

The Senate

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Standing  
Committee for the  
Scrutiny of Delegated  
Legislation

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Delegated Legislation Monitor

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Senator Catryna Bilyk	Tasmania, ALP
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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.

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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](#).

**Guidelines**

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

**Other resources**

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

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

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

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

## Report snapshot

<b>Scrutiny period</b>	
Legislative instruments registered on the Federal Register of Legislation between 28 February and 25 March 2024	164
Instruments in this period exempt from disallowance	23
<b>Chapter 1: New and ongoing matters</b>	
New legislative instruments commented on in report	1
Ongoing legislative instruments commented on in report	2
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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.

### Jervis Bay Territory Rural Fires Rules 2024<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2024L00347</a>
<b>Purpose</b>	The purpose of the instrument is to make rules, as permitted by the Jervis Bay Territory Rural Fires Ordinance 2014, to provide effective and efficient fire management services to the Jervis Bay Territory. The instrument replaces the Jervis Bay Territory Rural Fires Rule 2014 which sunsets on 1 October 2024.
<b>Authorising legislation</b>	<i>Jervis Bay Territory Rural Fires Ordinance 2014</i>
<b>Portfolio</b>	Infrastructure, Transport, Regional Development, Communications and the Arts
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 21 March 2024).  Notice of motion to disallow must be given by 12 August 2024.

#### Overview

1.3 The Jervis Bay Territory Rural Fires Rules 2024 (the instrument) are made under subsection 98(1) of the Jervis Bay Territory Rural Fires Ordinance 2014 (the Ordinance), to provide fire management services to the Jervis Bay Territory (JBT). The Ordinance provides the legislative framework for fire management services to the JBT. It establishes the JBT Rural Fire Service, the JBT Fire Management Committee and deals with other matters relating to bushfire prevention, such as preparation of JBT Bush Fire Management Plans and issuing of notices and fire permits.

1.4 Subsection 98(1) of the Ordinance enables the minister to make rules in relation to the issuing of fire permits, the classification of substances as combustible, the

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Jervis Bay Territory Rural Fires Rules 2024, *Delegated Legislation Monitor 5 of 2024*; [2024] AUSStaCSDLM 19.

operation of committees, the service of notices or directions under the Ordinance, the conduct and discipline of members of the Rural Fire Service (RFS), and the operations of rural fire brigades.

### **Scrutiny concerns**

#### ***Conferral of discretionary powers;<sup>2</sup> adequacy of explanatory materials<sup>3</sup>***

1.5 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. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether its accompanying explanatory statement provides sufficient information to gain a clear understanding of the instrument.

1.6 The committee considers that instruments conferring broad discretionary powers on a person should set out the factors which the person must consider in exercising the discretion. The explanatory statement should also address the purpose and scope of the discretion, why it is necessary, and explain who will be exercising the discretion, including whether they possess the appropriate qualifications and necessary skills. The committee also expects the explanatory statement to outline the nature and source of any relevant limitations on the exercise of the powers.

1.7 The instrument contains a number of broad discretionary provisions, but neither the instrument nor its explanatory statement provides an adequate explanation of the factors that may be considered in exercising the discretion.

1.8 Specifically, subsection 7(2) enables the minister to refuse to list a person's name on a brigade register if, 'in the Minister's opinion' the person is not a 'fit and proper person' to be a member. The explanatory statement provides that, 'in practice', this assessment will be made based on the person's application and the outcome of 'administrative processes such as a Police Check'. However, it is unclear to the committee what specific factors in the application or other documents the minister will take into account in forming this opinion. It is also unclear what other 'administrative processes' might include and the weight to be given to each factor that is taken into account in forming the relevant opinion.

1.9 Similarly, paragraph 9(2)(e) enables the minister to remove a person's name from the brigade register if 'in the Minister's opinion' they are no longer a 'fit and proper person' to be a member of the brigade. In contrast with a refusal to list a person's name on the register on the basis that they are 'not' a fit and proper person, subsection 9(3) provides that 'without limiting paragraph (2)(e)', the minister may form an opinion that a person is 'no longer' a fit and proper person to be a member if

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

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



they (a) have not been an active member for at least 12 months, or (b) have not paid their annual subscription in accordance with the brigade's constitution. However, while subsection 9(3) provides a non-exhaustive list of factors that may be taken into account, it is not clear from either the instrument or its explanatory statement what other factors may be taken into account in exercising this discretion. In this regard, the explanatory statement restates the grounds for removal under subsection 9(2) of the instrument, which include where, in the Minister's opinion the person is no longer a fit and proper person to be a rural fire brigade member.

1.10 Finally, subsection 7(4) provides that a person's listing on a brigade register is subject to 'such conditions as may be imposed by the Minister'. Subparagraph 11(4)(c)(iv) allows the 'appropriate disciplinary authority' to recommend that the minister impose conditions under subsection 7(4) in relation to a breach of discipline. However, it is unclear from the instrument or its explanatory statement what such conditions, including in relation to a breach of discipline, may include or what specific factors the minister would take into account in deciding whether to impose any such conditions.

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

- **why it is considered necessary and appropriate for the minister to have broad discretionary powers under the instrument, including in particular those provided under subsections 7(2), 7(4) and 9(2);**
- **whether further detail can be provided regarding the factors the minister may take into account in determining that a person is not, or is no longer, a 'fit and proper person' under subsections 7(2) and 9(2) of the instrument and the weight given to each of those factors; and**
- **what factors the minister may take into account in deciding whether to impose any conditions on a person's listing on a brigade register under section 7(4) and what such conditions are likely to include.**

***Compliance with the Legislation Act 2003 - incorporation;<sup>4</sup> incorporated materials freely accessible;<sup>5</sup> adequacy of explanatory materials<sup>6</sup>***

1.12 Senate standing order 23(3)(a) requires the committee to scrutinise each instrument as to whether it is in accordance with its enabling Act and otherwise complies with all legislative requirements. This includes the requirement in paragraph 15J(2)(c) of the *Legislation Act 2003* (the Legislation Act) that the explanatory statement to an instrument that incorporates a document describe that document, the manner in which it is incorporated and how it may be obtained. In addition, under

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<sup>4</sup> Senate standing order 23(3)(a).

<sup>5</sup> Senate standing order 23(3)(f).

<sup>6</sup> Senate standing order 23(3)(g).

Senate standing order 23(3)(f), the committee expects that any incorporated documents may be freely accessed and used.

1.13 The instrument makes provision in relation to 'Service Standards' and 'relevant Service Standards'; however, it is unclear whether and which specific standards have been incorporated by reference, or where they may be freely accessed and used.

1.14 Notably, subsection 6(3) requires that in determining whether the constitution for a rural fire brigade should be amended, members must take into consideration 'any relevant Service Standards'. Under subsection 8(2), the minister may remove a person's name from the register if, at the end of their probationary period, they have not achieved a 'satisfactory level of competency required by the Service Standards'. Under paragraph 11(1)(c), it is a breach of discipline if a member fails to comply with 'the Service Standards' and, under paragraph 11(3)(a), the appropriate disciplinary authority may take disciplinary action if 'an alleged breach of discipline is dealt with in accordance with the procedure set out in the Service Standards'. In addition, the 'appropriate disciplinary authority' is defined in paragraph 11(5)(b) with reference to 'the procedure set out in the Service Standards'. Finally, under subsection 13(2), written reports of relevant fires, incidents or emergencies must be given to the minister within the time required by, and include any matters required to be covered by, the Service Standards.

