

The Senate

Standing
Committee for the
Scrutiny of Delegated
Legislation

Delegated Legislation Monitor

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Introduction

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

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

This Monitor details matters relating to the committee's scrutiny of **128** legislative instruments registered on the Federal Register of Legislation between **24 June 2023** and **6 July 2023**. This includes **105** disallowable instruments and **23** instruments exempt from disallowance.

Committee information

Terms of reference

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

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

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

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

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

Nature of the committee's scrutiny

Technical legislative scrutiny

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

Resolving minor technical scrutiny concerns

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

Resolving significant technical scrutiny concerns

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

Undertakings

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

Matters of interest to the Senate

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

Disallowance process¹

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

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

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

Publications

Delegated Legislation Monitor

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

Scrutiny News

[Scrutiny News](#) is a brief newsletter summarising significant matters arising in the Monitor, as well as in the reports of the Senate Standing Committee for the Scrutiny

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

of Bills. Past editions, and information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.

Guidelines

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

Other resources

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

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

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

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

Part I—Technical legislative scrutiny

Chapter 1

New and ongoing matters

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

New matters

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

Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023¹

FRL No.	F2023L00983
Purpose	This instrument 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).

Overview

1.3 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 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 9 of 2023*; [2023] AUSStaCSDLM 94.

Scrutiny concerns

Conferral of discretionary powers²

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

1.5 Item 1 of the instrument repeals section 16 of the Higher Education Support (Other Grants) Guidelines 2022 (the Principal Instrument) and substitutes a new section 16. 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. However, new section 16 does not set out what amount will be spent on the program for each of the grant years.

1.6 The effect of this amendment appears to significantly broaden the minister's discretionary power to determine the amount to be spent on grants under the National Priorities Pool Program.

1.7 The explanatory statement does not appear to provide an explanation for why it was considered necessary and appropriate to remove the spending cap in relation to this grant program, noting that removing the spending cap significantly broadens the minister's discretion.

1.8 In light of the above, the committee requests the minister's advice as to why it was considered necessary and appropriate to remove the spending cap in relation to grants made under the National Priorities Pool Program.

² Senate standing order 23(3)(c).

Australian National University (Governance) Statute 2023³

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

Overview

1.9 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 subdelegations by the Council, Vice-Chancellor, and other University officials
- rules and orders of the University.'

1.10 The committee has identified several technical scrutiny concerns in the instrument, detailed below.

³ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Australian National University (Governance) Statute 2023, *Delegated Legislation Monitor 9 of 2023*; [2023] AUSStaCSDLM 95.

Scrutiny concerns

Delegation of administrative powers and functions;⁴ adequacy of explanatory materials⁵

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 broad administrative powers and functions are delegated under the instrument. Additionally, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.12 Sections 63-67 of the instrument contain a broad range of delegation powers. For example, section 65 provides that the University Council may delegate 'any' of their functions to listed 'eligible entities'. Under subsection 65(3), these delegates also possess the power to subdelegate relevant functions to another eligible entity. Section 66 provides similar powers relating to the Vice-Chancellor's functions and section 67 does the same for other listed University officials. Additionally, in each of these sections, 'eligible entity' is defined broadly to include a wide class of people, including students at the University.

1.13 Reading these provisions together, they appear to authorise the Council or any University staff member to delegate any or all their functions to a wide group comprised of any person in the University, including students.

1.14 Where an instrument delegates administrative powers or functions, the committee expects that the explanatory statement will 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.

1.15 According to the instrument's explanatory statement, the delegation provisions 'are intended to remove the need to include separate delegation and subdelegation powers in individual items of University legislation and to allow the application of consistent governance arrangements across the University for delegations and subdelegations.' However, the explanatory statement does not explain why the delegation powers in the instrument are necessary and appropriate, or address who these delegated powers or functions will be exercised by and whether they will be required to possess specific skills, qualifications, and/or experience.

⁴ Senate standing order 23(3)(c).

⁵ Senate standing order 23(3)(g).

1.16 Considering the above, the committee requests 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.**

No-invalidity clause⁶

1.17 Senate standing order 23(3)(i) requires the committee to consider whether an instrument excludes or limits judicial review of administrative decisions.

1.18 This instrument appears to contain three no-invalidity clauses that exclude or limit the availability of judicial review.

1.19 Section 30 of the instrument provides that 'A decision of the returning officer for an election about the conduct or result of the election is final and not subject to appeal or review in any way'. Further, subsection 70(3) (dealing with the tabling of rules, orders etc.) provides that failure to comply with the requirements contained in subsection 70(2) does not affect the validity of relevant instruments.

