

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).

The Monitor details matters relating to the committee's scrutiny of **51** legislative instruments registered on the Federal Register of Legislation between **9 September 2023** and **18 September 2023**. This includes 46 disallowable instruments and 5 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 not resolved to raise significant technical scrutiny concerns in relation to any instruments registered within this period.

Ongoing matters

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

Competition and Consumer (Gas Market Code) Regulations 2023¹

FRL No.	F2023L00994
Purpose	Establishes a mandatory code of conduct for the domestic wholesale gas market.
Authorising legislation	<i>Competition and Consumer Act 2010</i>
Portfolio	Climate Change, Energy, the Environment and Water
Disallowance	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee gave notice of motion to disallow on 14 September 2023. Notice must be resolved by 27 November 2023.

Overview

1.4 The Competition and Consumer (Gas Market Code) Regulations 2023 (the instrument) are made under the *Competition and Consumer Act 2010* (the Act) and establishes a mandatory code of conduct for the domestic wholesale gas market, pursuant to sections 53L and 172 of the Act. The committee raised scrutiny concerns

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Competition and Consumer (Gas Market Code) Regulations 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDLML 113.

with this instrument on 13 September 2023, in *Delegated Legislation Monitor 10 of 2023*.² The minister responded on 27 September 2023.³

Scrutiny concerns

Significant penalties in delegated legislation⁴

1.5 The instrument contains several significant penalty provisions that include penalties of up to 1,200 penalty units (currently \$375,600)⁵ for individuals and 6,000 penalty units (currently \$1,878,000)⁶ for bodies corporate.⁷

1.6 The explanatory statement did not appear to adequately explain why it was appropriate, as a matter of principle, to include these significant penalties in delegated legislation. Accordingly, in *Delegated Legislation Monitor 10 of 2023*, the committee sought the minister's advice as to why such significant penalties were necessary and appropriate for inclusion in delegated legislation and whether further justification could be provided with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences* (AGD guide).

Minister's response

⁸

1.7 In his response, the minister advised that the penalties are consistent with the *Competition and Consumer Act 2010* (the Act) under which the instrument was made, as well as with other industry codes made under that Act. The minister further noted that the penalties in the instrument are lower than the maximum amount for pecuniary penalties, which is set out in the Act. Further, the maximum penalty was designed to provide an effective deterrent to breaches of the law, while ensuring a penalty cannot be considered an acceptable cost of doing business. This penalty also aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law, as well as the consequences for other gas market participants.

1.8 Further, the minister noted that the AGD guide provides examples of where it may be appropriate to include offences in delegated legislation, including where it involves a level of detail that is not appropriate for an Act or a legislative instrument is necessary due to the changing nature of the subject matter. In this regard, the relevant

² Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 10 of 2023](#) (13 September 2023) pp. 8-13.

³ This correspondence was tabled with the monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

⁴ Senate standing order 23(3)(j).

⁵ See the Crimes (Amount of Penalty Unit) Instrument 2023.

⁶ See the Crimes (Amount of Penalty Unit) Instrument 2023.

⁷ Sections 10(1), 11, 12, 13, 14(1), 16(1), 17, 18(1), 20(1), 21(1), 24(1), 25(1), 33(1), 34(1), 35(1), 36(1), 36(2), 37(1), 38(1), 39(1), 40(5), 41(1), 41(6), 41(7) and 74(1).

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

offences were created to urgently address gas market prices, power imbalances and systemic issues. Flexibility is also essential to allow the law to adapt to changing markets, and including technical details in delegated legislation also allows industry and other stakeholders to participate in the development of any changes, including specific penalties.

Committee view

1.9 The committee thanks the minister for his detailed response. While the committee notes the minister's advice regarding the appropriateness of including the relevant measures in delegated legislation, it nevertheless retains concerns about the inclusion of such significant penalties in delegated legislation. The committee acknowledges the minister's advice that these penalties are below the maximum amount authorised by the Act, however, they are still well above the committee's usual expectations of a maximum of 50 penalty units for individuals and 250 for bodies corporate when provided for in delegated legislation. This also aligns with the expectations set out in the AGD guide.⁹

1.10 The committee considers that penalties of this significance, which have a strong deterrent function, are generally more appropriate for inclusion in primary legislation. It is not clear to the committee, in this particular case, how the stated need for flexibility to respond to changing circumstances and technical details provide a sufficient justification for including penalties of this magnitude in delegated legislation.

1.11 In light of the above, the committee requests the minister's advice as to whether these penalties can be moved into primary legislation and, if not, whether further justification can be provided for the inclusion of such significant penalties in delegated legislation.

Availability of independent merits review;¹⁰ availability of judicial review;¹¹ no-invalidity clauses¹²

1.12 The committee raised concerns that the instrument contains a number of discretionary decisions, but its explanatory statement does not confirm whether these decisions are subject to independent merits review. In addition, the instrument contains two 'no-invalidity clauses', that is, clauses which may exclude or limit the availability of judicial review. These are subsections 61(7) and 76(3), which respectively provide that failure to comply with consultation requirements in subsections 61(6) and 76(3) prior to granting a conditional ministerial exemption, and

⁹ Attorney-General's Department, [Guide to Framing Commonwealth Offences](#) p. 44, [3.3].

¹⁰ Senate standing order 23(3)(i).

¹¹ Senate standing order 23(3)(i).

¹² Senate standing order 23(3)(i).

undertaking a review of the instrument's operation do not affect the validity of the exemption or the review.

1.13 Accordingly, the committee sought the minister's advice regarding: the availability of independent merits review and the justification for any exclusions; the necessity and appropriateness of the no-invalidity clauses; and whether there are any applicable safeguards.

*Minister's response*¹³

Availability of independent merits review

1.14 The minister advised that independent merits review is not available under the instrument. He indicated that many decisions are excluded because they are policy decisions of a high political content. Specifically, decisions including those under subsections 61(1), 63(1) and 68(1) may impact on Australia's trade and exports, international relations, and the welfare of Australians through the regulation of the Australian gas market.

1.15 The minister advised that other decisions including under subsections 61(4), 62(2), 63(2) and 75(1) are not suitable for merits review because they are preliminary or procedural decisions that facilitate or lead to the making of a substantive decision, such that providing for their review would frustrate or delay administrative decision-making processes. He further advised that decisions under section 77 are not appropriate for review because these involve the delegation of a function or power. In addition, the minister noted there are no legal consequences for failure to comply with a request under section 75.

1.16 Finally, the minister indicated that there are safeguards in place, including the requirement for at least 14 business days written notice to the person/s who will be subjected to proposed conditions, unless an exception applies. In addition, sections 59 and 67 enable an applicant to withdraw their application for a conditional ministerial exemption, variation or revocation from the penalty provisions in the instrument, including if they are not willing to accept the proposed conditions. This statutory withdrawal right recognises that the application process for exemption from a penalty provision is voluntary and exemptions should be granted on terms acceptable to both applicants and the Government, in such a way that achieves the objectives of the scheme.

Availability of judicial review and no-invalidity clauses

1.17 The minister advised that the no-invalidity clauses provide that failure to comply with the consultation requirements in the instrument do not affect the validity of the exemption or the review. As such, these provisions only apply in relation to

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

failure to consult, and do not affect a person's right to seek judicial review in other matters.

