

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

Monitor 7 of 2023

21 June 2023

© Commonwealth of Australia 2023

ISSN: 2652-4139 (print)

ISSN: 2652-4147 (online)

Committee contact details

PO Box 6100

Parliament House

Canberra ACT 2600

Ph: 02 6277 3066

Email: sdlc.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_sdlc

This report can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 7 of 2023*; [2023] AUSStaCSDLM 67.

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

Senator Linda White (Chair)	Victoria, ALP
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
Senator Paul Scarr	Queensland, LP

Secretariat

Fattimah Imtoul, Secretary (A/g)
Anika Khwaja, Principal Research Officer
Nicole Maslaris, Principal Research Officer
Aneka Atley, Senior Research Officer
Geoffrey Fricke, Legislative Research Officer

Committee legal adviser

Associate Professor Andrew Edgar

Contents

Membership of the committee	iii
Introduction.....	vii
Part I – Technical legislative scrutiny	1
Chapter 1: New and ongoing matters	3
<i>Ongoing matters</i>	3
Public Service Regulations 2023	3
Chapter 2: Concluded matters	13
Chapter 3: Agency engagement.....	15
<i>New matters</i>	15
<i>Ongoing matters</i>	16
<i>Concluded matters</i>	16
Chapter 4: Undertakings	17
<i>Implemented undertakings</i>	17
<i>Outstanding undertakings</i>	17
Part II – Matters of interest to the Senate.....	19
Chapter 5: Instruments raising significant issues	21
Chapter 6: Expenditure and taxation in delegated legislation.....	23
<i>Commonwealth expenditure</i>	23
Instruments specifying expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and <i>Industry Research and Development Act 1986</i>	23
Instruments providing for Commonwealth grants to states and territories under the <i>Federal Financial Relations Act 2009</i>	24

Chapter 7: Exemptions from disallowance and sunseting 27

Exemptions from disallowance 27

Exemptions from sunseting 29

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).

This Monitor details matters relating to the committee's scrutiny of **108** legislative instruments registered on the Federal Register of Legislation between **16 May 2023** and **31 May 2023**. This includes **88** disallowable instruments and **20** instruments exempt from disallowance.¹ 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;

1 These figures include one disallowable legislative instrument that was registered in the previous period without an explanatory statement: the CASA EX52/23 – CRS and SM CRS Document to Cover Specialist Maintenance by a Class D AMO – Instrument 2023 [F2023L00482]. This instrument was scrutinised in this Monitor.

One disallowable legislative instrument, the CASA EX56/23 – Implementation of Drug and Alcohol Management Plans (Micro-businesses and DAMP Organisations) Exemption 2023 [F2023L00628], was registered in this period without an explanatory statement. Scrutiny of this instrument has been deferred until an explanatory statement is registered. This instrument is not included in these statistics.

- (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 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 process²

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

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

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.

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.

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).

Ongoing matters

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

Public Service Regulations 2023¹

FRL No.	F2023L00368
Purpose	Remakes the Public Service Regulations 1999.
Portfolio	Prime Minister and Cabinet
Authorising legislation	<i>Public Service Act 1999</i>
Disallowance	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. ²

Overview

1.3 The Public Service Regulations 2023 (the instrument) remakes the Public Service Regulations 1999 (the 1999 regulations) following the sunset of the 1999 regulations. The explanatory statement provides 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.

1 This entry may be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Public Service Regulations 2023, *Delegated Legislation Monitor 7 of 2023*; [2023] AUSStaCSDLM 68.

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

1.4 The committee first sought advice about potential scrutiny concerns in this instrument in *Delegated Legislation Monitor 5 of 2023* on 10 May 2023.³ The minister responded to the committee's request on 30 May 2023.⁴

Scrutiny concerns

*Delegation of administrative powers and functions*⁵

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 set out in the instrument. As section 105 confers broad delegation powers on the relevant decision-makers to delegate and then subdelegate their powers with few limitations, the committee requested 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 *Public Service Act 1999* (the Act);
- the skills, qualifications, and experience of persons to whom the relevant powers and functions may be delegated; and
- whether any safeguards or limitations contained in law or policy apply to the delegation powers.