1.15 The 'Service Standards' are defined under section 11 of the Ordinance as the written Service Standards in connection with operation, management and control of the RFS that may be issued by the minister, as they exist from time to time.<sup>7</sup> Relevantly, paragraph 14(1)(b) of the Legislation Act provides that if enabling legislation authorises or requires provision to be made in relation to any matter by a legislative instrument, the instrument may (unless a contrary intention appears) make provision in relation to that matter by applying, adopting or incorporating any matter contained in an instrument or other writing but may not do so from time to time, unless the contrary intention appears (subsection 14(2)). In this case, the explanatory statement to the instrument indicates that, in practice, the Service Standards applying to New South Wales Rural Fire Service members apply to JBT Rural Fire Service members.

1.16 However, while section 11 of the Ordinance appears to enable the incorporation into the instrument of any such standards by reference, as they exist from time to time, it is unclear whether the Service Standards applying to the New South Wales Rural Fire Service standards have been formally incorporated under this provision. In addition, neither the instrument nor the explanatory statement describes the specific standard/s referred to in each of the above-noted provisions, their manner of incorporation, or where they can be freely accessed and used.

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<sup>7</sup> See a note to section 4 of the Jervis Bay Territory Rural Fires Rules 2024, and section 6 of the Jervis Bay Territory Rural Fires Ordinance 2014.

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

- whether the Service Standards defined under the Ordinance have been incorporated into the instrument; and, if so,
- which specific Standard or Standards are incorporated in relation to subsection 6(3), subsection 8(2), section 11 and subsection 13(2) of the instrument; and
- whether the instrument's explanatory statement can be amended to specify the specific Standards that have been incorporated under each of the above provisions, their manner of incorporation and where they can be freely accessed and used.

**Privacy<sup>8</sup>**

1.18 Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy.

1.19 The committee considers that provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary, rather than delegated, legislation. Where an instrument nevertheless contains such provisions, the explanatory statement should explain the nature and scope of the provisions (including the nature and extent of the information that may be disclosed and the persons and/or entities to whom disclosure is permitted). The explanatory statement should also address why the provisions are considered necessary and appropriate, what safeguards are in place to protect the personal information, and whether these are set out in law or in policy (including whether the *Privacy Act 1988* (the Privacy Act) applies).

1.20 Under section 13 of the instrument, if a rural fire brigade attends a fire, incident or other emergency, the officer in charge must ensure that the minister receives a written report on the fire, incident or emergency. Section 21 of the instrument also requires the minister to keep a register of the name of each member of the RFS who is given a commendation or award for long service, bravery or other forms of meritorious service and details of the commendation or award.

1.21 However, the explanatory statement does not explain the nature and scope of information that may be collected in a report under section 13, including whether it might contain personal information. Nor does it explain whether and how any personal information collected under sections 13 or 21 may be used or disclosed, or whether there are any safeguards in place to protect the use, collection or disclosure of such personal information.

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

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<sup>8</sup> Senate standing order 23(3)(h).

- **the nature and scope of the information that may be collected, used or disclosed under section 13 of the instrument and whether this is likely to include personal information; and**
- **whether any safeguards apply to protect any personal information collected, used or disclosed under either section 13 or section 21 of the instrument and whether these are set out in law or policy, including whether the Privacy Act applies.**

***Procedural fairness;<sup>9</sup> clarity of drafting;<sup>10</sup> adequacy of explanatory materials<sup>11</sup>***

1.23 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including whether the instrument abrogates procedural fairness. In relation to procedural fairness, the common law right to procedural fairness is underpinned by the fair hearing rule and the rule against bias. The fair hearing rule requires a person who may be adversely affected by a decision to be given an adequate opportunity to state their case before the decision is made.

1.24 Further, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether its explanatory statement provides sufficient information to gain a clear understanding of the instrument. Senate standing order 23(3)(e) requires the committee to scrutinise each instrument as to whether its drafting contains an error or is unclear.

1.25 Section 11 enables the 'appropriate disciplinary authority' to take disciplinary action, as set out in subsection 11(4), if a member of a rural fire brigade commits a breach of discipline on the grounds set out in subsection 11(1). One of these grounds (paragraph 11(1)(b)) relates to a member who is 'negligent, careless, inefficient or incompetent' in the discharge of their duties. Subsection 12(1) requires that, before taking disciplinary action, the appropriate disciplinary authority investigates the alleged breach of discipline and gives the member at least 14 days' notice of their findings and proposed disciplinary action. Although subsection 12(2) enables the member to appeal, within 14 days of receiving the notice, the findings of the authority or any proposed disciplinary action, it is not clear on the face of the instrument or the explanatory statement whether the member has an adequate opportunity to state their case prior to the appropriate disciplinary authority making a decision to take disciplinary action. The committee also notes the limited 14-day time frame for making an appeal.

1.26 Where an instrument limits or otherwise does not provide for procedural fairness in relation to a decision adversely affecting a person, the committee expects

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<sup>9</sup> Senate standing order 23(3)(h).

<sup>10</sup> Senate standing order 23(3)(e).

<sup>11</sup> Senate standing order 23(3)(g).

its explanatory statement to provide a comprehensive justification for the relevant limitation or exclusion. In this regard, the instrument and the explanatory statement do not clarify whether procedural fairness is provided for in relation to decisions to take disciplinary action under section 11 or seek to justify its exclusion. This is particularly important, noting that disciplinary action – such as the suspension, demotion or removal of a member from the brigade register – will adversely affect the member.

1.27 In addition, it is unclear what is meant by the terms 'careless' and 'inefficient' in paragraph 11(1)(b). The committee notes the importance of enabling individuals to understand the law to which they are subject, particularly where disciplinary action may affect rights, obligations or interests.

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

- **whether procedural fairness is provided for in relation to decisions to take disciplinary action under section 11 of the instrument and, if not, why its exclusion is considered necessary and appropriate;**
- **if procedural fairness is not provided for, whether any additional safeguards apply, noting the limited 14 day period for seeking appeal; and**
- **what is meant by the terms 'careless' and 'inefficient' under paragraph 11(1)(b) of the instrument and whether the instrument or the explanatory statement can be amended to define these terms.**

## Ongoing matters

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

### Migration Amendment (Bridging Visa Conditions) Regulations 2023<sup>12</sup>

<b>FRL No.</b>	<a href="#">F2023L01629</a>
<b>Purpose</b>	The instrument amends the Migration Regulations 1994 to make technical amendments to provisions enabling the minister to grant a Bridging R (Class WR) visa without application, make amendments consequential to amendments to the <i>Migration Act 1958</i> , set out the operation and application of certain visa conditions, and provide for periodic review of the imposition of certain visa conditions.
<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 February 2024). Committee gave notice of motion to disallow on 15 May 2024.

#### Overview

1.30 The Migration Amendment (Bridging Visa Conditions) Regulations 2023 (the instrument) make a number of amendments to the Migration Regulations 1994 (Migration Regulations). These include amendments to set out the application and operation of certain visa conditions which must be applied to a Bridging R (Class WR) visa (BVR) in certain circumstances and to provide for periodic review of the imposition of certain conditions specified in the Migration Regulations, including in relation to curfews and monitoring devices.