1.18 The minister further advised that it is appropriate that failure to consult two additional ministers does not invalidate a decision, as the instrument already effectively requires two other ministers to agree before granting an exemption or commencing a review. Thorough consultation is also to be balanced against the need for certainty, as parties may enter contracts based on a supplier exemption and failure to consult with other ministers should not affect the certainty of such a decision. The minister further indicated that it is the intention to consult in all but the most urgent circumstances.

Committee view

1.19 The committee welcomes the minister's advice regarding decisions that are excluded from merits review on the basis that they are preliminary or procedural in nature, because (in the case of decisions under section 77) they involve the delegation of a function or power, in accordance with the Administrative Review Council's guide, *What decisions should be subject to merits review?* (ARC guide).¹⁴ The committee also welcomes the advice that there are no legal consequences in relation to decisions under section 75. However, the committee's usual expectation is that such justifications for exclusion generally be included in an instrument's explanatory statement.

1.20 Regarding the exclusion for policy decisions of a high political content, the committee notes that the ARC guide states that this applies only to decisions of the 'highest consequence to the Government' and that 'economic decisions which may possess a sufficiently high political content include decisions of such fundamental significance as determining interest rates, floating the dollar and setting foreign exchange rates'. While the instrument itself creates a gas market code, which appears to be a policy decision of a high political content, the committee would appreciate further detail as to how decisions made under the relevant provisions of the instrument would meet this threshold.

1.21 The committee further welcomes the minister's advice as to why the no-invalidity clauses are considered necessary and appropriate and, in particular, notes that they do not affect the ability to seek review in relation to other matters. The committee considers that this information would be helpful for inclusion in the instrument's explanatory statement.

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

- **whether the explanatory statement can be amended to include the justification provided for exclusion of merits review in relation to decisions**

¹⁴ Administrative Review Council, [What decisions should be subject to merits review?](#)

that are preliminary or procedural in nature, including decisions under section 75;

- whether additional detail can be provided to the committee regarding how the justification for excluding decisions made under the instrument from merits review on the basis of policy decisions of a high political content meets the threshold in the ARC guide;
- in light of the exclusion of merits review for these decisions, how the requirement for a 14-day notice period is a sufficient safeguard; and
- whether the explanatory statement can be amended to include the additional detail provided regarding why the no-invalidity clauses are necessary and appropriate.

Strict liability offences¹⁵

1.23 It was unclear to the committee from the instrument and its explanatory statement, whether the offence provisions in the instrument are offences of strict liability. Where an instrument provides for strict liability offences, the committee's usual expectation is that its explanatory statement will explain why strict liability is necessary and appropriate, with reference to the AGD guide, noting that the requirement for the prosecution to prove fault on the part of the defendant is an important element of the common law right to be presumed innocent.

1.24 Accordingly, the committee requested the minister's advice as to whether the offence provisions in the instrument are intended to be strict liability offences and if so, why strict liability is necessary and appropriate, with reference to the AGD guide.

Minister's response¹⁶

1.25 In response to the committee's concerns, the minister confirmed that the offence provisions are not offences of strict liability but are instead civil penalty provisions. Although most of the provisions in the Act do not contain a fault element, they are all expressed as civil penalty provisions with either the words 'civil penalty' at their foot or because another provision specifies that they are a civil penalty provision, in line with section 79 of the *Regulatory Powers (Standard Provisions) Act 2014*. In addition, sections 30 and 31 of the instrument are similarly not strict liability offences due to the presence of a 'fault' element.

¹⁵ Senate standing order 23(3)(h).

¹⁶ This correspondence was tabled with the monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

Committee view

1.26 The committee welcomes the minister's advice that the provisions are not strict liability offences.

1.27 The committee thanks the minister for his advice in relation to strict liability offences and concludes its examination of the instrument in relation to this issue.

Privacy;¹⁷ conferral of discretionary powers;¹⁸ adequacy of explanatory materials¹⁹

1.28 The committee raised concerns about a number of provisions providing for the collection, use and/or disclosure of information. The committee sought the minister's advice as to whether a number of these provisions applied to personal information and, if so, whether any safeguards apply to its collection, use and/or disclosure.²⁰

1.29 The committee also sought the minister's advice as to whether section 75, which empowers the minister to request the provision of certain information, requires individuals to comply with such a request.

1.30 In addition, subsection 43(3) requires the Australian Competition and Consumer Commission (ACCC) to publish certain personal information in a manner it considers appropriate, with the only limitation on the face of the instrument that doing so would prejudice a supplier's commercial interests or be 'contrary to the public interest'. Accordingly, the committee sought the minister's advice as to the factors required to be considered in determining what is 'contrary to the public interest'.

Minister's response²¹

1.31 The minister advised that, in general, information collected and published under the instrument would pertain to businesses rather than individuals. In limited cases, some personal information may be collected, for example, the names and contact details of individuals applying for a conditional ministerial exemption on behalf of an entity. In such cases, the information will be dealt with in accordance with obligations under the *Privacy Act 1988* (Privacy Act). The minister further advised that there is no requirement to comply with a request under section 75. However, failure

¹⁷ Senate standing order 23(3)(h).

¹⁸ Senate standing order 23(3)(c).

¹⁹ Senate standing order 23(3)(g).

²⁰ For example, sections 37 and 38 create an offence where a covered supplier fails to provide the Commission with certain details regarding a gas offer or agreement to supply regulated gas, as well as to provide the offers or agreements themselves. In addition, section 75 empowers the Energy Minister to request the provision of certain information relating to a conditional ministerial exemption, but it appears unclear from both the instrument and explanatory statement whether a person is required to comply with such a request.

²¹ This correspondence was tabled with the monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

to provide such information may practically delay the decision-making process as, if insufficient information is provided, an application may be rejected on the basis that the minister cannot be satisfied of a certain matter.

1.32 Finally, the minister explained that what is 'contrary to the public interest' depends on the circumstances, and the ACCC may consider whether publishing certain information is of serious concern or benefit to the public, not merely of individual interest. It may also consider matters of common concern or relevance to all, or a substantial section of, the public, and determine whether publication will pose risks to the stability of the market or economy.

Committee view

1.33 The committee welcomes the minister's advice that information collected, used or disclosed under the instrument would generally not include personal information but that where it does, safeguards in the Privacy Act will apply. The committee also welcomes his advice as to the factors to be taken into account in determining what is 'contrary to the public interest'. The committee considers this would be helpful information for inclusion in the instrument's explanatory statement.

1.34 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be updated to include the additional information provided in relation to the factors to be taken into account in determining what is 'contrary to the public interest'.

Matters more appropriate for parliamentary enactment²²

1.35 The instrument establishes a mandatory code of conduct for the domestic wholesale gas market and establishes offence provisions with significant penalties, which the committee considers are matters ordinarily more appropriate for parliamentary enactment. On this basis, in *Delegated Legislation Monitor 10 of 2023*, the committee drew the issue to the attention of the Senate under Senate standing order 23(4).²³

*Minister's response*²⁴

1.36 The minister noted in this regard that the policy objectives of the instrument are consistent with those of the Act and that the explanatory memorandum to the Act specifies that a gas market code would need to deal with a broad range of matters

²² Senate standing order 23(3)(j).

²³ Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 10 of 2023](#) (13 September 2023) p.13.

²⁴ This correspondence was tabled with the monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

with sufficient obligations to ensure proper regulation of the industry. Accordingly, the measures give effect to the requirements and expectations of the Act.

