is the committee's view that if a power is delegated below the SES level or equivalent, the explanatory statement should justify why it is necessary and appropriate to delegate these powers and functions to officers below this level.

1.9 Further, it is unclear to the committee why the delegation powers in section 105 are required in this instrument due to the existing operation of delegation powers in section 78 of the *Public Service Act 1999* (the Act).

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

1.10 It appears that the delegation powers in section 105 of the instrument may duplicate, or even expand, the powers set out in section 78 of the Act. For example, subsections 78(5) and 78(5A) of the Act provide that the APS Commissioner may delegate any of their powers or functions to a 'senior official' or 'former senior official.' In contrast, subsection 105(1) of the instrument appears to allow for the delegation of powers and functions to 'a person', removing a qualification in the Act on the scope of the delegation power.

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

- **why it is considered necessary and appropriate to provide for such a broad delegation of powers or functions in the instrument, noting the pre-existing delegation power set out in section 78 of the Act;**
- **whether the persons to whom powers or functions may be delegated are required to have the appropriate skills, qualifications, and experience to exercise the powers or functions; and**
- **whether any safeguards or limitations, beyond those set out in the instrument, apply to the delegation of these powers or functions, and whether these safeguards are contained in law or policy.**

***Consultation with persons affected;<sup>4</sup> compliance with Legislation Act 2003<sup>5</sup>***

1.12 Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, as well as relevant experts, were adequately consulted in relation to the specific instrument. Further, section 17 of the *Legislation Act 2003* (the Legislation Act) requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.<sup>6</sup>

1.13 Accordingly, explanatory statements to instruments should provide details of any consultation undertaken. If no consultation was undertaken with persons likely to be affected, the explanatory statement should justify why no such consultation was undertaken.

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

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

6 Paragraph 17(2)(b).

1.14 In this instance, the explanatory statement to the instrument indicates that consultation was undertaken by the Australian Public Service Commission (APSC) with:

- the Merit Protection Commissioner; and
- the Department of Defence (in relation to amendments in section 105).

1.15 However, the explanatory statement does not indicate whether the APSC also consulted specifically with persons likely to be affected by the instrument such as APS employees, the Community and Public Sector Union or other government agencies. As this instrument sets out a range of matters directly relevant to the employment and promotion of APS employees and the review of APS actions, limiting consultation to the Merit Protection Commissioner and Department of Defence does not appear to amount to consultation with persons likely to be affected by the instrument.

**1.16 The committee therefore requests the minister's advice as to whether any consultation was undertaken in relation to the instrument with persons affected or, if not, why not.**

***Availability of independent merits review;<sup>7</sup> exemption from the operation of primary legislation<sup>8</sup>***

1.17 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits, or fails to provide for the independent review of decisions affecting rights, obligations, or interests. Where an instrument empowers a decision-maker to make discretionary decisions, the committee expects those decisions should be subject to merits review. Additionally, Senate standing order 23(3)(l) requires the committee to scrutinise each instrument as to whether it contains amendments or modifications to primary legislation or exempts persons or entities from the operation of primary legislation. Under this principle, the committee is typically concerned with instruments that amend or modify the operation of primary legislation or create an exemption from the operation of primary legislation.

1.18 Division 3, Subdivision A of the instrument sets out when an APS non-SES employee is entitled to seek review of an action that relates to their employment and identifies what actions are reviewable. Notably, subsection 37(2) of the instrument provides that certain actions listed in the table in that subsection are not, or cease to be, reviewable actions.

1.19 Section 37 of the instrument is made for the purposes of section 33(1) of the Act. Section 33 of the Act, in part, provides:

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

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



(1) An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment. However, an APS employee is not entitled to review under this section of APS action that consists of the termination of the employee's employment.

(2) The regulations may prescribe exceptions to the entitlement.

Note: For example, the regulations might provide that there is no entitlement to review if the application for review is frivolous or vexatious.

1.20 In this regard, section 36 of the instrument sets out details about APS employees' entitlement to review and section 37 sets out what APS actions are reviewable actions. Specifically, subsection 37(2) operates to provide exemptions to the general entitlement in section 33(1) of the Act that APS employees can seek review of any APS action related to their employment.

