

The Senate

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Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

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Introduction

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

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

Committee information

Terms of reference

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

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

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

Undertakings

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

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

Matters of interest to the Senate

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

Disallowance process¹

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

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

The committee may also give a notice of motion to disallow an instrument where it considers that the instrument raises significant and unresolved scrutiny concerns, and the committee has therefore resolved to recommend to the Senate that the instrument be disallowed. In these circumstances, the committee will detail its significant scrutiny concerns in Chapter 1 of the Monitor.

Publications

Delegated Legislation Monitor

The committee's usual practice is to table its [Delegated Legislation Monitor](#) each Senate sitting week. Legislative instruments detailed in the Monitor are also listed in the [Index of Instruments](#) on the committee's website.

Scrutiny News

[Scrutiny News](#) is a brief newsletter summarising significant matters arising in the Monitor, as well as in the reports of the Senate Standing Committee for the Scrutiny of Bills. Past editions, and information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.

¹ For further information on the disallowance process see [Odgers' Australian Senate Practice](#) and [Guide to Senate Procedure No. 19 - Disallowance](#).

Guidelines

[Guidelines](#) relating to the committee's scrutiny principles are published on the committee's website.

Other resources

Ministerial responses to the committee's concerns can be accessed on the committee's website through either the [Delegated Legislation Monitors](#) webpage or the [Index of Instruments](#).

The [Federal Register of Legislation](#) should be consulted for the text of instruments, explanatory statements, and associated information.

The [Senate Disallowable Instruments List](#) provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.

The [Disallowance Alert](#) records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.

Report snapshot

Scrutiny period	
Legislative instruments registered on the Federal Register of Legislation between 10 November and 16 November 2023	35
Instruments in this period exempt from disallowance	3
Chapter 1: New and ongoing matters	
New legislative instruments commented on in report	1
Ongoing legislative instruments commented on in report	0
Chapter 2: Concluded matters	
Legislative instruments of which the committee has concluded its examination following receipt of ministerial response	1
Chapter 3: Agency engagement	
New legislative instruments where the committee engaged with the relevant agency via its secretariat	0
Legislative instruments of which the committee has concluded its examination following receipt of agency response	7
Chapter 4: Undertakings	
New undertakings made by ministers or agencies to address the committee's scrutiny concerns	1
Undertakings which the committee was made aware had been implemented during this period	1
Outstanding undertakings	52
Chapter 5: Scrutiny of Commonwealth expenditure	
Advance to the Finance Minister determinations	0
Instruments specifying Commonwealth expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and the <i>Industry Research and Development Act 1986</i>	2
Levying of taxation in delegated legislation	0
Chapter 6: Exemptions from disallowance and sunseting	
Instruments that do not meet the committee's expectations regarding exemptions from disallowance under standing order 23(4A)	2
Instruments that do not meet the committee's expectations regarding exemptions from sunseting under standing order 23(3)(k)	1

Part I—Technical legislative scrutiny

Chapter 1

New and ongoing matters

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

New matters

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

Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023¹

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

Overview

1.3 The *Financial Framework (Supplementary Powers) Act 1997* (the Act) authorises the Commonwealth to spend public money on grants and programs specified in legislative instruments made under the Act. The Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations) are made under the Act for this purpose. Specifically, this instrument amends the FF(SP) Regulations, to establish legislative authority for government spending on a financial

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023, *Delegated Legislation Monitor 15 of 2023*; [2023] AUSStaCSDLM 131.

assistance scheme for respondents to applications brought under the Family Law (Child Abduction Convention) Regulations 1986.

1.4 The committee's secretariat, on behalf of the committee, engaged with the Department of Finance, which provided a response in consultation with the Attorney-General's Department, in November 2023. As the committee retains scrutiny concerns with the instrument, it has resolved to raise those concerns with the Minister for Finance.

Scrutiny concerns

Availability of independent merits review;² adequacy of explanatory materials³

1.5 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, obligations and interests. Further, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

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

1.7 However, the instrument's explanatory statement provides that independent merits review is not appropriate for decisions made in connection with grants of financial assistance under this scheme. It states that these decisions relate to the provision of a grant to one or more applicants over others and, due to the finite amount of funding for the program, any change to a decision for one applicant would affect the available funding for other applicants. The explanatory statement cites paragraphs 4.11 to 4.15 of the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (ARC guide)⁴ in support of this justification.