1.37 The committee notes the minister's comments in relation to matters more appropriate for parliamentary enactment and has concluded its examination of this issue by drawing it to the attention of the Senate.

Australian Education Regulations 2023²⁵

FRL No.	F2023L01020
Purpose	Repeals and remakes the Australian Education Regulations 2013 before the sunset date of 1 October 2023 to ensure current arrangements for Commonwealth financial assistance to schools may continue in substantially the same form. It also makes a small number of minor updates, clarifications and technical amendments.
Authorising legislation	<i>Australian Education Act 2013</i>
Portfolio	Education
Disallowance	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee gave notice of motion to disallow on 14 September 2023. The notice must be resolved by 27 November 2023.

Overview

1.38 The Australian Education Regulations 2023 (the instrument) repeal and remake the Australian Education Regulations 2013, which sunset on 1 October 2023, by operation of subsection 50(1) of the *Legislation Act 2003*.

1.39 On 13 September 2023, the committee raised scrutiny concerns with the minister in *Delegated Legislation Monitor 10 of 2023*.²⁶ The minister responded to the committee's request on 4 October 2023.²⁷

Scrutiny concerns

Broad discretionary powers;²⁸ coercive powers²⁹

1.40 The instrument contains broad discretionary powers, some of which appear to be coercive in nature, as they allow for entry and access to school premises. Section 33 of the instrument authorises the minister to appoint an 'authorised person' if satisfied that they have 'suitable qualifications or experience'. Once an 'authorised person' is

²⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian Education Regulations 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDLM 114.

²⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2023](#) (13 September 2023) pp. 3-7.

²⁷ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

²⁸ Senate standing order 23(3)(c).

²⁹ Senate standing order 23(3)(h).

appointed, section 39 requires a relevant authority or body to allow such a person 'full and free access' to 'any record' relating to compliance with the legislative scheme, and financial assistance, as well as 'full and free access' to premises occupied by the authority or body. Section 39A also requires an authority to provide information or records requested by either the minister or 'authorised persons' in relation to compliance with the legislative regime and financial administration of schools.

1.41 However, the instrument defines 'authorised person' only by reference to section 33, and neither the instrument nor the explanatory statement provides the factors that must be taken into account in determining whether an authorised person has 'suitable qualifications or experience'. Further, the explanatory statement does not appear to provide sufficient detail about the nature and scope of the powers in sections 39 and 39A, or whether there are any additional safeguards on the exercise of the relevant powers, including the availability of review.

1.42 Accordingly, the committee sought the minister's advice as to: the factors the minister may take into account in determining whether an 'authorised person' has suitable qualifications or experience; further detail about the nature and scope of the powers in sections 39 and 39A of the instrument; and whether there are any additional safeguards or limitations, including the availability of review.

Minister's response³⁰

1.43 The minister advised that, in appointing an 'authorised person' under section 33, the factors to be taken into account depend on the nature of the intended investigation or compliance activity. Therefore, an authorised person could be a legal practitioner, investigator, auditor, former regulator, or forensic accountant, depending on the specific issue to be investigated. For example, if an investigation related to the financial matters of an approved body, the minister could consider whether a person had suitable experience and qualifications in auditing or accounting.

1.44 The minister also provided detail regarding the nature and scope of the discretionary powers in sections 39 and 39A. These sections are used to require information or access to records from approved bodies regarding their compliance, when it is not otherwise available. Such powers are essential to ensure the ongoing integrity and accountability of Commonwealth financial assistance under the Act and provide an appropriate, balanced mechanism to investigate non-compliance. For example, this may include requiring an approved body to provide access to records about its expenditure of Commonwealth financial assistance.

³⁰ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

- 1.45 Lastly, the minister advised of the following safeguards on the above powers:
- sections 39 and 39A only apply to information or records related to compliance with the legislative regime, and associated financial administration;
 - approved bodies are not required to comply with a request for access, unless an authorised person has given reasonable notice of the access required, and access occurs at reasonable times;³¹
 - authorised persons must seek and consider the views of the relevant bodies about any access required, ensuring they have an opportunity to be heard about any such proposed access;³² and
 - sections 39 and 39A only apply to bodies that have been approved under the Act to receive Commonwealth financial assistance, and the instrument does not prescribe any offence or civil penalty for failure to comply.

Committee view

1.46 The committee welcomes the minister's advice regarding the factors that may be taken into account in determining whether a person has suitable qualifications or experience to be appointed as an 'authorised person'. The committee further welcomes the minister's advice as to the nature and scope of the powers in sections 39 and 39A and the safeguards on the exercise of these discretionary powers. However, the committee considers that this would be helpful information for inclusion in the instrument's explanatory statement.

1.47 Accordingly, the committee requests the minister's advice as to whether the explanatory statement to the instrument can be amended to include the additional detail provided in relation to the discretionary powers.

Privacy³³

1.48 Section 39(1) requires 'full and free access' to any record relating to compliance with the legislative regime or financial administration, while section 39A requires the provision of such information or records, as requested by the minister or an 'authorised person'. However, it was unclear to the committee whether there are any statutory safeguards, to the extent such provisions relate to personal information.

1.49 Accordingly, the committee sought the minister's advice as to whether information that may be collected, used and/or disclosed under these provisions includes personal information and, if so, whether there are any safeguards.

³¹ Subsection 39(6).

³² Subsection 39(7).

³³ Senate standing order 23(3)(h).

*Minister's response*³⁴

1.50 In his response, the minister advised that sections 39 and 39A are limited to information and records relating to compliance with the legislative framework and associated financial administration. Such information and records would generally not include personal information, as they generally consist of financial records, governance arrangements and operational records. Despite this, personal information could be accessed incidentally or in some specific circumstances, in which case the *Privacy Act 1988* (Privacy Act) and Australian Privacy Principles will apply.

Committee view

1.51 The committee welcomes the minister's advice that, while personal information will generally not be collected, used or disclosed under the instrument, where this does occur, the Privacy Act and Australian Privacy Principles will operate as a safeguard.

1.52 It is the committee's usual expectation that, where an instrument enables the collection, use or disclosure of such information, the explanatory statement addresses what safeguards are in place to protect the personal information (including, for example, the Privacy Act).

1.53 In light of the above, the committee requests the minister's further advice as to whether the explanatory statement can be amended to include additional information about the potential use, collection and disclosure of personal information under the instrument and the applicable safeguards.

*Availability of independent merits review*³⁵

1.54 The instrument contains a number of discretionary powers.³⁶ While the instrument provides that a decision made under section 9B(3) of the instrument is a reviewable decision, it is unclear from the instrument or the explanatory statement whether any other discretionary decisions are subject to independent review. Accordingly, the committee requested the minister's advice as to whether decisions under the instrument are exempt from merits review and, if so, the justification for their exclusion from merits review.

³⁴ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

³⁵ Senate standing order 23(3)(i).

³⁶ See sections 5, 9B, 11, 12, 21, 23, 25, 25B, 26, 27, 28, 29, 30, 30(1), 31, 33, 36, 39A, 43, 46, 52, 58A, 58B, 59, 63, 65 and Schedule 1.