1.21 Where an instrument provides that certain decisions are excluded from merits review, the committee considers that the explanatory statement should comprehensively justify the nature and scope of the relevant exclusions, including whether it is appropriate to include them in delegated legislation. Further, in instances where a decision is excluded from merits review, the relevant explanatory statement should explain what characteristics of the decisions justify the exclusion by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*<sup>9</sup>

1.22 In this case, the explanatory statement to this instrument does not provide a justification for the exemptions created by subsection 37(2), nor does it provide an explanation of their nature and scope, or why the exemptions are appropriate to be included in delegated legislation.

1.23 The committee's longstanding view is that provisions which amend or create exemptions to primary legislation should be included in primary rather than delegated legislation. If the provisions are in delegated legislation, in this case enabled by subsection 33(2) of the Act, the exemptions should operate no longer than strictly necessary. The exemptions created by subsection 37(2) of the instrument do not appear to be time-limited.

1.24 Additionally, some of the items listed in the table in subsection 37(2) are drafted broadly and appear to include classes of decisions that would have the capacity to substantially affect a person's rights and interests rather than specific actions. For example, item 8 of the table provides that an '[a]ction relating to the engagement of an APS employee' is not a reviewable decision. Neither the instrument nor the explanatory statement appears to provide an explanation of the kinds of

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9 Administrative Review Council (1999), [\*What decisions should be subject to merit review?\*](#)

decisions covered by item 8 or address why it is necessary to include them in delegated legislation.

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

- **the nature and scope of each of the APS actions listed in subsection 37(2) of the instrument as non-reviewable actions;**
- **what characteristics of the actions listed in subsection 37(2) of the instrument justify the exclusion of merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and**
- **why it is considered appropriate to include these exemptions from the Act in delegated rather than primary legislation.**

***Adequacy of explanatory materials***<sup>10</sup>

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

1.27 Under this standing order, the committee expects that explanatory statements should explain the purpose and operation of each section of the relevant instrument. This accords with the requirements of paragraph 15J(2)(b) of the Legislation Act, as well as the more general expectation that an explanatory statement be sufficiently comprehensive as to assist with the interpretation of the law.

1.28 While the explanatory statement to this instrument does include a provision-by-provision explanation, it is the committee's view that it does not contain sufficient information to enable the reader to gain a clear understanding of the instrument's purpose and functions.

1.29 The committee notes that there does not appear to be an explanation of the overarching purpose of the instrument and the framework it creates. Instead, the explanatory statement contains a description of the amendments made to the 1999 regulations, even though the 1999 regulations have been wholly replaced and are no longer in force. Further, each paragraph of the provision-by-provision explanation directs the reader back to equivalent provisions of the 1999 regulations. It does not provide an explanation of the provisions in this specific instrument.

1.30 As this instrument appears to set out the powers and functions of statutory officeholders and extends a regulatory framework created by the Act that impacts all APS employees, the explanatory statement should provide more detailed information

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

about the provisions in this instrument without requiring readers to refer to the 1999 regulations and the associated explanatory statements.

**1.31 The committee therefore requests the minister's advice as to whether the explanatory statement can be amended to explain the purpose and operation of this instrument, rather than merely referring to the 1999 regulations.**



## Chapter 2

### Concluded matters<sup>1</sup>

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

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

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1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 2: Concluded matters, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 53.



# Chapter 3

## Agency engagement<sup>1</sup>

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 Of the instruments registered on the Federal Register of Legislation between 16 March and 16 April 2023, the committee commenced engaging with the relevant agency via its secretariat about the following **49** instruments.<sup>2</sup>

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#### Instrument

Aged Care Legislation Amendment (Registered Nurses) Principles 2023 [F2023L00389]

Agricultural and Veterinary Chemicals Code (MRL Standard) Amendment Instrument (No. 2) 2023 [F2023L00261]

Auditing Standard ASA 2023-1 Amendments to Australian Auditing Standards [F2023L00295]

Australian National Audit Office Auditing Standards 2023 [F2023L00440]

CASA EX27/23 — Remotely Piloted Aircraft Operations Beyond Visual Line of Sight Exemption 2023 [F2023L00422]

Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2023 [F2023L00380]

Fair Work and Other Legislation Amendment Regulations 2023 [F2023L00293]

Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2023 [F2023L00313]

Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2023 [F2023L00288]

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1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 3: Agency engagement, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 54.