*Minister's response*⁶

1.6 The minister advised that the delegation powers prescribed in the instrument are 'administratively necessary and provide sufficient flexibility to enable Agency Heads, the APS Commissioner and the Merit Protection Commissioner to carry out their functions.' In particular, she advised that the broad delegation power for Agency Heads 'reflects that the Australian Public Service (APS) consists of many agencies of different sizes and differing operational requirements'. Accordingly, it is the relevant APS Agency Heads that are best placed to determine what persons possess the requisite skills, qualifications and experience to exercise delegated powers and functions.

3 Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2023](#) (25 January 2023) pp. 3–9.

4 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

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

6 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

1.7 The minister also advised that section 105 of the instrument is necessary because section 78 of the Act only applies to the delegation of powers and functions under the Act. It does not extend to the delegation of powers and functions conferred by subordinate legislation made under the Act.

1.8 The minister further advised that the scope of section 105 of the instrument is largely the same as the scope of section 78 of the Act. However, the minister acknowledged that the instrument does not limit the persons to whom the APS Commissioner may delegate their powers, while the Act and Australian Public Service Commissioner's Directions 2022 (the Directions) do. Both the Act and the Directions provide that the APS Commissioner's powers may only be delegated to a senior official. As such, the minister undertook to request the Australian Public Service Commission (APSC) conduct a review to consider whether the instrument should be amended to align the scope of the APS Commissioner's delegation powers under the instrument, the Act and the Directions.

Committee view

1.9 The committee thanks the minister for her advice on the operation of the delegation powers in section 105 of the instrument and their relationship with section 78 of the Act.

1.10 The committee also welcomes the minister's undertaking to request the APSC conduct a review to determine whether the APS Commissioner's delegation powers in the instrument should be amended to align with the Act and the Directions.

1.11 In light of the minister's undertaking, the committee has concluded its examination of this issue, and would appreciate an update on the outcome of this review when this is available.

Consultation with persons affected;⁷ compliance with Legislation Act 2003⁸

1.12 The explanatory statement to the instrument provides that consultation was undertaken by the APSC with the Merit Protection Commissioner and Department of Defence (in relation to section 105). However, there was no indication of whether the APSC had consulted specifically with persons likely to be affected by the instrument such as APS employees, the Community and Public Sector Union (CPSU) or other government agencies. As the 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

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

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

Defence did not appear to amount to consultation with persons likely to be affected by the instrument.

1.13 Consequently, the committee requested the minister's advice as to whether any consultation was undertaken with persons likely to be affected and, if not, why not.

Minister's response⁹

1.14 In her response, the minister advised that consultation had only occurred with the Merit Protection Commissioner and Department of Defence because they were persons directly affected by the 'minor streamlining, clarification and technical amendments' that this instrument made. As such, broader consultation was not conducted.

1.15 However, the minister acknowledged 'the importance of undertaking broad consultation with those affected by the legislation even where there are only minor changes'. As such, she undertook to ensure the APSC will consult with the CPSU on behalf of APS employees when the APSC 'proposes future changes to the Public Sector legislative framework'.

Committee view

1.16 While the committee thanks the minister for this response, it retains significant concerns about the approach taken to consultation with affected persons for the instrument.

1.17 The committee considers that consultation with affected persons before an instrument is made is crucial to ensure that it is fit-for-purpose and best suited to achieve the relevant rule-maker's objectives. Further, ensuring that adequate consultation has occurred is particularly significant when the relevant legislative instrument has the potential to impact individuals' legal rights and liberties, as is the case with this instrument.

1.18 It remains unclear to the committee how the APSC knew that only 'minor streamlining, clarification and technical amendments' to the 1999 regulations were required when they developed the instrument if consultation with affected persons did not occur. The purpose of the instrument is to remake the 1999 regulations which were due to sunset on 1 April 2023. A key purpose of the sunset regime is to facilitate a timely review of legislation to ensure its content remains fit-for-purpose. The committee considers that on the expiry of the 1999 regulations, the opportunity

9 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

for a thorough review of the relevant legislative framework arose and appropriate consultation ought to have been a vital part of that process.