*Minister's response*³⁷

1.55 The minister provided the committee with advice on these matters, outlined below:

- A number of decisions are a preliminary or procedural step in the making of a substantive decision. Such decisions include section 9B(6) which allows the minister to beneficially determine a longer period of time for an approved body to apply for a determination under section 9B(3). The minister advised that this is a procedural decision related to the decision under section 9B(3) which itself is reviewable.³⁸
- These also include decisions under subsections 65(1), (2) and (3) of the instrument which prescribe matters for the purposes of subsection 125(1) of the Act, which allows the minister to use or disclose school education information in accordance with the instrument. Further, decisions under these provisions are decisions for which there would be no appropriate remedy.³⁹
- Decisions under section 33 are not appropriate for merits review on the basis that they are decisions to appoint an authorised person to undertake a specific function.⁴⁰
- Decisions under section 39A which empower the minister to require the production of documents related to compliance with the legislative regime or in relation to financial matters is investigative in nature and relates to compliance with the law, so is not considered appropriate for merits review⁴¹
- Finally, a number of provisions, including sections 58, 58A, 58B and subsection 65(4), involve decisions to determine matters by legislative instrument. These are decisions that are legislation-like and considered unsuitable for merits review, on the basis they are more properly subject to the regime of scrutiny and publication that applies to the relevant legislative instruments made under those provisions.⁴²

³⁷ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

³⁸ Administrative Review Council, [What decisions should be subject to independent merits review?](#) p. 12.

³⁹ Administrative Review Council, [What decisions should be subject to independent merits review?](#) p. 22.

⁴⁰ Administrative Review Council, [What decisions should be subject to independent merits review?](#) p. 20.

⁴¹ Administrative Review Council, [What decisions should be subject to independent merits review?](#) p. 18.

⁴² Administrative Review Council, [What decisions should be subject to independent merits review?](#) p. 7.

Committee view

1.56 The committee thanks the minister for his detailed advice regarding the appropriateness of the exclusions from merits review. The committee notes the minister's advice that some of these decisions are ultimately subject to review under the Act; and that, where review is excluded, this in accordance with the grounds in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (ARC guide)., in line with the committee's usual expectations.

1.57 Accordingly, the committee requests the minister's advice as to whether the explanatory statement can be amended to include the justifications provided for the exclusion of merits review.

Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023⁴³

FRL No.	F2023L00983
Purpose	Amends the Higher Education Support (Other Grants) Guidelines 2022 to assist in ensuring that the full amount of available funding for the National Priorities Pool Program and the Regional Partnerships Project Pool Program can be administered and expended effectively.
Authorising legislation	<i>Higher Education Support Act 2003</i>
Portfolio	Education
Disallowance	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee gave notice of motion to disallow on 14 September 2023. The notice must be resolved by 27 November 2023.

Overview

1.58 This instrument amends the Higher Education Support (Other Grants) Guidelines 2022 to clarify how grants are to be paid under the National Priorities Pool Program and Regional Partnerships Project Pool Program.

1.59 The committee raised concerns about this instrument in *Delegated Legislation Monitor 9 of 2023* on 6 September 2023.⁴⁴ The minister provided a response to the committee on 4 October 2023.⁴⁵

⁴³ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDL M 115.

⁴⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 9 of 2023* (6 September 2023) pp.2-3.

⁴⁵ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

Conferral of discretionary powers⁴⁶

1.60 Item 1 of the instrument repeals section 16 of the Higher Education Support (Other Grants) Guidelines 2022 (the Principal Instrument) and substitutes new section 16. The previous section 16 provided that grants made under the National Priorities Pool Program in respect of projects were capped at \$6,500,000 for the years 2022, 2023, 2024 and 2025. New section 16 does not set out what amount will be spent on the program for each of the grant years.

1.61 This amendment appears to significantly broaden the minister's discretionary power to determine the amount spent on grants under the National Priorities Pool Program through removal of the spending cap in section 16. Further, the instrument's explanatory statement does not provide an explanation as to why the removal of the spending cap was necessary and appropriate.

1.62 In light of this, the committee requested the minister's advice as to why it was considered necessary and appropriate to remove the spending cap.

Minister's response⁴⁷

1.63 The minister advised that the removal of the spending cap occurred in response to the reprofiling of uncommitted funds due to the COVID-19 pandemic which resulted in more funding being available for the National Priorities Pool Program. In this regard, he advised that the removal would 'allow investment of the full amount of funding available in the Program, rather than inadvertently preventing the expenditure of available Program funding'.

1.64 The minister also advised that his power to specify an amount that will be spent on the program under paragraph 41-15(2)(c) of the *Higher Education Support Act 2003* (the Act) is a discretionary one. Further, determinations regarding amounts spent on grants 'continue to be limited by any determination made under sections 41-45 of the Act, which provides a cap on the total payments able to be made under Part 2-3 of the Act'. In this regard, the Higher Education Support (Maximum Payments for Other Grants) Determination 2020 is currently in force which determines the maximum amounts that can be spent from 2020 to 2024.

Committee view

1.65 The committee thanks the minister for his advice as to why removing the spending cap for grants made under the National Priorities Pool Program in this instrument was considered necessary and appropriate.

⁴⁶ Senate standing order 23(3)(c).

⁴⁷ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

1.66 As the spending caps set out in the Act and the Higher Education Support (Maximum Payments for Other Grants) Determination 2020 apply to spending under the program, the committee considers this would be helpful information to be included in the explanatory statement.

1.67 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be amended to include further information on the spending caps contained in the *Higher Education Support Act 2003* and the Higher Education Support (Maximum Payments for Other Grants) Determination 2020.

Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023⁴⁸

FRL No.	F2023L00998
Purpose	Remakes the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 and provides for the regulation of environmental management of petroleum and greenhouse gas activities in offshore areas.
Authorising legislation	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
Portfolio	Industry, Science and Resources
Disallowance	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee gave notice of motion to disallow on 14 September 2023. The notice must be resolved by 27 November 2023.

Overview

1.68 This Instrument is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act) and remakes the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (the instrument). It provides for the regulation of environmental management of petroleum and greenhouse gas activities in offshore areas.

1.69 On 13 September 2023, the committee raised potential scrutiny concerns with this instrument in *Delegated Legislation Monitor 10 of 2023*.⁴⁹ The minister responded to the committee's request for information on 27 September 2023.⁵⁰

Scrutiny concerns

Availability of independent merits review⁵¹

1.70 The instrument confers a number of discretionary decisions on the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) that do not appear to provide for independent merits review. Further, the committee

⁴⁸ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDLM 116.

⁴⁹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 10 of 2023](#) (13 September) pp. 14-19.

⁵⁰ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

⁵¹ Senate standing order 23(3)(l).

observed that while the explanatory statement appears to justify why merits review is excluded in relation to some of the decisions in the instrument, it does not do so for the majority of the discretionary decisions.

1.71 Therefore, the committee sought the minister's advice about whether:

- the discretionary decisions that can be made under the instrument are subject to independent merits review, and if so, a list of these decisions; and
- a list of the discretionary decisions that are not subject to merits review under the instrument, and what characteristics of each of these decisions justify the exclusion of review, by reference to the grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (ARC guide).

*Minister's response*⁵²

1.72 The minister advised that discretionary decisions under the instrument are not subject to independent merits review, for the following reasons in line with the ARC guidance:

- a number of these decisions are preliminary in nature and therefore unsuitable for review; and
- certain decisions involve the evaluation of 'complex and competing facts and policies, following extensive inquiry which may include public consultation'. Decisions of this nature include a decision to accept or refuse to accept an offshore project proposal (section 13) and a decision to accept an environment plan (including in part or subject to limitations or conditions), and give notice of an opportunity to modify and resubmit an environment plan or refuse to accept an environment plan (section 33).