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

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## **Instrument**

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**Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2023 [F2023L00349]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2023 [F2023L00247]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2023 [F2023L00307]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2023 [F2023L00249]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2023 [F2023L00306]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2023 [F2023L00315]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2023 [F2023L00250]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2023 [F2023L00251]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 11 of 2023 [F2023L00253]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 12 of 2023 [F2023L00256]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 13 of 2023 [F2023L00259]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2023 [F2023L00262]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 15 of 2023 [F2023L00266]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 16 of 2023 [F2023L00267]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 17 of 2023 [F2023L00301]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 18 of 2023 [F2023L00254]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 19 of 2023 [F2023L00255]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 20 of 2023 [F2023L00258]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 21 of 2023 [F2023L00280]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 22 of 2023 [F2023L00338]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 23 of 2023 [F2023L00310]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 24 of 2023 [F2023L00337]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 25 of 2023 [F2023L00264]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 26 of 2023 [F2023L00275]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 27 of 2023 [F2023L00316]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 28 of 2023 [F2023L00317]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 29 of 2023 [F2023L00318]**

**Financial Sector (Collection of Data) (reporting standard) determination No. 30 of 2023 [F2023L00319]**

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## Instrument

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Financial Sector (Collection of Data) (reporting standard) determination No. 31 of 2023 [F2023L00257]

Financial Sector (Collection of Data) (reporting standard) determination No. 32 of 2023 [F2023L00268]

Financial Sector (Collection of Data) (reporting standard) determination No. 33 of 2023 [F2023L00311]

Financial Sector (Collection of Data) (reporting standard) determination No. 34 of 2023 [F2023L00321]

Financial Sector (Collection of Data) (reporting standard) determination No. 35 of 2023 [F2023L00312]

Financial Sector (Collection of Data) (reporting standard) determination No. 36 of 2023 [F2023L00302]

Financial Sector (Collection of Data) (reporting standard) determination No. 37 of 2023 [F2023L00300]

Financial Sector (Collection of Data) (reporting standard) determination No. 38 of 2023 [F2023L00265]

Financial Sector (Collection of Data) (reporting standard) determination No. 49 of 2023 [F2023L00404]

Financial Sector (Collection of Data) (reporting standard) determination No. 51 of 2023 [F2023L00405]

Migration (Specification of evidentiary requirements—family violence) Instrument (LIN 23/026) 2023 [F2023L00382]

Safety, Rehabilitation and Compensation (Defence-related Claims)—Guide to the Assessment of the Degree of Permanent Impairment 2023 [F2023L00364]

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## Ongoing matters

3.4 The committee is continuing to engage with relevant agencies via its secretariat about potential scrutiny concerns raised by **one** instrument.<sup>3</sup>

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## Instrument

Transport Security Legislation Amendment (Criminal Intelligence Threshold) Regulations 2023 [F2023L00192]

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## Concluded matters

3.5 The committee has concluded its consideration of the following **five** instruments after engagement with relevant agencies via its secretariat.<sup>4</sup>

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## Instrument

Aged Care Legislation Amendment (Registered Nurses) Principles 2023 [F2023L00389]

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

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

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**Instrument**

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**Agricultural and Veterinary Chemicals Code (MRL Standard) Amendment Instrument (No. 2) 2023 [F2023L00261]**

**Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2023 [F2023L00380]**

**Fair Work and Other Legislation Amendment Regulations 2023 [F2023L00293]**

**Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2023 [F2023L00188]**

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# Chapter 4

## Undertakings<sup>1</sup>

4.1 This Chapter contains a summary of undertakings that the committee is aware have been implemented or remain outstanding since the committee's last Monitor.

4.2 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.<sup>2</sup> Further information about the scrutiny concerns leading to these undertakings can be found through the links published on the *Index of Instruments* available on the committee's website.<sup>3</sup>

### Implemented undertakings

4.3 Since the last Monitor was tabled, no amendments were made to explanatory statements in response to the committee's scrutiny concerns. The following table records undertakings to amend an Act or legislative instrument or to conduct a review that the committee is aware have been implemented since the tabling of the committee's last Monitor.

Instrument	Undertaking	Date implemented
<b>Corporations Amendment (Corporate Insolvency Reforms) Regulation 2020 [F2020L01654]</b>	The Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	12/12/2022

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1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 4: Undertakings, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 55.

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

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

## Outstanding undertakings

4.4 During this period, no new undertakings were made to amend explanatory statements to instruments in response to the committee's scrutiny concerns. No new undertakings were made to amend an Act or legislative instrument or to conduct a review in the relevant period.