1.19 As such, the committee requests further information about:

- **how it was decided what updates were necessary to the 1999 regulations, and the impact of the updates, in the absence of consultation with persons likely to be affected by the instrument, including APS employees and the CPSU; and**
- **whether the CPSU can be notified of this instrument.**

Availability of independent merits review;¹⁰ exemption from the operation of primary legislation¹¹

1.20 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 actions. Notably, section 37 of the instrument provides for circumstances when actions are not, or cease to be, reviewable actions. The committee had previously identified that some of these exemptions were drafted broadly and appeared to include classes of decisions that would have the capacity to substantially affect a person's rights and interests, rather than specific actions. Neither the instrument nor the explanatory statement appeared to provide an explanation of the kinds of decisions covered by the broad exemptions or address why it was necessary for them to be included in delegated legislation.

1.21 Consequently, the committee requested the minister's advice as to:

- the nature and scope of each of the 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?*¹² and
- why it is considered appropriate to include these exemptions from the Act in delegated rather than primary legislation.

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

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

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

*Minister's response*¹³

1.22 In her response, the minister advised that the exemptions set out in subsection 37(2) of the instrument are the same as the exemptions provided for in the 1999 regulations.

1.23 The minister explained that subsection 33(2) of the Act provides that exceptions to the Review of Action scheme are to be specified in the regulations and identified that the 'Explanatory Memorandum for the 1999 Act (at 4.47.6) expressly anticipated that these specific exemptions should be specified in the Regulations'. This, the minister stated, illustrates that it was the Parliament's judgement that it was appropriate to include the exemptions in delegated legislation.

1.24 In relation to items 1–7 listed in subsection 37(2), the minister explained that these are 'high level strategic whole-of-government decisions' which are beyond the scope of an individual employee's employment. For items 8–12, the exemptions 'relate to the administration of the agency and are designed to provide Agency Heads with flexibility available to employers more generally, in tasking employees and deploying them in accordance with operational requirements, without these decisions being subject to challenge and review'.

Committee view

1.25 The committee thanks the minister for her response, specifically the clarification sought in relation to subsection 37(2) of the instrument. However, as discussed above in relation to consultation, it remains unclear to the committee how it was determined that the exemptions contained in that subsection remain fit-for-purpose and appropriate for inclusion in the instrument.

1.26 Given the minister's advice about subsection 37(2), the committee has further questions about other exemptions set out in section 37 of the instrument. Specifically, subsection 37(4) provides that an action is not, or ceases to be, a reviewable action if the person who is, or would be, conducting the review considers that the action should not be reviewable for any of the following reasons:

- (a) the application by the affected employee for review of the action is misconceived or lacking in substance;
- (b) the application by the affected employee for review of the action is frivolous or vexatious;
- (c) the affected employee has previously applied for review of the action under this Division;

13 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

- (d) the affected employee has applied to have the action reviewed under Division 2 of this Part;
- (e) the affected employee has applied, or could apply, to have the action reviewed by an external review body and review by the external review body would be more appropriate than review under this Division;
- (f) the affected employee does not have sufficient direct personal interest in review of the action;
- (g) review, or further review, of the action is not otherwise justified in all the circumstances.

1.27 As with subsection 37(2), it appears that some of the reasons listed in subsection 37(4) are drafted broadly or have not been explained in the explanatory statement to the instrument and so how they operate is unclear:

- It is unclear whether paragraph 37(4)(c) could prevent a person from making an application for review of an action if they have made a previous application for review under division 3 of the instrument, even if the new application relates to review of a different action.
- Paragraph 37(4)(f) operates to exclude a person from seeking review of action over which the person does not have a sufficient personal interest. However, this appears to already be provided for by subsection 33(1) of the Act which limits an APS employee's right to review to an action 'that relates to his or her APS employment'.
- Paragraph 37(4)(g) provides that actions can be excluded from review if the person considers that review 'is not justified in all the circumstances'. This paragraph confers broad discretionary powers upon the relevant person conducting the review without setting out any factors that must be considered in exercising the discretion.

1.28 The instrument's explanatory statement does not provide an explanation of the nature and scope of these exemptions to an APS employee's right to review. Where an instrument confers broad discretionary powers upon a person, it is the committee's expectation that the relevant explanatory statement should set out the purpose and scope of the discretion as well as an explanation of any limitations and safeguards relevant to the exercise of the discretionary power.

