

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

Monitor 14 of 2023

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PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3066  
Email: [sdlc.sen@aph.gov.au](mailto:sdlc.sen@aph.gov.au)  
Website: [http://www.aph.gov.au/senate\\_sdlc](http://www.aph.gov.au/senate_sdlc)

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## Membership of the committee

### Current members

Senator Linda White (Chair)	Victoria, ALP
Senator the Hon Linda Reynolds CSC (Deputy Chair)	Western Australia, LP
Senator Catryna Bilyk	Tasmania, ALP
Senator David Pocock	Australian Capital Territory, IND
Senator Louise Pratt	Western Australia, ALP
Senator Paul Scarr	Queensland, LP

### Secretariat

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

### Committee legal adviser

Professor Lorne Neudorf

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## Introduction

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

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

### Committee information

#### Terms of reference

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

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

legislation, the instrument is in force only for as long as is strictly necessary;  
and

- (m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

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

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

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

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

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

#### *Resolving minor technical scrutiny concerns*

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

#### *Resolving significant technical scrutiny concerns*

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

#### *Undertakings*

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

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

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

## **Disallowance process<sup>1</sup>**

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

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

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

## **Publications**

### ***Delegated Legislation Monitor***

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

### ***Scrutiny News***

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

### ***Guidelines***

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

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

**Other resources**

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

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

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

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



## Report snapshot

<b>Scrutiny period</b>	
Legislative instruments registered on the Federal Register of Legislation between 31 October and 9 November 2023	41
Instruments in this period exempt from disallowance	9
<b>Chapter 1: New and ongoing matters</b>	
New legislative instruments commented on in report	1
Ongoing legislative instruments commented on in report	0
<b>Chapter 2: Concluded matters</b>	
Legislative instruments of which the committee has concluded its examination following receipt of ministerial response	1
<b>Chapter 3: Agency engagement</b>	
New legislative instruments where the committee engaged with the relevant agency via its secretariat	3
Legislative instruments of which the committee has concluded its examination following receipt of agency response	0
<b>Chapter 4: Undertakings</b>	
New undertakings made by ministers or agencies to address the committee's scrutiny concerns	7
Undertakings which the committee was made aware had been implemented during this period	0
Outstanding undertakings	54
<b>Chapter 5: Scrutiny of Commonwealth expenditure</b>	
Advance to the Finance Minister determinations	0
Instruments specifying Commonwealth expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and the <i>Industry Research and Development Act 1986</i>	1
Levying of taxation in delegated legislation	1
<b>Chapter 6: Exemptions from disallowance and sunseting</b>	
Instruments that do not meet the committee's expectations regarding exemptions from disallowance under standing order 23(4A)	2
Instruments that do not meet the committee's expectations regarding exemptions from sunseting under standing order 23(3)(k)	1



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

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## Chapter 1

### New and ongoing matters

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

#### New matters

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

### Migration Amendment (Biosecurity Contravention) Regulations 2023<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2023L01443</a>
<b>Purpose</b>	To amend the Migration Regulations 1994 to expand the grounds for the cancellation of visas where the Minister reasonably believes that the visa holder has contravened provisions under the <i>Biosecurity Act 2015</i> .
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Portfolio</b>	Home Affairs
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 November 2023). Notice of motion to disallow must be given by 5 December 2023.

#### Overview

1.3 The Migration Amendment (Biosecurity Contravention) Regulations 2023 (the instrument) amend the Migration Regulations 1994 (the Migration Regulations) to expand the grounds for the cancellation of visas where the minister reasonably believes that the visa holder has contravened provisions under the *Biosecurity Act 2015* (the Biosecurity Act). The committee has identified technical scrutiny concerns in relation to the instrument which are detailed below.

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Biosecurity Contravention) Regulations 2023, *Delegated Legislation Monitor 13 of 2023*; [2023] AUSStaCSDL M 128.

## Scrutiny concerns

### ***Adequacy of consultation***<sup>2</sup>

1.4 Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument, as well as relevant experts, were adequately consulted in relation to the specific instrument. Further, section 17 of the *Legislation Act 2003* requires that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken. In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to the extent to which the consultation ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content (paragraph 17(2)(b)).

1.5 The explanatory statement explains that this instrument amends the Migration Regulations to expand the grounds for the cancellation of visas where the minister or a delegate reasonably believes that a visa holder has contravened provisions of the Biosecurity Act, to include contravention of new subsection 186A(1) of the Biosecurity Act.

1.6 New subsection 186A(1) of the Biosecurity Act provides that a person is liable to a civil penalty if:

- the person brings or imports goods into Australian territory; and
- the goods are conditionally non-prohibited goods; and
- a condition in relation to the goods specified in a determination in force under subsection 174(1) has not been complied with; and
- the goods are concealed for the purpose of preventing the goods from being found, or preventing the true nature of the goods from being determined, by a biosecurity official.

