

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).

This Monitor details matters relating to the committee's scrutiny of **87** legislative instruments registered on the Federal Register of Legislation between **30 August 2023** and **8 September 2023**. This includes **80** disallowable instruments and **7** instruments exempt from disallowance.

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 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 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

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

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).

New matters

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

National Portrait Gallery of Australia Regulations 2023²

FRL No.	F2023L01184
Purpose	This instrument remakes the 2013 Regulations, includes minor changes to reflect current drafting practice, ensures 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 13 November 2023.

Overview

1.3 The National Portrait Gallery of Australia Regulations 2023 (the Regulations) regulate various matters relating to access to, and management of, the National Portrait Gallery of Australia (the Gallery). The Regulations repeal and remake the former National Portrait Gallery of Australia Regulation 2013 (the Old Regulations) with 'minor changes to reflect current drafting practice and ensure that the

² This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, National Portrait Gallery of Australia Regulations 2023, *Delegated Legislation Monitor 11 of 2023*; [2023] AUSStaCSDL110.

Regulations continue to be fit for purpose'. The committee has identified several significant technical scrutiny concerns in the instrument, detailed below.

Scrutiny concerns

Coercive powers³

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

1.5 Section 12(1) of the Regulations provides that the Director of the Gallery may, by instrument in writing, appoint a staff member to be an 'authorised officer' for any of the following purposes:

- (a) regulating, restricting, or prohibiting the entry of persons onto Gallery land or into a Gallery building;
- (b) regulating the conduct of persons on Gallery land or in a Gallery building; and/or
- (c) a purpose related to the removal of persons from Gallery land or a Gallery building.

1.6 Once appointed as an authorised officer, the staff member is empowered under several provisions to exercise a range of discretionary powers, some of which may be coercive in nature. For example, paragraph 12(3)(b) states that an authorised officer may apprehend a person and they may be 'held in the custody of an authorised officer until the person can be taken into the custody of a member of a police force'. Further, subsection 15(2) provides, while exercising their powers of apprehension, an authorised officer may use 'such force as is reasonably necessary'.

1.7 Where an instrument confers coercive powers on a person or class of persons, the committee will be concerned to ensure that the instrument does not unduly trespass on personal rights and liberties. In particular, the committee will consider: whether the power is clearly defined; that there are appropriate limits and safeguards in place; and whether the persons on whom the powers are conferred possess the appropriate qualifications or experience necessary to exercise the powers.

1.8 In this regard, the explanatory statement provides that 'the Director would only appoint persons as authorised officers if the Director were reasonably satisfied that they have the appropriate qualifications, skills and training necessary to carry out the role'. It is unclear to the committee what the appropriate qualifications, skills and training includes, or the minimum level of seniority required for a person to be appointed as an authorised officer.

³ Senate standing order 23(3)(c).

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

- **why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument; and**
- **further detail about what constitutes 'such force as is reasonably necessary' under section 15 of the instrument; and**
- **further detail about what qualifications, skills and training an authorised officer should have, and the minimum level of seniority required to be appointed to the role, given the coercive powers they will be empowered to exercise; and**
- **whether any safeguards or limitations apply to the exercise of powers by an authorised officer, and, if so, whether the safeguards are contained in law or policy.**

Conferral of discretionary powers⁴

1.10 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer broad discretionary powers on a person.

1.11 This instrument contains several provisions which appear to confer broad discretionary powers on authorised officers under section 12. For example, paragraphs 13(c)-(e) provide that an authorised officer may prohibit persons, or a group of persons, from entering Gallery land or a Gallery building if the authorised officer has reasonable grounds for believing:

- public safety or the safety of staff members will be, or is likely to be, endangered by the presence of the person or the group on Gallery land or in a Gallery building; or
- the conduct of the person or group on Gallery land or in a Gallery building will cause, or is likely to cause, offence to members of the public or staff members; or
- the person or group is likely to commit an offence against this instrument.

1.12 Additionally, section 14 of the instrument empowers authorised officers to direct a person or persons to leave Gallery land or buildings on similar discretionary grounds.

1.13 The committee considers that instruments that confer broad discretionary powers on a person should set out the factors which that person must consider in exercising the discretion. This is particularly the case when an instrument uses

⁴ Senate standing order 23(3)(c).

subjective concepts with a potentially broad application such as conduct that could cause 'offence to members of the public'. In this regard, it appears that the explanatory statement does not provide guidance on what conduct is likely to fall within the scope of these provisions, or the factors the authorised officer must take into account when exercising these powers.