1.20 Additionally, section 71 of the instrument provides:

(1) This section applies to a contravention of any instrument made under, or provided by, the ANU Act by any of the following persons or bodies:

- (a) the Council;*
- (b) the Chancellor the Pro-Chancellor or the Vice-Chancellor;*
- (c) the Nominations Committee;*
- (d) any other body of the university;*
- (e) any other office under the ANU Act, a statute, a rule or an order;*
- (f) any other member of staff at the university.*

(2) The contravention does not affect the validity of any act, transaction, contract, agreement, instrument, resolution, or any other thing.

(3) This section is additional to, and does not limit, the ANU Act, section 39 (Validity of acts and proceedings).

⁶ Senate standing order 23(3)(i).

1.21 The committee considers that limiting judicial review by no-invalidity clause a serious matter, because such clauses can restrict an applicant's capacity to seek independent review of relevant acts or decisions. 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 the no-invalidity clause.

1.22 In this regard, it appears that the invalidity clauses in this instrument are very broad and seek to immunise any university staff member's actions and decisions under the university's legislative framework from independent legal challenge. The committee is particularly concerned about the significantly broad scope of section 71 of the instrument, which applies to a contravention of any instrument made under, or provided by, the *Australian National University Act 1991* (ANU Act).

1.23 The committee's concerns are heightened as the explanatory statement does not appear to explain the nature and scope of these provisions or why they are necessary and appropriate.

1.24 Further, in relation to section 30, the explanatory statement provides:

This section has been included to ensure that decisions made by the returning officer have a degree of finality. However, it is intended that judicial review of decisions of the returning officer should continue to be available in appropriate cases, particularly cases where the requirements of the ANU Act, this instrument or the Governance Rule are alleged not to have been complied with.

1.25 Given the breadth of section 71 of the instrument, it is unclear how judicial review can be available in relation to decisions made by the returning officer under section 30.

1.26 In light of the above the committee requests 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**
 - **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.**
-

Insurance Exemption Determination No. 1 of 2023⁷

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). Notice of motion to disallow must be given by 14 September 2023.

Overview

1.27 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.

Scrutiny concerns

Exemption from the operation of primary legislation;⁸ parliamentary oversight⁹

1.28 Senate standing order 23(3)(l) requires the committee to consider whether an instrument contains continuing exemptions to the operation of primary legislation. In addition, Senate standing order 23(3)(m) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

1.29 This instrument exempts a class of persons from certain provisions of the Insurance Act, as listed in the Schedule to the instrument. Specifically, it excludes general insurers and their appointed auditors from reporting requirements in sections 49J and 49L.

1.30 The committee's longstanding view is that provisions which create exemptions to primary legislation should ordinarily be included in primary rather than delegated

⁷ 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 9 of 2023*; [2023] AUSStaCSDLML 96.

⁸ Senate standing order 23(3)(l).

⁹ Senate standing order 23(3)(m).

legislation. If the provisions are nonetheless included in delegated legislation, the instrument should operate no longer than strictly necessary.

1.31 As such, the committee welcomes the inclusion of a ten-year sunset period in relation to this instrument. However, the committee would appreciate the Assistant Treasurer's advice about whether there is any intention to review these measures to determine if they are still necessary and appropriate after 10-years.

1.32 The committee therefore requests the Assistant Treasurer's advice whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the measures in delegated legislation.

National Anti-Corruption Commission Regulations 2023¹⁰

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

Overview

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

1.34 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.

¹⁰ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, National Anti-Corruption Commission Regulations 2023, *Delegated Legislation Monitor 9 of 2023*; [2023] AUSStaCSDLM 97.

1.35 The committee's secretariat, on behalf of the committee, engaged with the Attorney-General's Department in relation to the instrument in July and August 2023. As the committee retained scrutiny concerns with the instrument, it has now resolved to raise those concerns with the Attorney-General.

Scrutiny concerns

Conferral of discretionary powers;¹¹ adequacy of explanatory materials¹²

1.36 Senate standing order 23(3)(c) requires the committee to scrutinise each instrument as to whether it makes rights, liberties, obligations, or interests unduly dependent on insufficiently defined administrative powers. This includes where instruments confer broad discretionary powers on a person. Further, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.37 The instrument contains several provisions which appear to confer broad discretionary powers on the Attorney-General and 'approving officials' (the Attorney-General, Secretary, Prime Minister or Finance Minister – see the definition in section 19).

1.38 Specifically:

- Subsections 13(3) and 14(2) enable the Attorney-General to authorise the provision of financial assistance in relation to a person's legal representation at hearing or application for administrative review, if the Attorney-General is satisfied that refusing the application would result in 'serious financial difficulty'; or the circumstances are of a 'special nature';
- Section 15 provides that financial assistance under the above sections is subject to 'any conditions' determined by the Attorney-General;
- Section 20 enables the approving official to provide financial assistance for a parliamentarian's (or former parliamentarian's) legal representation, disbursements and adverse costs awards for a matter arising under the Act (other than prosecution for an offence), or an application for administrative review.¹³ However, subsection 20(2) requires the approving official to be satisfied that the applicant's involvement in the matter arose only because of their role or duties as a parliamentarian; and that 'it is appropriate' to give financial assistance. In addition, under subsection 21(1), financial assistance may be subject to conditions determined by the approving official 'at any time', which is referred to in the explanatory statement as a

¹¹ Senate standing order 23(3)(c).