1.31 The instrument also makes technical amendments to provisions enabling the minister to grant a BVR without application, as well as amendments consequential to those that would be made by the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Matters) Act 2023*. These amendments follow from the insertion and amendment of a number of visa conditions in the Migration Regulations, made by the *Migration Amendment (Bridging Visa Conditions)*

<sup>12</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Bridging Visa Conditions) Regulations 2023; [2024] AUSStaCSDLM 20.

Act 2023 following the High Court's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)*.<sup>13</sup>

1.32 The committee raised scrutiny concerns with the instrument on 7 February 2024, in *Delegated Legislation Monitor 1 of 2024*,<sup>14</sup> and the minister provided a response on 3 April 2024.<sup>15</sup> As the committee retains scrutiny concerns about the below matters, it has resolved to raise those concerns with the minister.

### Scrutiny concerns

#### ***Significant matters in delegated legislation***<sup>16</sup>

1.33 In *Delegated Legislation Monitor 1 of 2024*,<sup>17</sup> the committee raised concerns about the inclusion of significant matters in delegated legislation. The instrument amends a number of existing, and specifies two new, conditions for BVR visa holders, including amendments to conditions 8612 and 8615 so that BVR holders in the NZYQ-affected cohort are only required to notify the department of the details of persons ordinarily residing with them and membership of organisations where the BVR holder has been convicted of an offence involving a minor or other vulnerable person.<sup>18</sup> It also makes amendments so that conditions relating to financial transactions, bankruptcy, curfews and electronic monitoring imposed on a BVR granted to a non-citizen will only be imposed for 12 months.<sup>19</sup>

1.34 The instrument's explanatory statement provides that these matters are appropriate for inclusion in delegated legislation because it has been the consistent practice of the Government of the day to include detailed matters concerning visa criteria and conditions in the regulations, because the *Migration Act 1958* (the Migration Act) expressly provides for such matters to be prescribed in regulations, and their inclusion in delegated legislation enables the government to effectively manage operation of Australia's visa program and respond quickly to emerging needs.

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<sup>13</sup> The Senate Standing Committee for the Scrutiny of Bills has commented on the Migration (Bridging Visa Conditions) Bill 2023, which became the *Migration (Bridging Visa Conditions) Act 2023*. See Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 15 of 2023](#) (29 November 2023) pp. 7-27.

<sup>14</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp. 2-7.

<sup>15</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>16</sup> Senate standing order 23(3)(j).

<sup>17</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp. 4-6.

<sup>18</sup> Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 18 in Part 1 of Schedule 1.

<sup>19</sup> Migration Amendment (Bridging Visa Conditions) Regulations 2023, item 12 in Part 1 of Schedule 1.

1.35 While noting this explanation, the committee reiterated its concern that, as a matter of principle, significant matters should ordinarily be included in primary legislation, due to the additional level of parliamentary scrutiny attached to the legislative process for primary legislation. The committee also noted its concern that delegated legislation was further amending the BVR framework a short time after the Migration Regulations had been recently amended by the *Migration Amendment (Bridging Visa Conditions) Act 2023*. For these reasons, the committee requested the minister's advice as to why it is considered necessary and appropriate in this instance to further amend the BVR framework by delegated, rather than primary, legislation.

*Minister's response*<sup>20</sup>

1.36 In his response of 3 April 2024, the minister advised that it is the usual practice of the Government of the day to provide for detailed matters relating to visa criteria and conditions in the Migration Regulations, that the Migration Act expressly provides for this and that, as the individual requirements and conditions of each visa subclass are prescribed in Schedule 2 to the Migration Regulations, it is necessary to amend Schedule 2 in order to update these requirements or conditions imposed on a visa.

*Committee view*

1.37 The committee notes the minister's advice that, to update the visa requirements or conditions which are prescribed in Schedule 2 to the Migration Regulations, it is necessary to amend that Schedule to the regulations and that this is permitted by the Migration Act.

1.38 The committee also notes the advice that it has been the consistent practice of governments to provide for such matters in the Migration Regulations. However, the committee wishes to reiterate its specific concerns about the further amendment of Schedule 2 by delegated legislation a short time after Schedule 2 was amended by primary legislation through the *Migration Amendment (Bridging Visa Conditions) Act 2023*. In particular, the committee notes with concern that this further amendment by delegated legislation involves a lesser degree of parliamentary oversight than the initial amendments related to the NZYQ-affected cohort.

1.39 The committee reiterates that, as a matter of principle, significant matters should ordinarily be included in primary legislation, due to the additional level of parliamentary oversight attached.

**1.40 Noting the minister's advice, the committee concludes its examination of the instrument in relation to this issue. However, the committee has resolved to draw its concerns about the additional amendments made by delegated legislation to the attention of the Senate under standing order 23(4).**

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<sup>20</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.



**Conferral of discretionary powers;<sup>21</sup> availability of independent merits review<sup>22</sup>**

1.41 The instrument inserts a new provision into the Migration Regulations, to provide that if specified visa conditions, relating to electronic monitoring, financial transactions, bankruptcy and curfews are imposed on a BVR holder, the visa holder will be subject to the conditions for 12 months.<sup>23</sup> The instrument also makes amendments to require the minister to impose such conditions when a BVR is granted,<sup>24</sup> if new subclause 070.612A(3) applies,<sup>25</sup> unless the minister is satisfied that it is 'not reasonably necessary' to impose a condition for the protection of any part of the community.

1.42 The explanatory statement explains that the purpose of the amendment is to provide the minister with authority to exercise a discretion not to impose a mandatory visa condition where satisfied this is 'not reasonably necessary' for protection of the community and that under new subclause 070.612A(2), the minister must consider the reasonable necessity of each condition for the protection of the community and the extent to which each of the other conditions contribute to this purpose, in sequential order.<sup>26</sup> However, as it was unclear from the instrument, the committee requested the minister's advice as to whether further detail could be provided regarding the factors that the minister may take into account in determining whether each condition is 'not reasonably necessary' for protection of the community, and whether any safeguards or limitations apply to exercise of the minister's powers or functions under new subclause 070.612A(1) including any review mechanisms, such as independent merits review.

**Minister's response<sup>27</sup>**

1.43 In his response, the minister advised that although there is no exhaustive list of matters relevant to the consideration of whether a condition is 'not reasonably necessary' for protection of the community, these conditions have a protective

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<sup>21</sup> Senate standing order 23(3)(c).

<sup>22</sup> Senate standing order 23(3)(i).

<sup>23</sup> Condition 8621 requires a BVR holder in the NZYQ-affected cohort to wear a monitoring device at all times; condition 8617 requires them to notify Immigration in relation to financial transactions; condition 8618 requires them to notify Immigration in relation to bankruptcy; and condition 8620 requires them to abide by a curfew.

<sup>24</sup> New subclause 070.612A(1), inserted by item 17 in Part 1 of Schedule 1.

<sup>25</sup> That is, if the visa was granted under regulation 2.25AAA and at the time of grant, there was no real prospect of the removal of the holder from Australia becoming practicable in the reasonably foreseeable future or the visa was granted under regulation 2.25AB.