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

- **what factors should be taken into account by the authorised officer when deciding if the conduct of a person or group on Gallery land or in a Gallery building will cause, or is likely to cause, 'offence' to members of the public or staff members; and**
- **examples of the types of conduct that may be considered 'offensive' under the instrument.**

Strict liability⁵

1.15 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This includes whether the instrument provides for offences of strict liability.

1.16 Subsection 12(6) of the Regulations 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. The penalty for this offence is 1 penalty unit.

1.17 The requirement for the prosecution to prove fault on the part of a defendant is an important element of the common law right to be presumed innocent. The application of strict liability undermines this right by removing the requirement to prove fault in relation to one or more elements of an offence.

1.18 Where an instrument provides for strict or absolute liability offences, the committee expects the explanatory statement to explain the nature and scope of each offence, including the relevant penalties. The committee also expects the explanatory statement to justify why it is necessary and appropriate to apply strict liability to the offence with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.

1.19 In this regard, the instrument's explanatory statement provides that the strict liability offence is 'intended to encourage the prompt return of identity cards'. Further, the following justifications for the offence are provided:

- access to identity cards by individuals who are not appointed authorised officers weakens the security of the Gallery. This could have impacts on

⁵ Senate standing order 23(3)(h).

public safety, the safety of staff members, and the safety of the national collection, and

- the conduct proscribed by the offence aims to achieve the important public health and safety objective of preventing unauthorised supply of liquor, including to minors.

1.20 Based on the above justifications, it remains unclear to the committee why it is necessary and appropriate to create a strict liability offence in relation to failing to return an authorised officer identity card. While subsection 12(7) does create defences that can be relied upon if the relevant identity card was lost or destroyed, the instrument's explanatory statement does not provide adequate justification for why this offence is likely to deter the relevant conduct and why a criminal offence provision is more appropriate than other enforcement mechanisms with reference to the *Guide to Framing Commonwealth Offences*.

1.21 Further, it is unclear to the committee how this strict liability offence will achieve the relevant 'public health and safety objective of preventing unauthorised supply of liquor' as outlined in the explanatory statement. This offence provision is solely directed at the return of identity cards and does not appear to relate to the supply of liquor.

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

- **why it is necessary and appropriate for subsection 12(6) of the instrument to provide for an offence of strict liability in relation to failing to return an authorised officer identity card within 14 days, with reference to the Attorney-General's *Guide to Framing Commonwealth Offences*; and**
 - **how this provision is likely to achieve the 'public health and safety objective of preventing unauthorised supply of liquor'.**
-

Ongoing matters

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

National Anti-Corruption Commission Regulations 2023⁶

FRL No.	F2023L00759
Purpose	Prescribes arrangements for allowances for travel and other expenses incurred by a witness appearing at a hearing under the <i>National Anti-Corruption Commission Act 2022</i> to be paid by the Commonwealth; specifies persons prescribed as legal aid officers for the purposes of section 98 of the Act; prescribes arrangements for the payment of legal financial assistance to parliamentarians and non-parliamentarians engaging with the National Anti-Corruption Commission; and prescribe information that must be included in annual reports prepared by the National Anti-Corruption Commissioner and the Inspector of the Commission.
Authorising legislation	<i>National Anti-Corruption Commission Act 2022</i>
Portfolio	Attorney-General's
Disallowance	15 sitting days after tabling (tabled in the Senate on 14 June 2023). Committee gave notice of motion to disallow on 4 September 2023. The notice must be resolved by 9 November 2023.

Overview

1.24 The *National Anti-Corruption Commission Act 2022* (the Act) establishes the National Anti-Corruption Commission (the NACC) as an independent agency responsible for detecting, preventing, investigating, and reporting on serious or systemic corrupt conduct in the Commonwealth public sector. The National Anti-Corruption Commission Regulations 2023 (the instrument) are made under paragraph 280(1)(a) of the Act, which enables the Governor-General to make regulations prescribing matters permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

⁶ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, National Anti-Corruption Commission Regulations 2023, *Delegated Legislation Monitor 11 of 2023*; [2023] AUSStaCSDLM 111.

1.25 The instrument's purpose includes to prescribe arrangements for the Commonwealth to pay allowances for travel and other expenses incurred by witnesses appearing at a hearing under the Act, and to prescribe arrangements for the payment of legal financial assistance to parliamentarians and non-parliamentarians engaging with the NACC.