1.8 Noting this, the committee retains some concerns about the appropriateness of the justification cited in this case for excluding merits review. Specifically, the ARC guide requires under the justification relied on to exclude merits review that there is both:

- a finite amount of resources available; and

² Senate standing order 23(3)(i).

³ Senate standing order 23(3)(g).

⁴ Administrative Review Council, [What decisions should be subject to independent merits review?](#)

- an allocation that has already been made to another party would be directly affected by overturning the original allocation decision.⁵

1.9 Further, the ARC guide states:

The mere fact that there is a limited pool of resources for distribution does not, of itself, make subsequent allocative decisions unsuitable for review.

For example, even though an overall program expenditure may be notionally capped, and program funding estimates may need to be marginally adjusted if decisions were overturned on review, these are not circumstances where funding is finite. If one allocation of funding from the resource is altered, funding to another person or body will not necessarily be directly affected.

1.10 It is unclear to the committee how the requirements of the justification in the ARC guide apply to decisions made under this instrument. It appears from the instrument's explanatory statement that each application is assessed on its own merits and, if an applicant meets the specified criteria, they should receive funding. Further, the explanatory statement describes the program as being 'non-competitive'. In addition, it is unclear to the committee whether this is a case where the expenditure is notionally capped. As such, it is not evident how the review of a decision would affect the funding provided to other applicants.

1.11 Accordingly, the committee requests the minister's advice as to whether further justification can be provided for excluding independent merits review, addressing the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

1.12 In addition, the committee has resolved to place a 'protective' notice of motion to disallow the instrument to provide it with additional time to consider this matter.

⁵ Administrative Review Council, [What decisions should be subject to independent merits review?](#) p.14, paragraph [4.14].

Chapter 2

Concluded matters

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

National Portrait Gallery of Australia Regulations 2023¹

FRL No.	F2023L01184
Purpose	To remake the 2013 Regulations, including minor changes to reflect current drafting practice, ensuring the Regulations continue to be fit for purpose and where appropriate, are consistent with the powers provided to other National Collecting Institutions.
Authorising legislation	<i>National Portrait Gallery of Australia Act 2012</i>
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Disallowance	15 sitting days after tabling (tabled in the Senate on 6 September 2023). Notice of motion to disallow must be given by 10 November 2023. Committee gave notice of motion to disallow on 10 November 2023.

Overview

2.2 The National Portrait Gallery of Australia Regulations 2023 (the instrument) regulate various matters relating to access to, and management of, the National Portrait Gallery of Australia (the Gallery).

2.3 The committee first raised scrutiny concerns with the instrument on 9 October 2023 in *Delegated Legislation Monitor 11 of 2023* and the minister responded on 31 October 2023. As the committee retained scrutiny concerns, it sought further advice

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, National Portrait Gallery of Australia Regulations 2023, ; [2023] AUSStaCSDLM 132.

on 9 November 2023 in *Delegated Legislation Monitor 13 of 2023*.² The minister responded on 23 November 2023.³

Scrutiny concerns

Coercive powers;⁴

2.4 The instrument contains several provisions that empower ‘authorised officers’ appointed under section 12 to exercise a range of coercive powers. In this regard the committee had previously requested advice on a range of matters, including:

- why those provisions were necessary and appropriate,
- what constitutes ‘such force as is reasonably necessary’ under section 15 of the instrument,
- the qualifications and skills of authorised officers; and
- what safeguards and limitations applied to the exercise of coercive powers by an authorised officer.

2.5 In his previous advice, the minister provided detailed information on why the powers were necessary and appropriate. Additionally, the minister explained that determining what constitutes ‘such force as is reasonably necessary’ under section 15 of the instrument was to be determined objectively on a case-by-case basis and with regard to the general principal that ‘only the minimal physical force necessary to restrain a person (if needed) should be applied’.

2.6 Regarding the qualifications and skills of authorised officers and other safeguards and limitations that applied to these provisions, the minister also provided detailed information on matters such as: the Gallery’s training policies and procedures for authorised officers; the security and police checks undertaken by relevant contracting company; and the Gallery’s Service Charter.