1.7 Regarding the consultation undertaken in relation to the instrument, the explanatory statement provides that 'consultation has been undertaken with the Department of Agriculture, Fisheries and Forestry. The consultation undertaken accords with section 17 of the *Legislation Act 2003* (the Legislation Act)'.

1.8 The explanatory statement also notes that 'the Department follows standard practices to notify clients about amendments of the Regulations, including updating its website and notifying peak bodies'.

1.9 Noting the significant impact this instrument could have on a range of visa-holders, including visitor, student, working holiday and temporary work visa-holders, the committee queries why clients, relevant peak bodies or other experts were not consulted.

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<sup>2</sup> Senate standing order 23(3)(d).

**1.10 The committee therefore requests the minister's advice as to whether further detail can be provided about:**

- **what consultation was undertaken; and**
- **if no consultation was undertaken with the public, visa holders, relevant peak bodies or other experts, the justification for this.**

***Delegation of discretionary powers<sup>3</sup>***

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

1.12 The instrument expands the grounds for the cancellation of visas where the minister or a delegate reasonably believes that a visa holder has contravened provisions under the Biosecurity Act.

1.13 However, neither the instrument nor the explanatory statement explain who this delegated power or function will be exercised by, and whether they will be required to possess particular skills, qualifications and experience. Further, there is no detail about the safeguards or limitations that apply to the exercise of this power.

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

- **why it is necessary and appropriate to delegate the powers or functions in the instrument;**
- **who the power or function will be delegated to, including whether that person will be required to have the appropriate skills, qualifications and experience to exercise the powers or functions; and**
- **whether any safeguards or limitations apply to the exercise of these powers or functions, including whether merits review is available.**

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<sup>3</sup> Senate standing order 23(3)(c).

## 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).

### Competition and Consumer (Gas Market Code) Regulations 2023<sup>1</sup>

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

#### Overview

2.2 The Competition and Consumer (Gas Market Code) Regulations 2023 (the instrument) are made under the *Competition and Consumer Act 2010* (the Act) and establish 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 with the instrument on 13 September 2023, in *Delegated Legislation Monitor 10 of 2023*.<sup>2</sup> The minister responded on 27 September 2023.<sup>3</sup> As the committee retained scrutiny concerns, it sought the minister's further advice in *Delegated Legislation Monitor 12 of 2023*, on 18 October 2023.<sup>4</sup> The minister responded on 6 November

<sup>1</sup> 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 14 of 2023*; [2023] AUSStaCSDLM 129.

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

<sup>3</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation Committee (27 September 2023) pp.11-15.

<sup>4</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation [Delegated Legislation Monitor 12 of 2023](#) (18 October 2023) pp. 3-11.

2023.<sup>5</sup> However, the committee continued to retain scrutiny concerns regarding the availability of independent merits review and, accordingly, sought the minister's additional advice about this matter. The minister responded on 14 November 2023.<sup>6</sup>

## Scrutiny concerns

### ***Availability of independent merits review<sup>7</sup>***

2.3 The committee had raised concerns with the minister regarding the availability of independent merits review of discretionary decisions under the instrument. In response, the minister advised that a number of decisions relating to conditional ministerial exemptions,<sup>8</sup> were excluded from merits review, with reference to the Administrative Review Council's guide, *What decisions should be subject to merits review* (the ARC guide).

2.4 The minister's advice included that these decisions are appropriate for exclusion from merits review because they are policy decisions of a high political content. However, the committee was unclear as to how these decisions met the threshold in the ARC guide for exclusion on this ground and, accordingly, requested additional detail regarding the justification for policy decisions of a high political content.

2.5 The minister's advice in response included that such decisions are economically consequential to the east coast gas market and the cost of energy for consumers, ranging from households to industrial gas users. Further, a key objective of the exemptions framework is to incentivise suppliers to commit more gas supply to the east coast in order to address forecasted supply shortfalls. Finally, the scale and market impact of decisions under the instrument are of high political content, based on the considerations involved in making these decisions, which also contribute to the instrument's objective of incentivising adequate supply and long-term investment of reasonably priced gas in the domestic market.

2.6 Additionally, the minister advised that the exemptions framework allows Australia to deliver on energy supply commitments to trading partners, reduce the risk of triggering the Australian Domestic Gas Security Mechanism and, as a result, maintain its investments and reputation as a trusted trading partner. Finally, he noted

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<sup>5</sup> See [correspondence](#) to the Senate Scrutiny of Delegated Legislation Committee (6 November 2023) pp. 4-8.

<sup>6</sup> This correspondence was tabled with the monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>7</sup> Senate standing order 23(3)(i).