<sup>26</sup> Explanatory statement p. 23. See also new subclause 070.612A(2) which requires the minister to decide whether or not to impose each condition in the following sequential order: 8621 (electronic monitoring), 8617 (financial transactions), 8618 (bankruptcy) and 8620 (curfews).

<sup>27</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

purpose having regard to the risk of harm the non-citizen poses. The minister provided a non-exhaustive list of factors that would be relevant to that consideration, broadly regarding the nature and frequency of past offending or other serious conduct; rehabilitation and matters going to the likelihood of engaging in further conduct of that kind; other conditions addressing the risk; residential and family circumstances and other community support; and the extent to which any other factors address the risk (for example, if the non-citizen is subject to parole or bail conditions or in criminal detention).

1.44 The minister further provided a non-exhaustive list of the kind of information to which the minister may have regard in considering these matters, such as criminal history, reports from law enforcement or correctional authorities, information about parole conditions or restrictive measures to which the non-citizen will be subject while in the community and representations from the non-citizen or on their behalf (for example, character references).

1.45 In response to the committee's queries about safeguards, such as the availability of independent merits review, the minister provided advice about the granting of a visa under the Migration Act. He advised that section 76E of the Migration Act applies where there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future and the BVR is subject to a condition prescribed in the Migration Regulations. Under section 76E, while the rules of natural justice do not apply, if the visa holder makes representations to the minister about why the visa should not be subject to one or more of these conditions and the minister is satisfied that the conditions are 'not reasonably necessary' for the protection of the Australian community, the minister must grant the individual a further BVR which is not subject to those conditions. The minister further advised that a decision to grant a visa subject to prescribed conditions is not reviewable by the Administrative Appeals Tribunal. However, following representations to the Minister by a non-citizen, a decision by the Minister 'not to grant a BVR that is not subject to one or more of the prescribed conditions' is reviewable under paragraph 338(4)(c) of the Migration Act.

1.46 In addition, the minister noted the safeguard in new regulation 2.25AE that, if these conditions are imposed on a BVR, they are only imposed for a period of 12 months, which operates to ensure there is some form of review at least every 12 months. Finally, the minister noted the availability of Commonwealth Ombudsman review and judicial review.

#### *Committee view*

1.47 The committee welcomes the minister's detailed advice about the kinds of factors that may be taken into account in determining whether a condition is 'not reasonably necessary' for protection of the community. However, the committee considers that this information is appropriate for inclusion in the instrument's explanatory statement, in line with its expectations, noting the ability for such

conditions to significantly impact on the rights and liberties of individuals. Further, the committee's general expectation is that explanatory materials contain sufficient information to gain a clear understanding of the instrument.

1.48 The committee notes the minister's advice that, while independent merits review is not available for a decision to grant a visa under the Migration Act, review is available in relation to a decision 'not to grant a BVR that is not subject to one or more of the prescribed conditions'. The committee welcomes the inclusion of independent review in relation to the decision not to grant a BVR that is not subject to one or more of the conditions. While the committee welcomes the availability of Ombudsman and judicial review, it does not consider that these factors alone provide an adequate justification for excluding merits review.

1.49 Furthermore, the committee notes that it was unclear, on the face of the explanatory statement, which decisions of the minister relating to the grant of a Bridging (Class WR) visa to a non-citizen were subject to independent merits review. In this regard, the committee notes, as a rule of law principle, the importance of ensuring that the explanatory statement to an instrument provides sufficient information to enable a clear understanding of the instrument, particularly where there is potential to significantly impact individuals' rights and obligations.

**1.50 In light of the above, the committee requests the minister's further advice as to:**

- **whether the instrument's explanatory statement can be amended to include the additional information provided by the minister regarding the factors relevant to the minister's consideration of whether a condition is 'not reasonably necessary' for the protection of the community; and**
- **whether the instrument's explanatory statement can be amended to make clear which decisions of the minister to grant a Bridging R (Class WR) visa to a non-citizen are subject to independent merits review, noting this does not appear to be clear on the face of the instrument's explanatory statement.**

### ***Consultation with persons affected***<sup>28</sup>

1.51 The instrument's explanatory statement indicates that the Office of Impact Analysis (OIA) and other Commonwealth agencies including the Attorney-General's Department, were consulted in relation to the instrument, but does not specify which agencies were consulted or whether any persons likely to be affected by the instrument, or experts, were consulted. Accordingly, the committee requested the minister's advice as to which other agencies were consulted and whether any persons likely to be affected, any experts or any stakeholders representing the NZYQ-cohort were consulted and, if so, who or, if not, why not.

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<sup>28</sup> Senate standing order 23(3)(d).

*Minister's response*<sup>29</sup>

1.52 In his response, the minister advised that the measures in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* and the instrument were informed by consideration of the High Court's written reasons in the NZYQ case, and consultation between the Department of Home Affairs (the department) and the Attorney-General's Department, the Australian Government Solicitor and the Office of Parliamentary Counsel in the course of developing and drafting the instrument. The minister also advised that following passage and commencement of that Act and the instrument, the department held roundtable discussions on three occasions with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross, to discuss matters relating to implementation of the legislative response to NZYQ, management of the NZYQ-affected cohort and to hear these organisations' views on these and related matters.

*Committee view*

1.53 The committee notes the minister's advice that the department worked with a number of relevant Commonwealth agencies in developing and drafting the instrument and that, following its commencement, held roundtable discussions with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross. However, while the committee welcomes liaison with those organisations, it emphasises the obligation in paragraph 17(2)(b) of the *Legislation Act 2003*, as reflected in Senate standing order 23(3)(d), that the rule maker must be satisfied that appropriate consultation was undertaken and may have regard to the extent to which those likely to be affected by the proposed instrument had an opportunity to comment on it, *prior to the instrument being made*. The committee also notes that, in this instance, it appears that there may be a range of other organisations representing the interests of those who may be affected by the measures in the instrument and it is therefore unclear as to why a broader range of stakeholders were not consulted with or involved in the roundtable discussions. The committee's concerns are heightened in this instance, as the scheme and the amendments made by the instrument have the potential to significantly impact the rights of the NZYQ-affected cohort.

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

- **the outcome of the roundtable discussions with the Australian Human Rights Commission, Commonwealth Ombudsman's Office and the Australian Red Cross as well as the basis on which these organisations were identified as relevant stakeholders; and**

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<sup>29</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

- **whether consideration could be given to further amending the Migration Regulations 1994 to address feedback provided as part of this consultation process.**

**1.55 In addition, the committee has resolved to place a 'protective' notice of motion to disallow the instrument to provide it with additional time to consider the matters outlined in relation to this instrument.**

## Biosecurity (Electronic Decisions) Determination 2023<sup>30</sup>

<b>FRL No.</b>	<a href="#">F2023L01672</a>
<b>Purpose</b>	The instrument provides the relevant provisions of the <i>Biosecurity Act 2015</i> under which a decision may be made by the operation of a computer program and the classes of persons that may use a computer program under an arrangement made under subsection 541A(1) of the Act, and the conditions of that use.
<b>Authorising legislation</b>	<i>Biosecurity Act 2015</i>
<b>Portfolio</b>	Agriculture, Fisheries and Forestry
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 February 2024).  Committee gave notice of motion to disallow on 15 May 2024.