1.26 On 6 September 2023, the committee raised scrutiny concerns with the Attorney-General in *Delegated Legislation Monitor 9 of 2023*.⁷ The Attorney-General provided a response on 22 September 2023.⁸

Scrutiny concerns

Conferral of discretionary powers;⁹ adequacy of explanatory materials¹⁰

1.27 The instrument contains several provisions, in Parts 4 and 5, which appear to confer broad, discretionary powers on the Attorney-General and relevant 'approving officials'.¹¹ Part 4 of the instrument enables the Attorney-General to approve applications for non-parliamentarians in relation to legal representation at a hearing or in relation to a an application for judicial review. Part 5 relates to the provision of such financial assistance for parliamentarians and former parliamentarians.

1.28 The committee raised concerns that, contrary to its usual expectations, several key phrases in those sections were not defined. Additionally, neither the instrument nor its explanatory statement details the factors required to be taken into account in exercising the discretionary powers under those provisions, or any limitations and/or safeguards on those powers.

1.29 Accordingly, the committee sought the Attorney-General's advice as to what factors decision-makers must take into account when exercising their discretion under these provisions and whether any safeguards and limitations apply.

Attorney-General's response¹²

1.30 The Attorney-General advised that the factors which the decision-maker must take into account when exercising their discretion under Part 4 of the instrument, as well as the applicable safeguards, are contained in the *Commonwealth Guidelines for*

⁷ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2023](#) (6 September 2023) pp. 1014.

⁸ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

⁹ Senate standing order 23(3)(c).

¹⁰ Senate standing order 23(3)(g).

¹¹ See the definition of 'approving official' in section 19 of the instrument. In relation to the relevant discretionary powers, see [Delegated Legislation Monitor 9 of 2023](#) (6 September 2023) pp. 1112, paragraph 1.38.

¹² This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

Legal Financial Assistance 2012 (the 'Commonwealth Guidelines'). Specifically, the factors that must be considered under those guidelines include assessment of an applicant's financial means to meet the cost of the legal action, availability of funds and the reasonableness of the grant amount requested.

1.31 Additionally, there are limitations on the scope of these powers because applications would be assessed in accordance with the Attorney-General Department's obligations under the *Public Governance, Performance and Accountability Act 2013*. Further, the decision-maker may decide the weight that should be given to each matter relevant to the circumstances of the case (see section 5.1(3) of the Guidelines).

1.32 The Attorney-General also specified that the safeguards in the Commonwealth Guidelines include a requirement for decision-makers to comply with the *Commonwealth Grant Rules and Guidelines 2017*. These guidelines include transparency and accountability obligations to publish information on individual grants of assistance under Part 4 within 21 calendar days, as well as requirements for officials to establish ongoing monitoring and management arrangements to ensure the grant of relevant money is being appropriately managed.

1.33 Regarding the discretionary powers conferred under Part 5 of the instrument, the Attorney-General advised that these powers are informed by, and align with, similar discretionary powers under the existing legal financial assistance scheme for current and former ministers under the *Parliamentary Business Resources Regulations 2017*. Additionally, the Attorney-General advised that these powers are also subject to the following limits and safeguards:

- the definition of 'eligible matter' requires the decision-maker to assess whether an application relates to a matter or prosecution arising under the Act, or relates to review under the *Administrative Decisions (Judicial Review) Act 1977*;
- the decision-maker must be satisfied that the applicant's involvement in the matter arose only because they are, or were, a parliamentarian, or that the 'eligible matter' relates to the performance or non-performance of their duties as a parliamentarian;
- requirements for the Secretary to certify the costs of an applicant's legal representation and disbursements as reasonable (subsection 21(2)), and to monitor strategies adopted by the applicant in matters where assistance has been approved and to inform the approving official if they believe proposed expenditure is unreasonable (section 24) - the Attorney-General indicated that these requirements prevent an approving official's broad discretion from being misused in order to approve unreasonable expenditure amounts; and

- reporting requirements on the Attorney-General to inform both houses of Parliament about each decision to pay legal financial assistance under Part 5, including reasons for the decision and any limits on expenditure; and to table a consolidated statement of expenditure under Part 5 for the financial year. These reporting requirements provide transparency and accountability as they ensure the Parliament and public have timely information on decisions to approve legal financial assistance.