¹² Senate standing order 23(3)(g).

¹³ See the definition of 'eligible matter' in section 17 of the instrument.

'broad discretion'. Under subsection 21(2), the costs of legal representation and disbursements will only be paid 'to the extent they are certified as reasonable' by the Secretary;

- Subsection 20(4) enables the approving official to reduce financial assistance if satisfied that the applicant breached the instrument or an applicable condition; and
- Similarly, subsection 20(5) enables the approving official to defer a decision on whether to approve payment until the approving official 'considers it appropriate' to decide.

1.39 The committee is concerned that several key phrases are not defined and that neither the instrument nor its explanatory statement set out the factors which the relevant decision-maker must consider in exercising the discretionary powers under the above provisions, in line with the committee's usual expectations. Notably, while section 15 enables the Attorney-General to determine 'any conditions' for financial assistance, neither the instrument nor the explanatory statement specifies criteria to be considered in determining those conditions. Similarly, the only further consideration specified in relation to the discretion under subsections 20(4) and 20(5) is whether there has been an 'unreasonable delay' in making the application for financial assistance (see subsection 20(6)).

1.40 Further, the committee generally expects the explanatory statement to set out the nature and source of any relevant limitations and safeguards regarding discretionary decisions, including whether they are contained in law, for example in another instrument, or in policy. It is unclear on the face of the instrument and from the explanatory statement whether these discretionary powers are subject to any such limitations or safeguards.

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

- **what factors the relevant decision-maker must take into account when exercising their discretion under the above provisions; and**
- **whether any safeguards and limitations apply to the exercise of these powers, and whether such safeguards are contained in law or policy.**

Availability of independent merits review;¹⁴ adequacy of explanatory materials¹⁵

1.42 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for independent review of decisions affecting rights, obligations and interests. Further, Senate standing

¹⁴ Senate standing order 23(3)(i).

¹⁵ Senate standing order 23(3)(g).

order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.43 Subsections 6(1) and 7(1) (in Part 2) of the instrument provide that witnesses are 'entitled' to be paid expenses in relation to travel, accommodation and meals. However, subsections 6(7) and 7(8) further provide that where the relevant decision-maker¹⁶ has granted the application but is 'not satisfied that the expenses applied are equal or less than the maximum allowance', they must reduce the amount payable to that maximum amount.

1.44 Part 4 of the instrument provides the Attorney-General with discretion to authorise financial assistance in relation to a person's legal representation at a hearing or application for administrative review of a matter arising under the Act, if satisfied that refusing the application would result in serious financial difficulty or the circumstances of the case are of such a special nature that the application should be granted.¹⁷

1.45 Under Senate standing orders 23(3)(i) and 23(3)(g), where an instrument empowers a decision-maker to make discretionary decisions, the committee generally expects that those decisions should be subject to independent merits review. However, where they are nonetheless excluded from merits review, the committee considers that the explanatory statement should comprehensively justify the nature and scope of the relevant exclusions. The committee also expects the explanatory statement to explain what characteristics of the decisions justify their exclusion by applying the factors in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*¹⁸

1.46 In this regard, the explanatory statement does not explain whether decisions under subsections 6(7) and 7(8) are subject to independent merits review.

1.47 In the case of Part 4, the explanatory statement explains that the instrument 'do[es] not provide for merits review', but it does not justify the nature or scope of that exclusion or provide a justification with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

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

- **whether the decisions under subsections 6(7) and 7(8) (in Part 2) of the instrument are subject to independent merits review and, if not, what characteristics of those decisions justify the exclusion of independent merits review, by reference to the factors set out in the Administrative**

¹⁶ Defined in subsections 6(5) and 7(6) respectively.

¹⁷ Subsections 13(3) and 14(2).