### Overview

1.56 Subsection 541A(1) of the *Biosecurity Act 2015* (the Act) provides that the Director of Biosecurity may arrange for the use, under their control, of computer programs for any purposes for which a biosecurity officer may make a decision under a ‘relevant provision’ of the Act as specified in a determination made under subsection 541A(2), as authorised by subsection 541A(1).

1.57 The Biosecurity (Electronic Decisions) Determination 2023 (the instrument) is made under subsection 541A(2) of the Act and authorises (in subsection 5(1)) the Director of Biosecurity to arrange for a computer program to make decisions under four provisions of the Act. Those provisions enable a biosecurity officer to require a person whom a biosecurity officer ‘suspects on reasonable grounds’ has information, custody or control of documents in relation to an aircraft or vessel that is the subject of a pre-arrival report or in relation to a conveyance that is subject to a biosecurity control,<sup>31</sup> to answer questions or provide information, in writing, in relation to the relevant aircraft, vessel or conveyance. The instrument also specifies classes of persons that may use an authorised computer program for such a decision and sets out conditions on the use of such a computer program.

<sup>30</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Biosecurity (Electronic Decisions) Determination 2023, *Delegated Legislation Monitor 5 of 2024*; [2024] AUSStaCSDL M 21.

<sup>31</sup> See subsections 195(2), 195(3), 200(1) and 201(1) of the Act.

1.58 The committee first raised scrutiny concerns with the instrument on 7 February 2024 in *Delegated Legislation Monitor 1 of 2024*,<sup>32</sup> and the minister provided a response dated 21 March 2024.<sup>33</sup> The committee raised further concerns on 28 March 2024 in *Delegated Legislation Monitor 4 of 2024*,<sup>34</sup> to which the minister provided a response dated 26 April 2024.<sup>35</sup>

1.59 As the committee retains scrutiny concerns about the below matters, it has resolved to raise them with the Minister for Agriculture, Fisheries and Forestry and Emergency Management.

### Scrutiny concerns

#### ***Automated decision-making;<sup>36</sup> conferral of discretionary powers<sup>37</sup>***

1.60 In *Delegated Legislation Monitors 1 and 4 of 2024*,<sup>38</sup> the committee raised concerns as the instrument facilitates an automated decision-making process for discretionary decisions by determining, in subsection 5(1), four provisions of the Act under which decisions may be made by the operation of a computer program.

1.61 Specifically, the committee raised concerns and sought the minister's advice about the operation of a number of provisions of the Act identified as safeguards in the instrument's explanatory statement. This included in relation to:

- the factors considered in exercising discretion under subsections 541A(3), 541A(4) and 541A(7) of the Act;
- the factors and weighting of criteria in the business rules underpinning the computer program which assist with decision-making;
- mechanisms to identify and correct errors in automated decision-making;
- any specific safeguards in relation to the wide range of users of the computer program; and
- whether consideration had been given to the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide* (the

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<sup>32</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024) pp. 9-15.

<sup>33</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (28 March 2024) p. 3-7.

<sup>34</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 21-29.

<sup>35</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>36</sup> Senate standing order 23(3)(m).

<sup>37</sup> Senate standing order 23(3)(c).

<sup>38</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024) pp. 9-15.; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 21-29.

Ombudsman's Guide),<sup>39</sup> or addressing recommendations of the Royal Commission into the Robodebt scheme, which relate to legislative reform and establishment of a body to monitor and audit automated decision-making.<sup>40</sup>

1.62 The minister's response of 21 March 2024<sup>41</sup> included advice about how the Director of Biosecurity had taken 'reasonable steps' to ensure decisions by a computer program were based on grounds on which a biosecurity officer could have made the decision. Namely, that the arrangement under subsection 541A(1) of the Act provides measures and processes for electronic decisions that lead to the effective assessment and management of biosecurity risks, consistent with the grounds on which a biosecurity officer could have made a decision, and the overall objects of the Act. The minister also advised how the business rules operate to determine:

- whether extra information, answers to questions, or the production of documents, are required for further decisions to be made (other than by a computer);
- rule parameters and safeguards in the business rules; and
- an audit trail of decisions to assist in identifying and rectifying errors.

1.63 The minister also provided two examples of technical and scientific information that may be included in the business rules in relation to determining whether extra information, answers or documents are necessary.

1.64 In relation to safeguards on users of the computer program, the minister advised that the system is a secure environment accessible only through registration and that each user's access and action can be traced and reported on. Further, the department provides instructional and training material to ensure compliance with conditions of use of the program, including the need for accurate information entry. Finally, the minister indicated that the business rules, departmental policy and instructional material were designed with consideration of the Ombudsman's Guide, and that the Australian Government has committed to considering legislative reform in response to the Royal Commission into the Robodebt Scheme.

1.65 The committee welcomed the minister's detailed advice about the operation of a number of these safeguards on automated decision-making enabled by the instrument and, therefore, sought the minister's further advice in *Delegated*

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<sup>39</sup> Commonwealth Ombudsman, [Automated Decision-making Better Practice Guide](#) (updated January 2019).

<sup>40</sup> [The Royal Commission into the Robodebt Scheme](#) (July 2023) p. xvi.

<sup>41</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (28 March 2024) p. 3-7.



*Legislation Monitor 4 of 2024*,<sup>42</sup> as to whether the explanatory statement could be amended to include the advice provided about these matters.

1.66 However, it remained unclear to the committee what factors biosecurity officers would take into account and on what basis they would be satisfied that a decision was not consistent with the Act's objects or that another decision was more appropriate in the circumstances such that they would substitute the decision under subsection 541A(7) of the Act. The committee was also unclear as to the specific mechanisms employed to identify errors of the computer program, and how and when an audit trail would be generated to identify and rectify errors. Accordingly, in *Delegated Legislation Monitor 4 of 2024*, the committee sought the minister's further advice regarding these concerns.<sup>43</sup>

#### *Minister's response*<sup>44</sup>

1.67 In his correspondence of 26 April 2024, the minister advised that his department was in the process of amending the explanatory statement to include the additional detail provided regarding the operation of a number of the safeguards above, as requested by the committee in *Delegated Legislation Monitor 4 of 2024*.<sup>45</sup>

1.68 In response to the committee's further queries relating to the operation of safeguards under subsection 541A(7) of the Act, the minister advised that his department has a mandatory policy relating to automated decision-making under section 541A, that ensures appropriate control arrangements, risk mitigation measures and safeguards are in place to satisfy the Director of Biosecurity that the objects of the Act are being met and that computer program decisions conform with best practice principles of lawful administrative decision-making.

1.69 In addition, the minister detailed a dedicated feedback mechanism for persons affected by decisions made by the computer program and the arrangement made under subsection 541A(1). The mechanism allows an affected person to raise queries or concerns with an automated decision or advise of problems with reporting information into the computer program. This mechanism enables a biosecurity officer to identify if the relevant decision is appropriate or if a substituted decision is necessary. The minister also detailed some factors that a biosecurity officer may consider when determining whether to substitute a decision, including the type of

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<sup>42</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 21-29.

<sup>43</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 21-29.

<sup>44</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>45</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 26.

automated decision made by the computer program, the information available to the officer at the time and the accuracy of this information.