Committee view

1.34 The committee thanks the Attorney-General for his detailed advice in relation to the factors to be taken into account, as well as the relevant limitations and safeguards, in exercising the discretionary powers under Parts 4 and 5 of the instrument. The committee considers that this would be helpful information for inclusion in the instrument's explanatory statement, as those factors, limitations and safeguards are not apparent on the face of the instrument or its explanatory statement.

1.35 The committee also thanks the Attorney-General for his advice that the Secretary's certification and monitoring powers under subsection 21(2) and section 24 prevent an approving official's broad discretion from being misused. However, the committee notes that section 19 enables the Secretary to also be specified as the 'approving official'. The effect of this appears to be that the Secretary can be both the approving official exercising the discretion to approve financial assistance, and can certify or monitor the expenditure approved by the official. It is therefore unclear to the committee how this operates as a limitation or safeguard on the approving official's discretion.

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

- **how the powers under subsection 21(2) and section 24 operate as a limitation or safeguard where the Secretary is specified as the approving official and whether there are any other safeguards in place where this occurs; and**
 - **whether the explanatory statement to the instrument can be updated to include the additional detail regarding limitations and safeguards on the relevant discretionary powers, as well as the factors to be taken into account in exercising those powers.**
-

Availability of independent merits review;¹³ adequacy of explanatory materials¹⁴

1.37 All persons deemed eligible for funding under subsections 6(1) and 7(1) of the instrument are 'entitled' to travel, accommodation, and meal expenses to appear at a hearing, except where the Commission meets some or all of those costs (see section 8). However, subsections 6(7) and 7(8) require that, where the decision maker is not satisfied that a witness's relevant expenses are equal to or less than the maximum allowance, they must reduce the expenditure to that maximum amount. Further, Part 4 provides the Attorney-General with discretion to authorise financial assistance in relation to a person's legal representation at hearing or application for administrative review, if satisfied that refusing the application would result in serious financial difficulty or the circumstances of the case are of such a special nature that the application should be granted.

1.38 In *Delegated Legislation Monitor 9 of 2023*, the committee sought the Attorney-General's advice regarding whether these discretionary decisions are subject to independent merits review and, if not, what characteristics of those decisions justify their exclusion, by reference to the factors in the Administrative Review Council's guidance document.

Attorney-General's response¹⁵

1.39 The Attorney-General advised that the decisions under subsections 6(1) and 7(8), and Part 4 of the instrument are excluded from merits review, because they require the allocation of a finite resource between competing applicants.

1.40 All persons deemed eligible for funding under subsections 6(1) and 7(1) are 'entitled' to be paid travel, accommodation, and meal expenses to appear at a hearing, subject to section 8 which provides that they are not eligible where the Commission meets some or all of those costs directly. As limited funding is available for these purposes, any change to the amount/s allocated to one party as a result of overturning a decision would likely have a direct effect on the allocations for other applicants. It would also create uncertainty for the Commission in distributing funding and potentially disadvantage competing applicants.

1.41 In addition to the above, the Attorney-General advised that decisions under subsection 7(8) are also not appropriate for merits review because they automatically flow from a set of circumstances occurring, which leaves no room for merits review to operate. Subsection 7(8) requires decision-makers to limit the expenditure to a predetermined maximum allowance, set out in Tables 6A and 6B of the Remuneration

¹³ Senate standing order 23(3)(i).

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.

Tribunal (Official Travel) Determination 2022, which is incorporated into the instrument, under subsection 7(2).

Committee view

1.42 The committee thanks the Attorney-General for his advice regarding the justification for excluding the above decisions from merits review. The committee acknowledges the advice that decisions under subsection 7(8) are inappropriate for merits review on the basis that they automatically flow from a set of circumstances, leaving no room for merits review, and considers this would be helpful information for inclusion in the instrument's explanatory materials.

1.43 In relation to the justification provided for excluding merits review of decisions under subsection 6(1), the committee notes that the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* requires that there are finite resources available *and* that the overturning of one allocation affects an allocation already made.¹⁶ As the instrument provides that all persons 'deemed eligible' are 'entitled' to be paid the relevant expenses, it is unclear to the committee how an allocation to one applicant can be said to affect an allocation made to another applicant.

1.44 As discretionary decisions have the capacity to affect individuals' rights, liberties or obligations, the committee considers that individuals should generally be able to seek review of these decisions. The committee considers that this should ordinarily be in the form of independent review, unless there is a sound justification for exclusion, with reference to the Administrative Review Council's guidance document. However, instruments should at the very least provide for internal review (for example, by a departmental officer), to ensure a minimum safeguard of individuals' rights.