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Instrument	Undertaking	Date of undertaking
<b>Agricultural and Veterinary Chemicals Code (MRL Standard) Amendment Instrument (No. 2) 2023 [F2023L00261]</b>	The Department of Agriculture, Fisheries and Forestry undertook to remake the instrument, addressing the committee's scrutiny concerns in the new explanatory statement.	28/04/2023

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

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# Chapter 5

## Instruments raising significant issues<sup>1</sup>

5.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4), on the basis that they raise significant issues.<sup>2</sup> This may include instruments which:

- set out significant elements of a regulatory scheme;
- significantly trespass on personal rights and liberties;
- amend primary legislation; or
- contain significant policy matters.

5.2 In this Monitor, there are no instruments which the committee has resolved to draw to the attention of the Senate and the relevant legislation committee under standing order 23(4) on the basis that they raise significant issues.

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1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 5: Instruments raising significant issues, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 56.

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](#).





# Chapter 6

## Expenditure and taxation in delegated legislation<sup>1</sup>

6.1 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 interests of promoting appropriate parliamentary scrutiny and control of Commonwealth expenditure in delegated legislation.<sup>2</sup> This Chapter is divided into two sections, covering expenditure-related matters and the levying of taxation in delegated legislation.

### Commonwealth expenditure

6.2 This section contains two broad categories of expenditure-related instruments:

- instruments specifying Commonwealth expenditure under the *Financial Framework (Supplementary Powers) Act 1997* and the *Industry Research and Development Act 1986*; and
- instruments providing grants to the states and territories under the *Federal Financial Relations Act 2009*.

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

6.3 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 in instruments made under those Acts. Consequently, the specification of expenditure in an instrument made under these Acts effectively authorises the Commonwealth to spend public monies on the relevant grant or program. The scrutiny of these instruments is a key aspect of parliamentary scrutiny and control of Commonwealth expenditure.<sup>3</sup> Accordingly, the committee has resolved to draw the Senate's

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1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 6: Expenditure and taxation in delegated legislation, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLM 57.

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 For further information see the committee's guideline on [Scrutiny of Commonwealth expenditure](#) and Chapter 7 of the report of the committee's inquiry, [Parliamentary scrutiny of delegated legislation](#).

attention to Commonwealth expenditure authorised by delegated legislation made under the FF(SP) Act and IRD Act under Senate standing order 23(4).<sup>4</sup>

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

<b>Instrument</b>	<b>Amount</b>	<b>Grant/Program</b>
<b>Financial Framework (Supplementary Powers) Amendment (Climate Change, Energy, the Environment and Water Measures No. 1) Regulations 2023 [F2023L00276]</b>	\$20.3 million over four years from 2022-23	Carbon Farming Outreach Program
	Not specified	Delivering the Basin Plan Program
	\$59.9 million over three years from 2022-23	Energy efficiency grants for small and medium enterprises
	\$90 million over five years from 2022-23	Landcare Rangers Program
<b>Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2023 [F2023L00434]</b>	\$4.7 million over four years from 2022-23	Grant to The Oasis Townsville Limited
	\$2.1 million over three years from 2022-23	Financial counselling services for veterans—pilot program
<b>Financial Framework (Supplementary Powers) Amendment (Education Measures No. 1) Regulations 2023 [F2023L00233]</b>	\$10.9 million over seven years from 2023-24	Commonwealth Regional Scholarship Program
	\$83.5 million over six years from 2022-23	Consent and Respectful Relationships Education
<b>Financial Framework (Supplementary Powers) Amendment (Employment and Workplace Relations Measures No. 1) Regulations 2023 [F2023L00237]</b>	\$5.1 million over three years from 2023-24	Productivity, Education and Training Fund
<b>Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2023 [F2023L00229]</b>	Part of \$15.7 million over four years from 2022-23	Vietnamese labour mobility for work in relation to primary industries in Australia
	\$11.4 million over four years from 2022-23	Pacific Engagement Visa
<b>Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2023 [F2023L00243]</b>	\$871.1 million over three years from 2022-23	Status Resolution and Support Services—special purpose visa holders