1.70 Regarding the audit trail and the identification and correction of errors, the minister advised that his department has auditing abilities to enable review of decisions made by the computer program, as well as processes in place to test the program's accuracy, including routine reviews and audits of automated decisions and information provided by users. The minister explained that these processes ensure that decisions are operating consistently with the relevant business rules and that, where required, the business rules can be updated. The department also retains a comprehensive set of computer program business rules to ensure capabilities to access earlier versions of business rules, providing transparency around historical decisions made by the computer program.

1.71 The minister also advised that, where an audit and review of an electronic decision identifies an incorrect decision, a decision may be substituted or the business rules of the computer program amended, to ensure that a subsequent decision is correct. The minister illustrated with an example, referring to the mandatory requirement under subsection 193(2) of the Act for the operator of a vessel to provide a pre-arrival report that includes information relating to the health status of passengers or crew, so as to enable a biosecurity officer to assess human health biosecurity risks. If the vessel operator becomes aware that information included in such a report is incorrect, they are required to update the information pursuant to subsection 194(1A) of the Act. If the vessel operator becomes aware that any of the vessel travellers or crew have signs or symptoms of a listed disease, they must notify the department as soon as practicable by submitting a Human Health Update in the computer program. Following this, the computer program can make a decision under subsection 200(1) of the Act to send a Human Health Questionnaire to the vessel operator and require the production of relevant specified documents, pursuant to subsection 201(1). This information and documentation then allows a biosecurity officer, rather than the computer program, to make an assessment of the biosecurity risk.

1.72 The minister also provided an example of where a biosecurity officer can substitute a decision in the case of a system error. That is, where there is a telecommunications outage, and the vessel operator is unable to provide updated information into the computer system. If this occurred, the system would make an incorrect decision to not request further information or documents. In such a case, this is a circumstance in which a biosecurity officer could substitute a decision to seek further information and documentation, and make an accurate assessment of the biosecurity risk.

#### *Committee view*

1.73 The committee welcomes the minister's undertaking to update the explanatory statement with further details on the safeguards that apply to automated decisions

under the instrument, relating to 'reasonable steps' under subsections 541A(3) and 541A(4) of the Act; the examples of the technical and scientific information for inclusion in the business rules; specific safeguards on users of the computer program and consideration of the Ombudsman's Guide.

1.74 The committee also welcomes the minister's further detailed advice regarding the safeguards in relation to electronic decisions under the instrument and the audit, identification and correction of errors. The committee considers that it would be useful to include this information in the instrument's explanatory statement. In particular, the committee considers that it would be helpful to detail in the explanatory statement the department's dedicated feedback mechanism, the audit process for correcting errors, and the factors that may be considered when a biosecurity officer is determining whether to substitute an automated decision, noting the capacity for discretionary decisions to affect the rights and obligations of individuals. In this regard, the committee restates the importance of ensuring that the instrument's explanatory statement provides sufficient information to enable a clear understanding of the instrument, particularly noting the impact of such discretionary decisions to impact rights and obligations.

**1.75 In light of the above, the committee requests the minister's advice as to whether the explanatory statement can be amended to include the further information provided in the minister's response regarding the following matters:**

- **the department's policy relating to automated decision-making under section 541A of the Act;**
- **the department's ability to audit decision-making outcomes made by the computer program, including the routine review and audit process;**
- **factors that a biosecurity officer may take into account under subsection 541A(7) of the Act; and**
- **the use of the department's dedicated feedback mechanism.**

**1.76 In addition, the committee has resolved to place a 'protective' notice of motion to disallow the instrument to provide it with additional time to consider these matters.**

***Availability of independent merits review;<sup>46</sup>consultation with persons affected<sup>47</sup>***

1.77 In *Delegated Legislation Monitors 1 and 4 of 2024*,<sup>48</sup> the committee raised concerns about the justification for excluding independent merits review, the

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<sup>46</sup> Senate standing order 23(3)(i).

<sup>47</sup> Senate standing order 23(3)(d).

<sup>48</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024) pp. 9-15.; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 21-29.

consultation that was undertaken in relation to the instrument and an apparent drafting error in the explanatory statement.

1.78 In response to the committee's concerns, the minister provided advice on 21 March 2024 regarding the:

- justification for the exclusion of independent merits review with reference to Administrative Review Council guidance on the basis that they are preliminary decisions;
- the consultation previously undertaken in relation to the relevant computer program; and
- ongoing regular meetings with users and those affected by the instrument.<sup>49</sup>

1.79 The committee requested the minister's advice as to whether the explanatory statement could be amended to include the advice provided about these matters.

1.80 The minister also undertook in his response of 21 March to amend the explanatory statement to correct a drafting error in the explanatory statement, where it referred to incorrect provisions of the instrument.

#### *Minister's response*<sup>50</sup>

1.81 In his response of 26 April 2024, the minister advised that his department was in the process of amending the explanatory statement to include the additional details requested by the committee, and the previous undertaking regarding the drafting error.

#### *Committee view*

1.82 The committee welcomes the minister's undertaking to amend the explanatory statement with the additional details provided regarding the justification for excluding independent merits review as well as the previous consultation and ongoing engagement in relation to the instrument.

**1.83 In light of the minister's undertaking to amend the explanatory statement in relation to the exclusion of independent merits review and consultation, the committee concludes its examination of the instrument in relation to these issues.**

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<sup>49</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (28 March 2024) p. 3-7.

<sup>50</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) 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).

### Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2024L00088</a>
<b>Purpose</b>	This instrument amends the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) to create exemptions from the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> for the issue or sale of securities and derivatives on specified low money laundering and terrorism financing risk domestic financial markets.
<b>Authorising legislation</b>	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
<b>Portfolio</b>	Attorney-General's
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 6 February 2024).  Notice of motion to disallow must be given by 15 May 2024.

#### Overview

2.2 Subsection 247(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) allows the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the rules) to specify circumstances in which the obligations in the Act do not apply to the provision of a designated service. The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024 (the instrument) amends the rules to exempt the issue or sale of securities and derivatives on specified low money laundering and terrorism financing risk domestic financial markets from the Act.

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024, *Delegated Legislation Monitor 5 of 2024*; [2024] AUSStaCSDLM 22.

2.3 The committee raised scrutiny concerns with the instrument in *Delegated Legislation Monitor 2 of 2024*, on 28 February 2024.<sup>2</sup> The Attorney-General provided a response dated 20 March 2024.<sup>3</sup> As the committee retained scrutiny concerns, it sought the Attorney-General's further advice in *Delegated Legislation Monitor 4 of 2024* on 28 March 2024.<sup>4</sup> The Attorney-General provided a further response on 18 April 2024.<sup>5</sup>

### Scrutiny concerns

#### ***Exemption from the operation of primary legislation;<sup>6</sup> parliamentary oversight<sup>7</sup>***

2.4 Subsection 247(3) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) allows the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (the rules) to specify circumstances in which the obligations in the Act do not apply to the provision of a designated service. The Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024 (the instrument) amends the rules to exempt the issue or sale of securities and derivatives on specified low money laundering and terrorism financing risk domestic financial markets from the Act.