<sup>8</sup> See subsections 61(1), 63(1) and 68(1). In summary, subsection 61(1) relates to the granting of a conditional ministerial exemption from gas penalty provisions in the instrument; subsection 63(1) provides for such exemptions to be subject to conditions where the relevant ministers consider this to be appropriate; and subsection 68(1) relates to variation or revocation of a conditional ministerial exemption.



that the instrument allows producers to enter multi-year commitments with the Commonwealth government, providing certainty around price regulation; this may be diminished if relevant decisions were subject to merits review.

2.7 The committee thanked the minister for his advice regarding the appropriateness of excluding merits review, in line with the ARC guide. However, as the committee considered this information would be helpful for inclusion in the instrument's explanatory statement, it also sought the minister's advice as to whether the explanatory statement could be amended to include the detail provided by the minister.

*Minister's response*<sup>9</sup>

2.8 In response, the minister provided an undertaking to amend the explanatory statement to include the additional information provided in relation to the exclusion of policy decisions of a high political content.

*Committee view*

2.9 The committee thanks the minister for his engagement and welcomes the undertaking to amend the explanatory statement.

**2.10 In light of the minister's undertaking to amend the explanatory statement, the committee concludes its examination of the instrument in relation to this issue.**

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

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<sup>9</sup> This correspondence was tabled with the monitor and will be accessible via the [Delegated Legislation Monitors](#) 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 instruments.<sup>1</sup>

##### Instrument

Airspace Amendment (Danger Areas) Regulations 2023 [F2023L01448]

Superannuation Legislation Amendment (CSS) Regulations 2023 [F2023L01454]

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

#### Concluded matters

3.4 The committee did not conclude its consideration of any instruments in this reporting period.<sup>2</sup>

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

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

## Chapter 4

### Undertakings

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

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

#### New undertakings

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

Instrument	Undertaking	Date made
<b>Vehicle Standard (Australian Design Rule 106/00 – Side Underrun Protection) 2023 [F2023L01317]</b>	The Department of Infrastructure, Transport, Regional Development, Communications and the Arts undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	31 October 2023
<b>Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023 [F2023L01182]</b>	The Department of Employment and Workplace Relations undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	31 October 2023
<b>Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023 [F2023L00983]</b>	The Minister for Education undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	1 November 2023
<b>Australian National University (Governance) Statute 2023 [F2023L00867]</b>	The Minister for Education advised of the Australian National University's undertaking to amend the explanatory statement to the instrument in response to the committee's concerns.	1 November 2023
<b>Australian Education Regulations 2023 [F2023L01020]</b>	The Minister for Education undertook to amend the explanatory statement to the	1 November 2023

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

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

Instrument	Undertaking	Date made
	instrument in response to the committee's scrutiny concerns.	
<b>Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023 [F2023L00998]</b>	The Minister for Resources and Northern Australia undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	3 November 2023
<b>Competition and Consumer (Gas Market Code) Regulations 2023</b>	The Minister for Climate Change and Energy undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	6 November 2023

### Implemented undertakings

4.4 Since the last Monitor was tabled, no undertakings have been implemented.

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

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## 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.<sup>1</sup> This includes expenditure-related instruments and instruments that levy taxation.

#### Commonwealth expenditure

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

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

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

Instrument	Amount	Grant/Program
Industry Research and Development (Capacity Investment Scheme Program) Instrument 2023 [F2023L01481]	Not specified	Capacity Investment Scheme Program

#### Levying of taxation in delegated legislation

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

<sup>1</sup> 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](#).

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

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

Instrument	Limit on the taxation amount in primary legislation?
Private Health Insurance (National Joint Replacement Register Levy) Amendment (NJRR Funding Amount) Rule 2023 [F2023L01472]	No

## 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.<sup>3</sup>

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;<sup>4</sup>
- is exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the *Legislation Act 2003*;<sup>5</sup>
- overrides or modifies primary legislation;

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<sup>3</sup> 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](#).

<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup>

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

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

<b>Instrument</b>	<b>Source of exemption</b>
Housing Australia Future Fund Investment Mandate Direction 2023 [F2023L01466]	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015

### **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

<sup>6</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2<sup>nd</sup> edition (February 2022) pp. 47–49; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 61–72; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 99–123.

and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

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

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;<sup>8</sup>
- is exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003*;<sup>9</sup>
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or

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<sup>7</sup> 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](#).

<sup>8</sup> 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.

<sup>9</sup> 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.

- otherwise contains a matter requiring parliamentary oversight.

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

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

### ***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
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 5) Determination 2023 [F2023L01465]	Section 54(1) of the <i>Legislation Act 2003</i>

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

<sup>10</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Guidelines](#), 2<sup>nd</sup> edition (February 2022) pp. 34–35; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report](#) (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 87–88 and 99–123.