¹⁸ Administrative Review Council (1999), [What decisions should be subject to merits review?](#)

Review Council's guidance document, *What decisions should be subject to merits review?*; and

- **what characteristics of the decisions in Part 4 of the instrument justify the exclusion of independent merits review, by reference to the factors set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?***

Chapter 2

Concluded matters

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

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

Chapter 3

Agency engagement

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

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

New matters

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

Instrument

Aviation Transport Security (Screening Officer Requirements) Determination 2023 [F2023L00962]

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

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

Radiocommunications (Spectrum Licence Allocation—3.4/3.7 GHz Bands) Determination 2023 [F2023L00865]

Statement of Principles concerning peripheral neuropathy (Balance of Probabilities) (No. 73 of 2023) [F2023L00941]

Statement of Principles concerning peripheral neuropathy (Reasonable Hypothesis) (No. 72 of 2023) [F2023L00940]

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

Concluded matters

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

Instrument

Commonwealth Procurement Rules 13 June 2023 [F2023L00766]

Long Service Leave (Commonwealth Employees) Amendment (Recognising Transferring Employees) Regulations 2023 [F2023L00834]

Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Regulations 2023 [F2023L00775]

Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Regulations 2023 [F2023L00777]

Ozone Protection and Synthetic Greenhouse Gas Management (Non-grandfathered Quota—2024-2025) Determination 2023 [F2023L00774]

Radiocommunications (Spectrum Licence Allocation—3.4/3.7 GHz Bands) Determination 2023 [F2023L00865]

Statement of Principles concerning peripheral neuropathy (Balance of Probabilities) (No. 73 of 2023) [F2023L00941]

Statement of Principles concerning peripheral neuropathy (Reasonable Hypothesis) (No. 72 of 2023) [F2023L00940]

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

Chapter 4

Undertakings

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

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

New undertakings

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

Instrument	Undertaking	Date made
Public Service Regulations 2023 [F2023L00368]	The Minister for the Public Service undertook to amend the explanatory statement in response to the committee's scrutiny concerns.	4/07/2023

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

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

Part II—Matters of interest to the Senate

Chapter 5

Expenditure and taxation in delegated legislation

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

Commonwealth expenditure

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

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

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

Instrument	Amount	Grant/Program
Industry Research and Development (Australia-Vietnam Science, Technology and Innovation Cooperation Initiative Program) Instrument 2023 [F2023L00947]	\$1.5 million	Australia-Vietnam Science, Technology and Innovation Cooperation Initiative Program
Industry Research and Development (Resources Sector Methane Abatement Technology Development Program) Instrument 2023 [F2023L00961]	\$10 million	Resources Sector Methane Abatement Technology Development Program

¹ Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the [committee's website](#).

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

Chapter 6

Exemptions from disallowance and sunseting

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

Exemptions from disallowance

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

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

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

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁴
- is exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the *Legislation Act 2003*;⁵
- overrides or modifies primary legislation;

³ For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

⁴ Items 1 to 4 of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from disallowance: instruments requiring the approval of either or both Houses of Parliament; instruments that are directions by a minister to any person or body; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

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

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

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

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

Instruments which do not meet the committee's expectations

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

Instrument

Automatic Mutual Recognition (New South Wales) (Exemption—Various) Declaration 2023 [F2023L00924]

Biosecurity (Biosecurity Response Zone for Foot and Mouth Disease—Relevant Landing Places) Determination 2023 [F2023L00883]

Biosecurity (Biosecurity Response Zone for Foot and Mouth Disease—Relevant Ports) Determination 2023 [F2023L00893]

Biosecurity (First Point of Entry—Port of Port Adelaide) Amendment (2023 Measures No. 1) Determination 2023 [F2023L00967]

Biosecurity (First Point of Entry—Port of Sydney) Amendment (2023 Measures No. 1) Determination 2023 [F2023L00968]

Federal Financial Relations (National Partnership Payments—2022-23 Payment No. 13) Determination 2023 [F2023L00881]

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

Instrument

Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 1) Determination 2023 [F2023L00964]

Local Government (Financial Assistance) (Final Factor for 2022-23 and Estimated Factor for 2023-24) Determination 2023 [F2023L00887]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Enhancing the Home Guarantee Scheme) Direction 2023 [F2023L00882]

Seafarers Rehabilitation and Compensation Directions 2023 [F2023L00938]

Exemptions from sunseting

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

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

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

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

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

⁷ For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, [Resolutions relating to oversight of delegated legislation](#).

- is exempt from sunseting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;⁸
- is exempt from sunseting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003*;⁹
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

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

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

⁸ Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunseting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

⁹ Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#) (March 2021) pp. 50–53 and 106–107.

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

Instruments which do not meet the committee's expectations

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

Instrument

Customs Legislation Amendment (Status of Forces Agreements) By-Laws 2023 [F2023L00946]

Local Government (Financial Assistance) (Final Factor for 2022-23 and Estimated Factor for 2023-24) Determination 2023 [F2023L00887]

National Housing Finance and Investment Corporation Investment Mandate Amendment (Enhancing the Home Guarantee Scheme) Direction 2023 [F2023L00882]

Norfolk Island Applied Laws Amendment (Suspension) Ordinance 2023 [F2023L00869]

Seafarers Rehabilitation and Compensation Directions 2023 [F2023L00938]

**Senator Linda White
Chair**