2.5 In *Delegated Legislation Monitor 2 of 2024*, the committee raised concerns that, as the rules are exempt from sunseting and there does not otherwise appear to be a time limit in the instrument or the rules, the effect of the instrument is to create an ongoing exemption to the operation of the Act. It was also unclear to the committee why it was necessary and appropriate to include the exemptions in delegated, rather than primary, legislation.<sup>8</sup>

2.6 In response to the committee's queries regarding these matters, the Attorney-General advised on 20 March 2024 that the inclusion of exemptions in the rules ensures sufficient flexibility to make, amend and repeal exemptions to the Act, as circumstances require – in this case, the issue was time-sensitive and needed to be addressed faster than legislative amendment would allow. He further advised that the Australian Government had commenced consultation on reforms to the anti-money

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<sup>2</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2024](#) (28 February 2024), pp. 3-5.

<sup>3</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (20 March 2024), pp. 1-2.

<sup>4</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024), pp. 17-20.

<sup>5</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>6</sup> Senate standing order 23(3)(l).

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

<sup>8</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2024](#) (28 February 2024), p. 5.

laundering and counter-terrorism financing regime, as part of which the department was considering which exemptions currently contained in the rules should be moved into the Act. Those which are intended to be enduring would be included in the Act, while those which were intended to be limited in scope, have detailed conditions attached or likely require amendment to adapt to changing circumstances would be retained in the rules. However, those which are retained in the rules would be time-limited, consistent with the committee's expectations.<sup>9</sup>

2.7 The committee welcomed the Attorney-General's advice that the Government had commenced consultation on reforms to the regime and that the department proposed to move the exemptions intended to be enduring into the Act and time limit those that are retained in the rules. However, noting its expectations in this regard that exemptions in delegated legislation should operate no longer than strictly necessary, the committee requested the Attorney-General's advice as to whether an update could be provided on the expected timeframes in relation to reforms to the regime and the associated legislative amendments.<sup>10</sup>

#### *Attorney-General's response<sup>11</sup>*

2.8 In his response of 18 April 2024, the Attorney-General confirmed the committee's understanding that the proposed reforms would either codify existing exemptions that are intended to be enduring or attach sunset periods to exemptions that would only exist in the rules. Further, he advised that the department 'expects to commence second stage consultation shortly' as the next step in the progress of the proposed reforms and would seek views from industry and the public on detailed reform proposals, supported by consultation papers and stakeholder engagement.

#### *Committee view*

2.9 The committee welcomes the Attorney-General's confirmation that the proposed reforms would codify existing exemptions that are intended to be enduring or attach sunset periods to those exemptions which remain in the rules. In this regard, the committee re-iterates its expectations (reflected in Senate standing order 23(3)(I)) that where delegated legislation creates exemptions to primary legislation, such provisions should operate no longer than strictly necessary. The committee considers that in most cases, this means 3-5 years but, at the very least, a ten-year sunset period to facilitate a minimum level of oversight and ensure executive-made law remains fit-for-purpose and up to date.

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<sup>9</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (20 March 2024), pp. 1-2.

<sup>10</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024), p. 5.

<sup>11</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

2.10 The committee further welcomes the Attorney-General's advice that the department expects to commence second stage consultation 'shortly' as the next step in the progress of these reforms. While this is helpful information, the committee notes that the ongoing exemptions remain in delegated legislation until completion of the review.

**2.11 In light of the above, the committee has resolved to conclude its examination of the instrument but notes that it will continue to monitor the issue closely.**



## 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

ASIC Corporations (mFund) Instrument 2024/18 [F2024L00376]

Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification) Regulations 2024 [F2024L00271]

Defence Determination, Force Commander, Multinational Force and Observers – supporting benefits Determination 2024 [F2024L00231]

Environment Protection and Biodiversity Conservation (National Recovery Plan for Leadbeater's Possum (*Gymnobelideus leadbeateri*)) Instrument 2024 [F2024L00270]

Environment Protection and Biodiversity Conservation (Recovery Plan for the Spiny Rice-flower (*Pimelea spinescens* subsp. *spinescens*)) Instrument 2024 [F2024L00346]

Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 [F2024L00286]

Financial Accountability Regime Act (Information for register) Regulator Rules 2024 [F2024L00285]

Industry Research and Development (Defence Industry Export Program) Instrument 2024 [F2024L00353]

Migration (Code of Behaviour for Public Interest Criterion 4022) Instrument (LIN 24/031) 2024 [F2024L00381]

Migration Amendment (Subclass 192 (Pacific Engagement) Visa) Regulations 2024 [F2024L00327]

National Occupational Respiratory Disease Registry Determination 2024 [F2024L00288]

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

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**Instrument**

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**Radiocommunications Licence Conditions (PTS Licence) Determination 2024 [F2024L00316]**

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**Concluded matters**

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

**Instrument**

**Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification) Regulations 2024 [F2024L00271]**

**Defence Determination, Force Commander, Multinational Force and Observers – supporting benefits Determination 2024 [F2024L00231]**

**Environment Protection and Biodiversity Conservation (National Recovery Plan for Leadbeater's Possum (*Gymnobelideus leadbeateri*)) Instrument 2024 [F2024L00270]**

**Environment Protection and Biodiversity Conservation (Recovery Plan for the Spiny Rice-flower (*Pimelea spinescens* subsp. *spinescens*)) Instrument 2024 [F2024L00346]**

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<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 relation to instruments considered in this report and undertakings that the committee has made aware have been implemented as at 9 May 2024.

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
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2024 (Chapter 21 Amendments) [F2024L00088]	The Attorney-General undertook to codify in the <i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i> relevant exemptions intended to be enduring and to time limit those retained in delegated legislation.	20 March 2024
Biosecurity (Electronic Decisions) Determination 2023 [F2023L01672]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	21 March 2024
Biosecurity (Electronic Decisions) Determination 2023 [F2023L01672]	The minister undertook to further amend the explanatory statement to the instrument in response to the committee's concerns.	26 April 2024
Defence Determination, Force Commander, Multinational Force and Observers – supporting benefits Determination 2024 [F2024L00231]	The department undertook to progress amendments to the explanatory statement to the instrument and to other relevant instruments in response to the committee's scrutiny concerns.	23 April 2024
Environment Protection and Biodiversity Conservation (National Recovery Plan for Leadbeater's Possum ( <i>Gymnobelideus</i>	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	3 May 2024

<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.

<b>Instrument</b>	<b>Undertaking</b>	<b>Date made</b>
leadbeateri)) Instrument 2024 [F2024L00270]		
Environment Protection and Biodiversity Conservation (Recovery Plan for the Spiny Rice-flower ( <i>Pimelea spinescens</i> subsp. <i>spinescens</i> )) Instrument 2024 [F2024L00346]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	3 May 2024
Export Control (Animals) Amendment (Improving Regulatory Outcomes) Rules 2023 [F2023L01700]	The department undertook to progress amendments to the instrument's explanatory statement in response to the committee's scrutiny concerns.	20 March 2024
Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023 [F2023L01551]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	12 March 2024
Road Vehicle Standards Amendment (2023 Measures No. 1) Rules 2023 [F2024L00086]	The department undertook to progress amendments to the instrument's explanatory statement in response to the committee's scrutiny concerns.	20 March 2024

## Implemented undertakings

4.4 During this period, the following undertakings have been implemented.

<b>Instrument</b>	<b>Undertaking</b>	<b>Date implemented</b>
Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 [F2022L01457]	The Minister for Aged Care undertook that the explanatory statement for an amending instrument would include additional information requested for inclusion by the committee.	29 April 2024
Defence Determination, Force Commander, Multinational Force and Observers – supporting benefits Determination 2024 [F2024L00231]	The department undertook to progress amendments to the explanatory statement to the instrument and to other relevant instruments in response to the committee's scrutiny concerns.	8 May 2024
Export Control (Animals) Amendment (Improving Regulatory Outcomes) Rules 2023 [F2023L01700]	The department undertook to progress amendments to the instrument's explanatory statement in response to the committee's scrutiny concerns.	21 March 2024