2.7 Based on this advice, the committee requested that the instrument’s explanatory statement be updated to reflect the information provided.

Minister’s response

2.8 In his response, the minister undertook to draft and register a replacement explanatory statement to reflect the information provided regarding the Gallery’s incident management policies and procedures, and the limitations and safeguards that apply to the exercise of an authorised officer’s powers. This includes the principle that

² Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 11 of 2023](#) (9 October 2023) pp. 11-15.

³ This correspondence was tabled with this Monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee’s website.

⁴ Senate standing order 23(3)(h).

'minimal physical force' should be used when an authorised officer is exercising their powers under section 15'.

Committee view

2.9 The committee welcomes the minister's undertaking to include this information in a replacement explanatory statement, which it now understands has been registered, and considers this addresses the committee's concerns about this scrutiny issue.

2.10 In light of the minister's implemented undertaking, the committee is concluding its examination of this issue.

***Conferral of discretionary powers;*⁵**

2.11 The instrument contains several provisions that confer broad discretionary powers on authorised officers. As the instrument's explanatory statement did not contain guidance on what conduct could fall within the scope of these powers, the committee originally sought the minister's advice on these matters.

2.12 In the minister's previous advice, he advised that authorised officers 'would have regard to the Gallery's Service Charter and security policies and procedures in determining objectively what actions will cause or likely cause offence to members of the public or staff'. The minister also provided detail on relevant factors that authorised officers would reasonably be expected to consider when exercising discretionary powers under the instrument.

2.13 Following this advice, the committee requested that the instrument's explanatory statement be updated to reflect the information provided.

Minister's response

2.14 In his response, the minister undertook to draft and register a replacement explanatory statement to include this additional information.

Committee view

2.15 The committee welcomes the minister's undertaking to include this information in a replacement explanatory statement, which it now understands has been registered, and considers this addresses the committee's concerns about this scrutiny issue.

2.16 In light of the minister's implemented undertaking, the committee is concluding its examination of this issue.

⁵ Senate standing order 23(3)(c).

Strict liability⁶

2.17 Subsection 12(6) of the instrument provides that a person commits a strict liability offence if they cease to be an authorised officer under section 12 of the instrument and do not return their identity card to the Director within 14 days. Due to the seriousness of including strict liability offences in delegated legislation, the committee had previously requested the minister's advice as to why it was necessary and appropriate for subsection 12(6) of the instrument to provide for a strict liability offence with reference to the Attorney-General's *Guide to Framing Commonwealth Offences*.

2.18 Additionally, the instrument's explanatory statement provides that subsection 12(6) aims to achieve the 'public health and safety objective of preventing unauthorised supply of liquor'. As it was unclear how an offence relating to the return of identity cards was related to the supply of liquor, the committee had previously sought advice on this matter.

2.19 In his previous response, the minister provided detailed reasons as to why it was appropriate to use a strict liability offence in subsection 12(6) of the instrument. Further, his advice explained that this provision was 'drafted to ensure consistency with regulations supporting some other national collecting institutions' such as the National Library of Australia and that the true intention of the provision was minimising the opportunity for people to misuse identity cards and ensure the Gallery was safe for the public and staff.

2.20 Following the provision of this advice, the committee queried whether the references to the 'unauthorised supply of liquor' on page 11 of the explanatory statement were a drafting error and identified that the explanatory statement also referred to the incorrect number of penalty units for this offence. As such, the committee requested that the explanatory statement be updated to correct these possible errors.

Minister's response

2.21 In his response, the minister undertook to draft and register a replacement explanatory statement to correct the drafting error identified in relation to subsection 12(6) of the instrument.

Committee view

2.22 The committee welcomes the minister's undertaking to include this information in a replacement explanatory statement, which it now understands has been registered, and considers this addresses the committee's concerns about this scrutiny issue.

⁶ Senate standing order 23(3)(h).