1.73 Additionally, the minister advised that the Commonwealth Government has announced a policy review of the environmental management regulatory regime for offshore petroleum and greenhouse gas storage activities. Noting the committee's previous comments, the minister advised that the availability of independent merits review for discretionary decisions under the instrument can be considered further as part of this review.

Committee view

1.74 The committee thanks the minister for her advice that discretionary decisions in the instrument are unsuitable for merits review in line with the ARC guide.

1.75 The committee considers that generally, such decisions should be reviewable, particularly in this case where external parties may wish to seek review of certain decisions under the instrument. For this reason, the committee welcomes the

⁵² This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

minister's advice that a policy review of the environmental management regulatory regime for offshore petroleum and greenhouse gas storage activities has been announced and that the availability of independent merits review under the instrument will be considered as part of this review.

1.76 In light of the above advice, the committee has concluded its examination of this issue, noting that a policy review of the environmental management regulatory regime for offshore petroleum and greenhouse gas storage activities has been announced. The committee would appreciate an update on the outcome of this review in due course.

Availability of judicial review⁵³

1.77 Where an instrument contains a no-invalidity clause, the committee expects the explanatory statement to explain the nature and scope of the clause. Further, the explanatory statement should justify why it is necessary and appropriate to potentially restrict a person's access to independent review through the inclusion of such a clause.

1.78 The instrument contains four no-invalidity clauses, in subsections 9(3), 13(3), 33(3) and 33(9). These clauses relate to the requirement for NOPSEMA to make specified decisions within a 30-day time period or, if it is unable to meet this timeframe, no later than the date it advises the titleholder that a decision will be made.

1.79 The explanatory statement provides that 'this ensures the validity of all decisions is maintained and provides NOPSEMA with the flexibility to make thorough and informed decisions in any circumstances'. However, there was no detail about the circumstances in which this may occur, noting that the timeframes may be set by NOPSEMA itself.

1.80 The committee therefore requested the minister's advice as to:

- why the no-invalidity clauses are necessary and appropriate and whether there are any safeguards in place in relation to decisions under these provisions; and

the circumstances, and likelihood, that NOPSEMA might exceed the specified time limits for making a decision, particularly as the instrument appears to allow NOPSEMA to determine the time period for making decisions, if the 30-day period cannot be met.

Minister's response⁵⁴

1.81 The minister advised that the main intent of the no-invalidity clauses related to timeframes is to ensure the validity of NOPSEMA's decisions if NOPSEMA fails to

⁵³ Senate standing order 23(3)(i).

⁵⁴ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

comply with the 30-day period. However, it is acknowledged that the provisions will also apply in the unlikely event that NOPSEMA does not make a decision by any later day advised by NOPSEMA. This is to ensure the validity of NOPSEMA's decisions is maintained and to increase regulatory certainty for titleholders.

1.82 Further, the minister explained that, for context, a decision to require extra time beyond the 30-day period is generally used in conjunction with NOPSEMA providing the titleholder with a reasonable opportunity to modify the offshore project proposal or environment plan after inadequacies have been identified in its written submission, in accordance with NOPSEMA's published assessment policies. This gives the titleholder the opportunity to address those issues before a final decision is made.

1.83 Additionally, the relevant provisions provide for the validity of a decision to the extent that NOPSEMA fails to meet the decision-making timeframes and that judicial review of a decision could still be sought on other grounds. For these reasons, the minister considers that the no-invalidity provisions in the instrument are necessary, reasonable and proportionate to provide regulatory certainty and avoid potential disadvantage to titleholders.

Committee view

1.84 The committee thanks the minister for her detailed response, in particular, that the main intent of the clauses is to ensure the validity of NOPSEMA's decisions if it fails to comply with the 30-day period (an in the event that NOPSEMA does not make a decision by any later day advised).

1.85 The committee also notes the minister's advice that these measures are designed to increase regulatory certainty and ensure the titleholders are not penalised for an administrative oversight (or to benefit the titleholder by providing the opportunity to address any issues raised with their proposal before a final decision is made).

1.86 However, the committee considers there are other provisions in the instrument which allow NOPSEMA to extend its own timeframes, as needed. The committee understands the need for allowing further time to make a decision in certain circumstances, but noting other provisions which allow extensions of time, it is unclear to the committee why the no-invalidity clauses are necessary.

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

- **whether the no-invalidly clauses in the instrument can be removed, noting there are existing provisions in the instrument that allow NOPSEMA to extend the time they have to make certain decisions; or**
- **if this is not possible, a further justification as to the necessity of the no-invalidity clauses.**

Strict liability;⁵⁵ significant penalties in delegated legislation⁵⁶

1.88 This instrument contains a number of strict liability offences, with penalties ranging from 30 to 80 penalty units. While the explanatory statement explains why it is necessary and appropriate to impose offences of strict liability in the instrument (noting the potential consequences to the environment), the committee was concerned about the associated high penalties imposed by subsections 17(1), 18(1) and 19(1) in delegated legislation.

1.89 Despite this explanation, the committee noted its general view is that penalties that exceed 50 penalty units for individuals and 250 penalty units for corporations should be in primary rather than delegated legislation. The committee also noted the Attorney-General's Department's *Guide to Framing Commonwealth Offences* (AGD guide) states that generally, strict liability offences are only appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual and 300 penalty units for a body corporate.

1.90 Therefore, the committee requested the minister's advice as to why the significant penalties for the strict liability offences are necessary and appropriate for inclusion in delegated legislation; and the justification for penalties that exceed the committee's expectations, in line with the AGD guide.

Minister's response⁵⁷

1.91 The minister advised that a maximum of 80 penalty units only applies to the most serious offences in the instrument. This penalty is appropriate given there are potentially severe environmental consequences that may result from non-compliance with these provisions and the higher penalties therefore reflect the seriousness of the offence.

⁵⁵ Senate standing order 23(3)(h).

⁵⁶ Senate standing order 23(3)(j).

⁵⁷ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

1.92 The minister noted that the AGD guide states that a higher maximum penalty will be justified where the consequences of the offence are particularly dangerous or damaging.

1.93 Additionally, the minister clarified that the offence provisions apply to a 'titleholder'. Given the high costs involved in the oil and gas and greenhouse gas storage industries, in most (if not all) cases the titleholder will be a corporation rather than an individual. Furthermore, the offshore resources industry is a multi-billion dollar industry, with the capability and capacity to be aware of its regulatory obligations. A penalty less than 80 penalty units is considered unlikely to provide a sufficient deterrent or punishment to titleholders for non-compliance with these offences, or to reflect the seriousness of a worst-case offence against one of these provisions.

1.94 The minister also confirmed that the higher penalties are consistent with those in the 2009 version of the instrument, which is when the measures commenced. The penalty is also consistent with the penalty imposed under similar offence provisions, noting that the AGD guide states that a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. Reducing the penalty amount compared to the 2009 instrument may suggest that environmental risks are now commensurately lower, or that non-compliance with the relevant provisions is perceived as less significant by the Australian Government.

1.95 The minister also advised that all the provisions relating to environment plans are contained in the instrument, rather than the Act, because keeping these in the one instrument provides greater clarity to regulated entities.

Committee view

1.96 The committee thanks the minister for the detailed response to this scrutiny issue. The committee appreciates the advice about the need to locate the offences regarding environmental plans in one location for clarity, and the need for higher penalties regarding offences that could have serious environmental impacts. The committee also appreciates the advice that the penalties in this instrument are consistent with those set in previous versions of the instrument.