Instrument	Undertaking	Date implemented
Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2022 [F2022L00222]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 2 of 2022 [F2022L00223]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 3 of 2022 [F2022L00209]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 4 of 2022	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 5 of 2022 [F2022L00217]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 6 of 2022 [F2022L00225]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 7 of 2022 [F2022L00227]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 8 of 2022 [F2022L00228]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Financial Sector (Collection of Data) (reporting standard) determination No. 9 of 2022 [F2022L00212]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024

Instrument	Undertaking	Date implemented
Financial Sector (Collection of Data) (reporting standard) determination No. 10 of 2022 [F2022L00214]	The Department of the Treasury undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	29 April 2024
Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023 [F2023L01551]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	18 March 2024
Radiocommunications Accreditation (Amateur Radio Examinations) Rules 2023 [F2023L01651]	The Australian Communications and Media Authority undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	23 February 2024
Vehicle Standard (Australian Design Rule 113/00 – Acoustic Vehicle Alerting Systems for Quiet Road Transport Vehicles) 2024 [F2024L00089]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	21 March 2024

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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. 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>1</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
<b>Financial Framework (Supplementary Powers) Amendment (Education Measures No. 1) Regulations 2024 [F2024L00311]</b>	\$0.6 million comprising two payments to be made in 2023-24 and 2024-25	Grant to the Trustees for the Catholic Diocese of Broken Bay
<b>Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2024 [F2024L00309]</b>	\$21.2 million over four years from 2023-24 \$14.2 million over four years from 2023-24 and \$3.9 million ongoing from 2027-28	Cyber systems in Pacific Island and Southeast Asian countries Australia-France Bilateral Roadmap
<b>Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 1) Regulations 2024 [F2024L00314]</b>	\$200 million over four years from 2023-24	Women and Girls in Sport – Play Our Way program
<b>Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts)</b>	\$13.6 million over four years from 2023-24	Arrangements with International Civil Aviation Organization (ICAO)

<sup>1</sup> Details of all instruments which authorise Commonwealth expenditure are published on the [committee's website](#).

<b>Measures No. 1) Regulations 2024 [F2024L00312]</b>	\$400.0 million over five years from 2023-24	Regional Roads Australia Mobile Program
	\$2.5 million over two years from 2023-24	Supporting Media Literacy in Culturally and Linguistically Diverse Communities
<b>Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 1) Regulations 2024 [F2024L00308]</b>	\$76.8 million over four years from 2023-24	Youpla Support Program
<b>Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2024 [F2024L00310]</b>	\$30.0 million over four years from 2023-24	Strengthening Families and Communities Partnership
<b>Financial Framework (Supplementary Powers) Amendment (Treasury Measures No. 1) Regulations 2024 [F2024L00313]</b>	\$0.5 million in 2023-24	Grant to the International Foundation for Ethics and Audit
<b>Industry Research and Development (Defence Industry Export Program) Instrument 2024 [F2024L00353]</b>	Not disclosed	Defence Industry Export Program
<b>Industry Research and Development (Small Business Cyber Resilience Service Program) Instrument 2024 [F2024L00266]</b>	\$8.1 million	Small Business Cyber Resilience Service program
<b>Industry Research and Development (Supermarket Price Transparency and Comparison Reports Program) Instrument 2024 [F2024L00355]</b>	\$1.1 million over four years from 2023-24	Supermarket Price Transparency and Comparison Reports 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.

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?
Migration (Visa Pre-application Process) Charge Regulations 2024 [F2024L00328]	Yes



## Chapter 6

### Exemptions from disallowance and sunseting

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

#### Exemptions from disallowance

6.2 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>2</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>3</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>4</sup>
- overrides or modifies primary legislation;

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<sup>2</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>3</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>4</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>5</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):

Instrument	Source of exemption
<b>Agricultural and Veterinary Chemicals (MRL Standard for Residues of Chemical Products) Amendment Instrument (No. 1) 2024 [F2024L00250]</b>	Subsection 44(1) of the <i>Legislation Act 2003</i>
<b>Classification (Accredited Persons) (Application for Revocation of Classification) Determination 2024 [F2024L00303]</b>	Subsection 44(1) of the <i>Legislation Act 2003</i>
<b>Classification (Publications, Films and Computer Games) Legislation Amendment Instrument 2024 [F2024L00299]</b>	Subsection 44(1) of the <i>Legislation Act 2003</i>
<b>Consumer Goods (Bicycle Helmets) Safety Standard 2024 [F2024L00362]</b>	Subsection 44(1) of the <i>Legislation Act 2003</i>

<sup>5</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.

Instrument	Source of exemption
<b>Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (PSS Scheme—Preserved Benefit Members) Approval 2024 [F2024L00295]</b>	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
<b>Family Law (Superannuation) (Provision of Information — Public Sector Superannuation Scheme) Amendment Determination 2024 [F2024L00293]</b>	Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015
<b>Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 1) 2024 [F2024L00301]</b>	Subsection 44(1) of the <i>Legislation Act 2003</i>
<b>Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) (Total Allowable Catch) Determination 2023 [F2023L01509]</b>	Subsection 44(1) of the <i>Legislation Act 2003</i>

## 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.<sup>6</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

<sup>6</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](#).

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>7</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>8</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
- 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

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<sup>7</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>8</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.



and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>9</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).

<b>Instrument</b>	<b>Source of exemption</b>
<b>Agricultural and Veterinary Chemicals (MRL Standard for Residues of Chemical Products) Amendment Instrument (No. 1) 2024 [F2024L00250]</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Charter of the United Nations (Listed Persons and Entities) Amendment (No. 2) Instrument 2024 [F2024L00251]</b>	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
<b>Classification (Accredited Persons) (Application for Revocation of Classification) Determination 2024 [F2024L00303]</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification) Regulations 2024 [F2024L00271]</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Classification (Publications, Films and Computer Games) Legislation Amendment Instrument 2024 [F2024L00299]</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Environment Protection and Biodiversity Conservation (National Recovery Plan for Leadbeater's Possum (<i>Gymnobelideus leadbeateri</i>)) Instrument 2024 [F2024L00270]</b>	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
<b>Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (PSS Scheme—Preserved Benefit Members) Approval 2024 [F2024L00295]</b>	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
<b>Family Law (Superannuation) (Provision of Information — Public Sector Superannuation Scheme) Amendment Determination 2024 [F2024L00293]</b>	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

<sup>9</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.

Instrument	Source of exemption
<b>Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 9) Determination 2024 [F2024L00352]</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 4) Determination 2023</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Greenhouse and Energy Minimum Standards (Exemption) Instrument (No. 1) 2024 [F2024L00301]</b>	Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Statute Law Amendment (Prescribed Forms) Regulations 2024 [F2024L00294]</b>	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 Subsection 54(1) of the <i>Legislation Act 2003</i>
<b>Superannuation Amendment (PSS Trust Deed) Instrument 2024 [F2024L00253]</b>	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015

**Senator Deborah O'Neill**  
Chair