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

Instrument	Amount	Grant/Program
<b>Financial Framework (Supplementary Powers) Amendment (Industry, Science and Resources Measures No. 1) Regulations 2023 [F2023L00285]</b>	Not specified	Protecting Australia's National Interest in Critical and Emerging Technologies
<b>Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 1) Regulations 2023 [F2023L00244]</b>	\$60 million over two years from 2023-24	Grant to Hobart International Airport Pty Limited
<b>Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2023 [F2023L00227]</b>	Up to \$1 million over two years from 2022-23	Forced Adoption Support Services—Commemoration and Capacity-Building
<b>Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 1) Regulations 2023 [F2023L00291]</b>	\$24 million over four years from 2022-23 \$145,000 per year, ongoing	Additional Employment Support for Veterans Grants-in-Aid

### ***Instruments providing for Commonwealth grants to states and territories under the Federal Financial Relations Act 2009***

6.5 The *Federal Financial Relations Act 2009* (the Federal Financial Relations Act) is a key source of legislative authority for funding provided by the Commonwealth to the states and territories. It empowers the relevant minister to make determinations providing for payments of general revenue assistance to the states and territories (under section 9) and specific purposes agreed with a state or territory (under section 16). Such instruments are not subject to disallowance by Parliament.<sup>5</sup>

6.6 The Annual Appropriation Acts set a debit limit on the total amounts that can be provided in general revenue assistance and specific purpose payments under sections 9 and 16 of the Federal Financial Relations Act. The *Appropriation Act (No. 2) 2021-2022* sets these limits at \$5 billion and \$25 billion, respectively. Noting the significant amount of expenditure which the relevant minister may determine subject to these limits, together with the non-disallowable status of the determinations, the committee has resolved to draw these instruments to the attention of the Senate under standing order 23(4).

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5 *Federal Financial Relations Act 2009*, sections 9(5) and 16(5).

6.7 The following tables list instruments providing for Commonwealth grants pursuant to the Federal Financial Relations Act framework registered in the relevant period.

*General revenue assistance – section 9, Federal Financial Relations Act*

<b>Instrument</b>	<b>Amount</b>	<b>Description</b>
<b>Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 9) Determination 2023 [F2023L00246]</b>	\$139 142 787.27	Determines amount of general purpose financial assistance to be paid to Western Australia and the Australian Capital Territory.

*Specific purpose payments – section 16, Federal Financial Relations Act*

<b>Instrument</b>	<b>Amount</b>	<b>Description</b>
<b>Federal Financial Relations (Housing, Homelessness and Housing Affordability Payments for 2021-22) Determination 2023 [F2023L00305]</b>	\$1 616 171 420.15	Determines the amount of Housing, Homelessness and Housing Affordability funding to be paid to each state, the Australian Capital Territory and the Northern Territory for the 2021-22 financial year.
<b>Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 10) Determination 2023 [F2023L00420]</b>	\$1 242 982 070.94	Determines amounts of financial assistance to be paid to the states, the Australian Capital Territory and the Northern Territory to: support the delivery of agreed outputs or projects; facilitate state and territory reforms; and reward states and territories for nationally significant reforms.

# Chapter 7

## Exemptions from disallowance and sunseting<sup>1</sup>

7.1 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

7.2 On 16 June 2021, the Senate resolved that delegated legislation should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.<sup>2</sup>

7.3 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.

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

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;<sup>3</sup>

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1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 7: Exemptions from disallowance and sunseting, *Delegated Legislation Monitor 5 of 2023*; [2023] AUSStaCSDLML 58.

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

7.5 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.

7.6 Further information about the committee's expectations regarding the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>5</sup>

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

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

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#### **Instrument**

**Biosecurity (Foot and Mouth Disease Biosecurity Response Zone) Amendment (Gold Coast Airport) Determination 2023 [F2023L00365]**

**Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 9) Determination 2023 [F2023L00246]**

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

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## Instrument

Federal Financial Relations (Housing, Homelessness and Housing Affordability Payments for 2021-22) Determination 2023 [F2023L00305]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 10) Determination 2023 [F2023L00420]

Torres Strait Fisheries Tropical Rock Lobster (Total Allowable Catch) Amendment Determination (No. 1) 2023 [F2023L00421]

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## Exemptions from sunseting

7.8 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.

7.9 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.

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

7.11 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.

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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](#).

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

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

7.13 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.

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

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



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

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

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**Instrument**

**Agricultural and Veterinary Chemicals Code (MRL Standard) Amendment Instrument (No. 2) 2023  
[F2023L00261]**

**Senator Linda White  
Chair**