1.97 In relation to the offences of strict liability, the committee notes the AGD guide is that such offences are only appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual or 300 for a body corporate.

1.98 Lastly, the committee thanks the minister for her advice that in practice, the offences will apply to a 'titleholder', who in most cases will be a corporation, rather than an individual. Notwithstanding this, the committee reiterates it would be best practice to provide for separate offences for individuals and corporations; however, it acknowledges that in this situation, the higher penalties may be appropriate.

1.99 In light of the above, the committee has concluded its examination of the instrument in relation to this issue.

Legal certainty;⁵⁸ clarity of drafting⁵⁹

1.100 Sections 57 and 58 of the instrument provide that a fee is payable to NOPSEMA which is the total of the expenses it incurred in considering the relevant proposal or in assessing the relevant financial assurance arrangements. A note to these sections provides that 'it is expected that NOPSEMA and the person ... will agree on the terms of payment of the fee. The invoice will state the terms, whether or not there is an agreement'.

1.101 The explanatory statement provides that the fee will be the total of the expenses incurred by NOPSEMA in considering the proposal to date. These sections appear to impose an unknown liability on a person or body corporate that submits a proposal for NOPSEMA's consideration.

1.102 For this reason, the committee requested the minister's advice about:

- how the fees referred will be calculated;
- further detail about the process to ensure an agreement on the terms of payment of the fee;
- whether there is a maximum cap or limit on the fee; and
- whether a person may seek internal or independent review of the fee that is determined and if so, further detail about this.

Minister's response⁶⁰

1.103 The minister advised that NOPSEMA's regulatory functions under Act and regulations are fully cost-recovered through levies and fees payable by the offshore petroleum and greenhouse gas storage industries. The minister explained that NOPSEMA recovers its expenses through a fee-for-service which is calculated by multiplying the hourly rate of each NOPSEMA staff member by the number of hours they worked on considering the proposal. Hourly rates are reviewed annually and are inclusive of fixed corporate overheads, which are also reviewed annually.

1.104 The minister also confirmed that a person may request internal review of the fee that NOPSEMA has determined, but noted to date, NOPSEMA has not received such a request. Additionally, judicial review of NOPSEMA's decision about the fee could also be sought on such grounds as an error of law.

⁵⁸ Senate standing order 23(3)(m).

⁵⁹ Senate standing order 23(3)(e).

⁶⁰ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

Committee view

1.105 The committee thanks the minister for her advice, in particular, that fees will be calculated by multiplying the hourly rate of each NOPSEMA staff member by the number of hours they worked on considering the proposal, and that hourly rates are reviewed annually. The committee also welcomes the minister's advice that an internal review process is available should there be a dispute about the fee charged. However, the committee considers this would be helpful information to include in the instrument's explanatory statement.

1.106 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be amended to include further detail about the how the fees will be calculated and the availability of an internal review process.

Australian National University (Governance) Statute 2023⁶¹

FRL No.	F2023L00867
Purpose	Provides governance arrangements for the Australian National University.
Authorising legislation	<i>Australian National University Act 1991</i>
Portfolio	Education
Disallowance	Exempt from disallowance.

Overview

1.107 The Australian National University (Governance) Statute 2023 (the instrument) provides governance arrangements for the Australian National University (ANU). The explanatory statement provides that 'the instrument makes provision for a broad range of matters relevant to the governance of the university, including, for example, the following:

- the organisation of the University
- the functions, powers and proceedings of the Council and its committees
- the composition of the Council, the election of the staff and student members of the Council, and the appointment of other members of the Council
- the Chancellor, Pro-Chancellor, and Vice-Chancellor of the University
- delegations and sub-delegations by the Council, Vice-Chancellor, and other University officials
- rules and orders of the University.'

1.108 The committee raised scrutiny concerns about this instrument in *Delegated Legislation Monitor 9 of 2023* on 6 September 2023.⁶² A response was prepared by the ANU and provided to the committee by the Minister for Education on 4 October 2023.⁶³

⁶¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian National University (Governance) Statute 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDL M 117.

⁶² Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 9 of 2023* (6 September 2023) pp. 4-7.

⁶³ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

Scrutiny concerns

Delegation of administrative powers and functions;⁶⁴ adequacy of explanatory materials⁶⁵

1.109 Sections 63–67 of the instrument contain delegation powers that appeared to authorise the University Council or any ANU staff member to delegate any or all their functions to a wide group comprising any person at the university, including students. Where an instrument delegates administrative powers or functions, the committee expects the explanatory statement to describe the purpose and scope of each delegation. Further, the explanatory statement should address who will be exercising the delegated powers and functions, as well as the nature and source of any limitations or safeguards.

1.110 For this reason, 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;
- whether the persons to whom the various powers or functions can be specifically identified, and what skills, qualifications, and experience they will need to exercise those powers or functions; and
- whether any safeguards or limitations, beyond those set out in the instrument, apply to the delegation of these powers or functions, and whether these safeguards are contained in law or policy.

Minister's response⁶⁶

1.111 The response advised that the delegation provisions in the instrument are 'not intended to operate in isolation, but as an integral part of the University's comprehensive Delegations Framework'. Further, the response advised that the ANU is working to ensure delegations are exercised consistently across the university, and for this reason they have been 'progressively removing separate delegation and sub-delegation powers in individual items of university legislation and moving to reliance on general provisions' that can be applied throughout the university.

1.112 The response advised that the Delegations Framework 'covers all delegations of authority within the University and is not limited to, but includes, delegations under Part 7 of functions under University legislation and under decisions of the University's Council and Vice-Chancellor'. This framework contains a range of safeguards that reflect the ANU's 'position-based organisational structure'. It is designed to ensure all delegations are assigned to a position, rather than an individual, and the exercise of

⁶⁴ Senate standing order 23(3)(c).

⁶⁵ Senate standing order 23(3)(g).

⁶⁶ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

delegated powers is managed in a systemic and transparent way across the organisation.

1.113 Further, the response advised that the ANU follows a merits-based appointment policy. As such, it 'would not appoint a person to a position within the University unless it was satisfied that the person had the skills, qualifications and experience required for the position, including the skills, qualifications and experience required to exercise the position's delegations.'

1.114 Recognising that the instrument's explanatory statement did not contain a detailed explanation of the nature and scope of the delegation provisions raised by the committee, the response undertook to ensure 'future explanatory statements would include more detail on the University's position on delegations and the practical limitations on their exercise', as set out in the Delegations Framework.

Committee view

1.115 The committee thanks the minister and ANU for the advice on the operation of delegation powers in the instrument.

1.116 While the committee welcomes the undertaking to ensure that future explanatory statements include more information on the ANU's approach to delegations, the committee remains concerned that the explanatory statement to the instrument does not contain this detail. As such, it appears the instrument allows for the exercise of broad delegation powers with few limitations.

1.117 In light of the above, the committee requests the minister's advice as to whether the instrument's explanatory statement can be updated to provide further information on the Delegation Framework and the safeguards and limitations contained within ANU policy on the exercise of delegation powers in the instrument.