1.29 From the committee's consideration of the 1999 explanatory material from the Act, it appears that it also did not anticipate the inclusion of the exceptions to the entitlement to a review contained in paragraphs 37(4)(c), (g) and (f) in the regulations.

1.30 In this regard, the committee requests further information on:

- **how it was determined that the exemptions from the 1999 regulations that are listed in subsection 37(2) remain fit-for-purpose;**

- the nature and scope of each of the exclusions from review contained in subsection 37(4) of the instrument;
- whether paragraph 37(4)(c) could prevent a person from making an application for review of an action if they have made a previous application for review in relation to a different action;
- whether paragraph 37(4)(f) is necessary, noting section 33(1) of the Act already limits review to 'any APS action that relates to his or her APS employment'; and
- what factors must be considered when a person is exercising the discretionary power in paragraph 37(4)(g), and if there are any safeguards in place.

Adequacy of explanatory materials¹⁴

1.31 The committee raised concerns about the explanatory statement to the instrument because there did not appear to be an explanation of the overarching purpose of this specific instrument and the framework it creates. Instead, the explanatory statement contained a description of the amendments the instrument made to the 1999 regulations which have been wholly replaced. Further, each paragraph of the provision-by-provision explanation directed the reader back to equivalent provisions of the 1999 regulations rather than explaining the operation of the provision in this specific instrument.

1.32 In this regard, the committee requested the minister's advice as to whether the explanatory statement could be amended to explain the purpose and operation of the instrument, rather than merely referring to the 1999 regulations.

Minister's response¹⁵

1.33 The minister advised that 'the level of detail in the explanatory statement reflects the primary audience for the explanatory statement: APS employees and managers who were familiar with the previous framework'. As such, the signposts to the 1999 regulations were 'intended to assist APS employees and managers in understanding the limited ways in which the Regulations differ from the 1999 Regulations'.

1.34 However, reflecting her engagement with the committee's scrutiny concerns, the minister undertook to prepare a replacement explanatory statement to include further information on the other scrutiny issues identified by the committee.

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

15 This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

Committee view

1.35 The committee notes the minister's advice about the purpose of the signposts to the 1999 regulations in the instrument's explanatory statement and reiterates its expectation that explanatory statements should adequately explain the purpose and operation of each section of the relevant instrument. This expectation also accords with the requirements of paragraph 15J(2)(b) of the *Legislation Act 2003*.

1.36 The committee welcomes the minister's undertaking to amend the explanatory statement to provide more information on the other scrutiny issues it has identified. However, it seeks the minister's further advice as to whether the explanatory statement could also be amended to include further detail about the purpose and operation of the instrument, beyond advising that it remakes the 1999 regulations.

1.37 In this regard, the committee requests the minister's advice as to whether the explanatory statement could also be amended to include further detail about the purpose and operation of the instrument.

Chapter 2

Concluded matters¹

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

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

1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 2: Concluded matters, *Delegated Legislation Monitor 7 of 2023*; [2023] AUSStaCSDLM 69.

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 Of the instruments registered on the Federal Register of Legislation between 16 May and 31 May 2023, the committee commenced engaging with the relevant agency via its secretariat about the following **11** instruments.²

Instrument

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 11) Determination 2023 [F2023L00559]

Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2023 [F2023L00603]

Financial Sector (Collection of Data) (reporting standard) determination No. 40 of 2023 [F2023L00605]

Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2023 [F2023L00582]

Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2023 [F2023L00591]

Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2023 [F2023L00592]

Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2023 [F2023L00596]

Financial Sector (Collection of Data) (reporting standard) determination No. 45 of 2023 [F2023L00597]

Financial Sector (Collection of Data) (reporting standard) determination No. 46 of 2023 [F2023L00573]

Safeguard Mechanism Legislation Amendment (2023 Measures No. 1) Regulations 2023 [F2023L00620]

1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 3: Agency engagement, *Delegated Legislation Monitor 7 of 2023*; [2023] AUSStaCSDLM 70.