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

- **whether the explanatory statement can be amended to include the additional information provided about the justification for exclusion of decisions made under subsection 7(8) from merits review;**
- **whether a further explanation can be provided as to how decisions made under subsections 6(1) and Part 4 can affect an allocation that has already been made and whether the explanatory statement can be amended to include this explanation; and**
- **whether internal review in relation to decisions made under section 6 and Part 4 could be provided for.**

¹⁶ Administrative Review Council, *What decisions should be subject to merits review?*, 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).

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

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 commenced engaging with the relevant agency via its secretariat about the following instruments.¹

Instrument

Social Security (International Agreements) Amendment (Republic of Serbia) Regulations 2023 [F2023L01176]

Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023 [F2023L01182]

Concluded matters

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

Instrument

Corporations (Derivatives) Determination 2023 [F2023L01072]

Defence (Visiting Forces) Amendment Regulations 2023 [F2023L01002]

Environment Protection and Biodiversity Conservation Amendment (Macquarie Island Marine Park) Proclamation 2023 [F2023L00860]

Industry Research and Development (Australia-Vietnam Science, Technology and Innovation Cooperation Initiative Program) Instrument 2023 [F2023L00947]

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.

Instrument

Marine Order 501 (Administration — national law) 2023 [F2023L01069]

Social Security (International Agreements) Amendment (Republic of Serbia) Regulations 2023 [F2023L01176]

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 undertakings were made to address the committee's scrutiny concerns.

Instrument	Undertaking	Date made
Aviation Transport Security (Screening Officer Requirements) Determination 2023 [F2023L00962]	The Department of Home Affairs undertook to amend the explanatory statement in response to the committee's scrutiny concerns.	8/09/2023

Implemented undertakings

4.4 Since the last Monitor was tabled, the following undertakings have been implemented.

Instrument	Undertaking	Date implemented
Aged Care Legislation Amendment (Palliative Care Classification and Other Measures) Instrument 2022 [F2022L00979]	The Department of Health and Aged Care undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	1/09/2023
Public Service Regulations 2023 [F2023L00368]	The Minister for the Public Service undertook to amend the explanatory statement in response to the committee's scrutiny concerns.	30/08/2023

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 (National Student Space Challenge Program) Instrument 2023 [F2023L01144]	\$3.5 million over four financial years	National Student Space Challenge Program

Levying of taxation in delegated legislation

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

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](#).

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

Instrument	Limit on the taxation amount in primary legislation?
Radiocommunications (Spectrum Licence Tax) Amendment Determination 2023 (No. 1) [F2023L01215]	Yes

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

6.1 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.¹

6.2 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.

6.3 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;²
- 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*;³
- overrides or modifies primary legislation;

¹ 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](#).

² 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.

³ 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.

6.4 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.

6.5 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.⁴

Instruments which do not meet the committee's expectations

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

Instrument	Source of exemption
Consumer Goods (Toys for Children up to and including 36 Months of Age) Safety Standard 2023 [F2023L01185]	Section 44(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 3) Determination 2023 [F2023L01178]	Section 44(1) of the <i>Legislation Act 2003</i>
National Housing Finance and Investment Corporation Investment Mandate (National Housing Accord—Preparatory Work) Direction 2023 [F2023L01186]	Section 9 of the Legislation (Other Matters and Exemptions) Regulations 2015
Telecommunications (Financial Hardship Industry Standard) Direction 2023 [F2023L01188]	Section 9 of the Legislation (Other Matters and Exemptions) Regulations 2015

⁴ 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

6.7 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.

6.8 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.

6.9 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.⁵

6.10 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.

6.11 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;⁶

⁵ For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

⁶ 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*;⁷
- 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.

6.12 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.

6.13 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.⁸

Instruments which do not meet the committee's expectations

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

Instrument	Source of exemption
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 3) Determination 2023 [F2023L01178]	Section 54(1) of the <i>Legislation Act 2003</i>
National Housing Finance and Investment Corporation Investment Mandate (National Housing Accord—Preparatory Work) Direction 2023 [F2023L01186]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

⁷ 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.

⁸ 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.

Instrument	Source of exemption
Telecommunications (Financial Hardship Industry Standard) Direction 2023 [F2023L01188]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

**Senator Linda White
Chair**