No-invalidity clause⁶⁷

1.118 This instrument contains three invalidity clauses that appear to exclude or limit the availability of judicial review. As it appeared these provisions were broad in nature, and sought to immunise any ANU staff member's actions and decisions under the university's legislative framework from independent legal challenge, the committee requested the minister's advice as to:

- why it is necessary and appropriate to include the specific no-invalidity clauses in sections 30 and 70, noting the impact this may have on the ability of affected persons to challenge these decisions; and

⁶⁷ Senate standing order 23(3)(i).

- why it is necessary and appropriate to include the broad no-invalidity clause in section 71, noting that this section appears to restrict the capacity for a person to seek review of any action taken by a university staff member.

*Minister's response*⁶⁸

1.119 The response advised that the no-invalidity clause contained in section 30 of the instrument was included to 'ensure that decisions of the returning officer for the election of a Council member have an appropriate degree of finality within the University and that election outcomes are not unduly delayed'. However, the intention of the provision was not to exclude relevant external or judicial review in appropriate cases.

1.120 To address the committee's concerns, the response undertook to amend section 30 of the instrument to ensure it is clear the section does not exclude or limit judicial review of the result of an election for a Council member and to update the instrument's explanatory statement to ensure the context and intent of the provision is clear. The response also included an undertaking to remove subsection 70(3) and section 71 of the instrument in their entirety 'at the earliest opportunity'.

Committee view

1.121 The committee thanks the minister and ANU for the advice as to the purpose of the relevant no-invalidity clauses and their operation. The committee also welcomes the undertaking to amend section 30, update the explanatory statement and remove subsection 70(3) and section 71 in their entirety.

1.122 In light of the undertaking to amend the instrument and its explanatory statement, the committee has concluded its examination of the instrument in relation to this issue.

⁶⁸ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

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 Anti-Corruption Commission Regulations 2023¹

FRL No.	F2023L00759
Purpose	Prescribe arrangements for allowances for travel and other expenses incurred by a witness appearing at a hearing under the Act to be paid by the Commonwealth; specify persons prescribed as legal aid officers for the purposes of section 98 of the <i>National Anti-Corruption Commission Act 2022</i> ; prescribe 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 NACC.
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

2.2 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

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, National Anti-Corruption Commission Regulations 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDLM 118.

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.

2.3 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.

2.4 On 6 September 2023, the committee raised scrutiny concerns with the Attorney-General in *Delegated Legislation Monitor 9 of 2023*.² The Attorney-General provided a response on 22 September 2023.³ As the committee retained scrutiny concerns, it sought further advice from the Attorney-General on 9 October 2023, in *Delegated Legislation Monitor 11 of 2023*.⁴ The Attorney-General provided a further response on 17 October 2023.⁵

Scrutiny concerns

Conferral of discretionary powers;⁶ adequacy of explanatory materials⁷

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

2.6 In response to the committee's request for advice in *Delegated Legislation Monitor 11 of 2023*, the Attorney-General advised of the factors that decision-makers must take into account in exercising the powers in Parts 4 and 5, as well as applicable safeguards and limitations.⁸ Two of those limitations cited by the Attorney-General are the Secretary's certification and monitoring powers in subsection 21(2) and section 24:

² Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 9 of 2023](#) (6 September 2023) pp. 10-14.

³ See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 September 2023 p. 2-5.

⁴ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 11 of 2023](#) (9 October 2023) pp. 16-21.

⁵ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

⁶ Senate standing order 23(3)(c).

⁷ Senate standing order 23(3)(g).

⁸ See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 September 2023 p. 2-5.

- the Secretary must certify the costs of an applicant's legal representation and disbursements as reasonable; and
- the Secretary must monitor strategies adopted by the applicant where assistance has been approved and inform the approving official if they believe proposed expenditure is unreasonable.

2.7 The Attorney-General advised that these requirements prevent approving officials' broad discretion from being misused to approve unreasonable expenditure amounts. However, as section 19 of the instrument enables the Secretary to be specified as an 'approving official', it was unclear to the committee how the above provisions are a limitation or safeguard on the approving official's discretion.

2.8 Accordingly, the committee sought the Attorney-General's advice as to how these provisions operate as a limitation or safeguard where the Secretary is specified as the 'approving official', and whether there are any other safeguards in place. The committee also sought his advice as to whether the explanatory statement could be updated to include the additional detail regarding limitations and safeguards and factors to be taken into account in exercising the discretionary powers.

Attorney-General's response⁹

2.9 The Attorney-General explained that the Secretary is a possible 'approving official' in order to ensure the Commissioner has the option of selecting a non-ministerial approving official where necessary, to ensure the independence and operations of the Commission are not compromised by an application for financial assistance. Further, it is anticipated that, in practice, the Secretary would only be certified as an 'approving official' in limited circumstances.

2.10 The Attorney-General advised that the above powers would operate as safeguards or limitations because, where the Secretary is specified as the approving official, they will in practice delegate their certification and monitoring powers under subsection 21(2) and section 24 to appropriate Senior Executive Service (SES) employees within the Attorney-General's Department (the department), as permitted by the instrument.¹⁰ Additionally, the department is currently progressing a delegation instrument to implement the Secretary's intention in this regard.

2.11 The Attorney-General further advised that the department would amend the explanatory statement to include the additional detail regarding limitations, safeguards and factors to be considered in exercising the discretionary powers, provided above and in his earlier correspondence of 22 September 2023.¹¹

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

¹⁰ See section 43.

¹¹ See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (22 September 2023) pp. 1-5.

Committee view

2.12 The committee thanks the Attorney-General for his advice as to how the Secretary will delegate their certification and monitoring powers, such that they operate as a limitation where the Secretary is an approving official. The committee notes that the ability to specify the Secretary as an approving official is designed to ensure the independence of the Commission, and intended to occur only in limited circumstances.

2.13 The committee also welcomes the Attorney-General's undertaking to amend the explanatory statement to include detail about both how these provisions operate as a limitation or safeguard, and the information provided in his earlier correspondence regarding factors to be considered in exercising discretionary powers under the instrument.

2.14 In light of the Attorney-General's advice regarding limitations and safeguards, and his undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this issue.

Availability of independent merits review;¹² adequacy of explanatory materials¹³

2.15 The instrument contains a number of discretionary decisions. However, it was unclear to the committee whether these were subject to independent merits review. Specifically, all persons deemed eligible for funding under subsections 6(1) and 7(1) are entitled to travel, accommodation, and meal expenses to appear at a hearing, except where the Commission meets some or all costs (see section 8). However, subsections 6(7) and 7(8) require that, where the decision maker is not satisfied that a witness's expenses are equal to or less than the maximum allowance, they must reduce the expenditure to that maximum. 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 are of such a special nature that the application should be granted.

2.16 In response to the committee's request for advice, the Attorney-General confirmed that decisions under subsection 6(1) and 7(1) and Part 4 of the instrument are excluded from merits review as they require the allocation of a finite resource between competing applicants and that decisions under subsection 7(8) are excluded because they automatically flow from a set of circumstances.

2.17 The committee acknowledged that decisions under subsection 7(8) automatically flow from a set of circumstances and considered this would be helpful information for inclusion in the instrument's explanatory materials. Accordingly, it

¹² Senate standing order 23(3)(i).

¹³ Senate standing order 23(3)(g).

requested the Attorney-General's advice as to whether the explanatory statement could be amended to include the additional information provided about this justification.

2.18 However, in relation to the finite resources exemption, and specifically decisions under subsection 6(1), it was unclear to the committee how an allocation to one applicant affected an allocation made to another applicant. Accordingly, it sought the Attorney-General's advice as to whether a further explanation could be provided as to how decisions under subsection 6(1) and Part 4 can affect an allocation already made.