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

Instrument

National Health (Price and Special Patient Contribution) Amendment Determination 2023 (No. 4) [F2023L00657]

Ongoing matters

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

Instrument

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

Concluded matters

3.5 The committee has concluded its consideration of the following 11 instruments after engagement with relevant agencies via its secretariat.⁴

Instrument

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

Extradition (Republic of North Macedonia) Regulations 2023 [F2023L00447]

Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2023 [F2023L00603]

Financial Sector (Collection of Data) (reporting standard) determination No. 40 of 2023 [F2023L00605]

Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2023 [F2023L00582]

Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2023 [F2023L00591]

Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2023 [F2023L00592]

Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2023 [F2023L00596]

Financial Sector (Collection of Data) (reporting standard) determination No. 45 of 2023 [F2023L00597]

Financial Sector (Collection of Data) (reporting standard) determination No. 46 of 2023 [F2023L00573]

Human Services (Medicare) (Medicare Programs) Amendment Specification 2023 [F2023L00522]

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.

Chapter 4

Undertakings¹

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.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

Implemented undertakings

4.3 Since the last Monitor was tabled, an amendment was made to one explanatory statement 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
Civil Aviation Legislation Amendment (Flight Operations—Consequential Amendments and Transitional Provisions) Regulations 2021 [F2021L00200]	The Civil Aviation Safety Authority undertook to amend the instrument in response to the committee's scrutiny concerns.	25/05/2023

Outstanding undertakings

4.4 During this period, 10 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.

1 This chapter can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Chapter 4: Undertakings, *Delegated Legislation Monitor 7 of 2023*; [2023] AUSStaCSDLM 71.

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

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

Part II—Matters of interest to the Senate

Chapter 5

Instruments raising significant issues¹

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.² 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.

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 7 of 2023*; [2023] AUSStaCSDLM 72.

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 legislation¹

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.² 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.³ Accordingly, the committee has resolved to draw the Senate's

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 7 of 2023*; [2023] AUSStaCSDLM 73.

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).⁴

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.

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 3) Regulations 2023 [F2023L00598]	\$4.9 million in 2022-23	Protecting Our Communities (Disaster Resilience) Program

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.⁵

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).

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

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

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

General revenue assistance – section 9, Federal Financial Relations Act

Instrument	Amount	Description
Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 11) Determination 2023 [F2023L00559]	\$96 136 915.32	Determines amounts of general purpose financial assistance to be paid to Western Australia and the Australian Capital Territory.

Chapter 7

Exemptions from disallowance and sunseting¹

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.²

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;³

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 7 of 2023*; [2023] AUSStaCSDLM 74.

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.

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.⁵

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):

Instrument

Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2023 [F2023L00621]

Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 11) Determination 2023 [F2023L00559]

Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2023 [F2023L00603]

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

Instrument

Financial Sector (Collection of Data) (reporting standard) determination No. 40 of 2023 [F2023L00605]

Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2023 [F2023L00582]

Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2023 [F2023L00591]

Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2023 [F2023L00592]

Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2023 [F2023L00596]

Financial Sector (Collection of Data) (reporting standard) determination No. 45 of 2023 [F2023L00597]

Financial Sector (Collection of Data) (reporting standard) determination No. 46 of 2023 [F2023L00573]

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.⁶

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.

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;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.

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

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).

Instrument

Consular Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Indirect Tax Concession Scheme) Amendment (Saudi Arabia) Determination 2023 [F2023L00556]

Diplomatic Privileges and Immunities (Indirect Tax Concession Scheme) Amendment (Saudi Arabia) Determination 2023 [F2023L00552]

Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2023 [F2023L00621]

Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2023 [F2023L00603]

Financial Sector (Collection of Data) (reporting standard) determination No. 40 of 2023 [F2023L00605]

Financial Sector (Collection of Data) (reporting standard) determination No. 41 of 2023 [F2023L00582]

Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2023 [F2023L00591]

Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2023 [F2023L00592]

Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2023 [F2023L00596]

Financial Sector (Collection of Data) (reporting standard) determination No. 45 of 2023 [F2023L00597]

Financial Sector (Collection of Data) (reporting standard) determination No. 46 of 2023 [F2023L00573]

**Senator Linda White
Chair**