2.23 In light of the minister's implemented undertaking, the committee is concluding its examination of this issue.

2.24 The committee has also resolved to withdraw the notice of motion placed to disallow the instrument.

Chapter 3

Agency engagement

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

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

New matters

3.3 The committee did not engage with agencies about any new matters during this reporting period.¹

Concluded matters

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

Instrument

Airspace Amendment (Danger Areas) Regulations 2023 [F2023L01448]

Financial Framework (Supplementary Powers) Amendment (Employment and Workplace Relations Measures No. 2) Regulations 2023 [F2023L01412]

Financial Sector (Collection of Data) (reporting standard) determination No. 130 of 2023 [F2023L01436]

Financial Sector (Collection of Data) (reporting standard) determination No. 131 of 2023 [F2023L01437]

Industry Research and Development (Capacity Investment Scheme Program) Instrument 2023 [F2023L01481]

Notice of Intention to Propose Customs Tariff Alterations (No. 4) 2023 [F2023L01283]

Nuclear Non-Proliferation (Safeguards) Amendment Regulations 2023 [F2023L01409]

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

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

Chapter 4

Undertakings

4.1 This Chapter identifies the new undertakings that have been made in this reporting period and those that the committee is aware have been implemented since the last Monitor.

4.2 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.¹ Further information about the scrutiny concerns leading to these undertakings can be found through the links published on the *Index of Instruments* available on the committee's website.²

New undertakings

4.3 During this period, the following undertaking was made to address the committee's scrutiny concerns.

Instrument	Undertaking	Date made
Competition and Consumer (Gas Market Code) Regulations 2023 [F2023L00994]	The minister gave a further undertaking to amend the explanatory statement in response to the committee's scrutiny concerns.	14/11/2023

Implemented undertakings

4.4 Since the last Monitor was tabled, the following undertaking has been implemented.

Instrument	Undertaking	Date made
Industry Research and Development (Australia-Vietnam Science, Technology and Innovation Cooperation Initiative Program) Instrument [F2023L00947]	The Department of Industry, Science and Resources undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	15/11/2023

¹ See the [Index of Undertakings](#) page on the committee's website.

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

Part II—Matters of interest to the Senate

Chapter 5

Expenditure and taxation in delegated legislation

5.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) in the interest of promoting appropriate parliamentary scrutiny of Commonwealth expenditure in delegated legislation.¹ This includes expenditure-related instruments and instruments that levy taxation.

Commonwealth expenditure

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

5.2 Instruments made under the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) and the *Industry Research and Development Act 1986* (the IRD Act) authorise the Commonwealth to spend public money on grants and programs specified. The committee has resolved to draw these instruments to the Senate's attention under Senate standing order 23(4).²

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

Instrument	Amount	Grant/Program
Industry Research and Development (Carbon Capture Technologies Program) Instrument 2023 [F2023L01486]	\$65 million over eight years	Carbon Capture Technologies Program
Industry Research and Development (Single Business Service Program) Instrument 2023 [F2023L01507]	\$39.6 million over four years from 2023-24 to 2026-27, and \$11.0 million ongoing	Single Business Service Program

¹ 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](#).

² Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

Chapter 6

Exemptions from disallowance and sunseting

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

Exemptions from disallowance

6.2 On 16 June 2021, the Senate resolved that delegated legislation should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.³

6.3 Senate standing order 23(4A) provides that the committee may consider instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance. Noting the Senate's concern about the exemption of delegated legislation from disallowance, this section identifies the instruments which do not satisfy the committee's expectations regarding the circumstances of their exemption from disallowance.

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

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁴
- 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*;⁵
- overrides or modifies primary legislation;

³ 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](#).

⁴ 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.

⁵ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

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

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

6.6 Further information about the committee's expectations regarding the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.⁶

Instruments which do not meet the committee's expectations

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

Instrument	Source of exemption
National Housing Finance and Investment Corporation Investment Mandate Amendment (Housing Australia Future Fund—Preparatory Work) Direction 2023 [F2023L01484]	Section 44(1) of the <i>Legislation Act 2003</i>
Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) (Total Allowable Catch) Determination 2023 [F2023L01509]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015

⁶ 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.

Exemptions from sunseting

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

6.9 The sunseting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. Sunseting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

6.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunseting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.⁷

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

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

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁸

⁷ 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](#).

⁸ 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.

- 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*;⁹
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

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

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunseting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.¹⁰

⁹ 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.

¹⁰ 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

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

Instrument	Source of exemption
National Housing Finance and Investment Corporation Investment Mandate Amendment (Housing Australia Future Fund—Preparatory Work) Direction 2023 [F2023L01484]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

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