2.19 Finally, the committee noted that, as discretionary decisions have the capacity to affect individual's rights, liberties or obligations, the committee considers that individuals should generally be able to seek review of these decisions. Accordingly, it sought the Attorney-General's advice as to whether internal review in relation to decisions under section 6 and Part 4 could be provided for.

Attorney-General's response¹⁴

2.20 In relation to decisions under section 6 of the instrument, the Attorney-General noted that the committee appropriately pointed out that all persons eligible under section 6 are 'entitled' to payment of the maximum travel allowance. As such, it is more appropriate to characterise decisions under section 6 as automatic or mandatory decisions and therefore appropriate for exclusion from merits review, in line with the Administrative Review Council's guide, *What decisions should be subject to merits review?* (ARC guide).¹⁵ Specifically, subsection 6(1) requires that where all the conditions set out in section 6 are satisfied, an applicant is 'entitled' to receive the relevant allowance. Although subsection 6(7) requires the decision maker, if necessary, to reduce the amount payable to the maximum allowance, this does not affect the witness's entitlement to the allowance.

2.21 The Attorney-General further advised that, while merits review is not appropriate under sections 6 or 7, it may be appropriate for the Commission to implement internal review and complaint procedures where a witness is dissatisfied with a decision regarding the maximum amount paid. The implementation of such internal review processes is a matter for the Commission to consider, but the department will monitor operation of the instrument and may consider future amendments if it becomes clear that there is a 'pressing need for internal review processes to be outlined in the [instrument] in the future'.

2.22 The Attorney-General also advised that grants of legal assistance under Part 4 will be made from finite administered funding and that decisions will be made in

¹⁴ See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 22 September 2023 p. 2-5.

¹⁵ Administrative Review Council, [What decisions should be subject to merits review?](#) pp.8-9, [3.8]-[3.9].

accordance with the *Commonwealth Guidelines for Legal Financial Assistance 2012*, which require decision-makers to have regard to the total amount of funding available in considering each application. If a decision under Part 4 was overturned or changed as the result of merits review, this would have a direct and significant impact on the ability of the department to maintain consistency and fairness for other applicants and may result in applicants in similar circumstances receiving vastly different entitlements.

2.23 The Attorney-General further advised that the instrument's explanatory statement notes that those guidelines allow an applicant to apply for internal review of a legal financial assistance decision under Part 4 of the instrument, within 28 days after notification of the decision.

2.24 Finally, the Attorney-General undertook to amend the explanatory statement to include additional information about the exclusion of merits review for decisions under sections 6, 7 and Part 4 of the instrument.

Committee view

2.25 The committee thanks the Attorney-General for his detailed advice about the justifications for exclusion of merits review, in line with the ARC guide, and the undertaking to amend the explanatory statement to include this information.

2.26 The committee also welcomes the Attorney-General's advice about potential availability of internal review for decisions under sections 6, as well as the availability under the guidelines for review of decisions under Part 4, noting that discretionary decisions have the capacity to affect individuals' rights, liberties or obligations.

2.27 In light of the Attorney-General's advice regarding the availability of review and his undertaking to amend the explanatory statement, the committee has concluded its examination of the instrument in relation to this issue.

2.28 In addition, the committee has resolved to withdraw the notice of motion to disallow the instrument.

Insurance Exemption Determination No. 1 of 2023¹⁶

FRL No.	F2023L00971
Purpose	Exempts a class of persons from certain provisions in sections 49J and 49L of the <i>Insurance Act 1973</i> .
Authorising legislation	<i>Insurance Act 1973</i>
Portfolio	Treasury
Disallowance	15 sitting days after tabling (tabled in the Senate on 31 July 2023). Committee gave notice of motion to disallow on 14 September 2023. The notice must be resolved by 27 November 2023.

Overview

2.29 The Insurance Exemption Determination No. 1 of 2023 (the instrument) exempts a class of persons from certain provisions in sections 49J and 49L of the *Insurance Act 1973* (the Insurance Act), as authorised by section 7(1) of that Act. This includes exempting the Appointed Auditor from auditing the information required by certain reporting standards.

2.30 On 6 September 2023, the committee raised a scrutiny issue with the Assistant Treasurer in *Delegated Legislation Monitor 9 of 2023*.¹⁷ The Assistant Treasurer provided a response on 4 October 2023.¹⁸

Scrutiny concerns

Exemption from the operation of primary legislation;¹⁹ parliamentary oversight²⁰

2.31 This instrument exempts a class of persons from certain provisions of the Insurance Act, as listed in the Schedule to the instrument.

2.32 The committee welcomed the inclusion of a 10-year sunset period in relation to this instrument. However, the committee sought the Assistant Treasurer's

¹⁶ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Insurance Exemption Determination No. 1 of 2023, *Delegated Legislation Monitor 12 of 2023*; [2023] AUSStaCSDLM 119.

¹⁷ Senate Standing Committee of the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 9 of 2023* (6 September 2023) pp. 8-9.

¹⁸ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

¹⁹ Senate standing order 23(3)(l).

²⁰ Senate standing order 23(3)(m).

advice about whether there was any intention to review these measures to determine if they are still necessary and appropriate, including if it is appropriate to include the measures in delegated legislation.

*Minister's response*²¹

2.33 The Assistant Treasurer advised that while there was no intention to instigate a specific review of the provisions in this instrument, regulators within the Treasury portfolio routinely assess the application and ongoing relevance of instruments. Further, as the instrument is subject to a 10-year sunset period, the ongoing need for the exemptions it contains and whether they remain fit-for-purpose will be considered in advance of 1 October 2033.

Committee view

2.34 The committee thanks the Assistant Treasurer for his advice. The committee considers that a 10-year sunset period provides a minimum level of parliamentary oversight, noting the committee's expectations that exemption provisions in delegated legislation should operate no longer than is strictly necessary. Further, the committee considers that assessment by regulators within the Treasury of the application and relevance of such instruments will provide a level of additional oversight regarding whether the measures remain necessary.

2.35 In light of the Assistant Treasurer's advice, the committee concludes its examination of the instrument, and has resolved to withdraw the notice of motion to disallow this instrument.

²¹ This correspondence was tabled with this Monitor and will be accessible via the [Index of Instruments](#) page on the committee's website.

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 instrument.¹

Instrument

Archives (Discretionary Service Charges) Determination 2023 [F2023L01245]

Concluded matters

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

Instrument

Archives (Discretionary Service Charges) Determination 2023 [F2023L01245]

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. There were no new or implemented undertakings this reporting period.

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.

5.2 The committee did not identify any expenditure-related instruments registered during the relevant period.

Levying of taxation in delegated legislation

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

5.4 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?
Primary Industries (Customs) Charges Amendment (Rubus) Regulations 2023 [F2023L01260]	No
Primary Industries (Excise) Levies Amendment (Rubus) Regulations 2023 [F2023L01258]	No

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](#).

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.²

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

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

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

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.

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.

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

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

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

Instruments which do not meet the committee's expectations

6.7 No instruments were identified in this reporting period that did not meet the committee's expectations under standing order 23(4A).

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

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.

exemption from sunseting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.⁶

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

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

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

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

⁶ 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 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.

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

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
Charter of the United Nations (Listed Persons and Entities) Amendment (No. 1) Instrument 2023 [F2023L01230]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

Senator Linda White
Chair

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.