

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 the Hon Linda Reynolds CSC (Deputy Chair)	Western Australia, LP
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 26 March and 13 May 2024	143
Instruments in this period exempt from disallowance	14
<b>Chapter 1: New and ongoing matters</b>	
New legislative instruments commented on in report	2
Ongoing legislative instruments commented on in report	0
<b>Chapter 2: Concluded matters</b>	
Legislative instruments of which the committee has concluded its examination following receipt of ministerial response	2
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New undertakings made by ministers or agencies to address the committee's scrutiny concerns	8
Undertakings which the committee was made aware had been implemented during this period	7
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<b>Chapter 5: Scrutiny of Commonwealth expenditure</b>	
Advance to the Finance Minister determinations	0
Instruments specifying Commonwealth expenditure under the <i>Financial Framework (Supplementary Powers) Act 1997</i> and the <i>Industry Research and Development Act 1986</i>	7
Levying of taxation in delegated legislation	0
<b>Chapter 6: Exemptions from disallowance and sunseting</b>	
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Instruments that do not meet the committee's expectations regarding exemptions from sunseting under standing order 23(3)(k)	7



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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.

### Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024<sup>1</sup>

<b>FRL No.</b>	<a href="#">F2024L00491</a>
<b>Purpose</b>	The purpose of the instrument is to regulate mixed waste paper and cardboard that is exported from Australia. The instrument imposes requirements that, from 1 October 2024, exporters hold a waste paper and cardboard export licence and make an export declaration for each consignment of regulated waste paper and cardboard that is to be exported.
<b>Authorising legislation</b>	<i>Recycling and Waste Reduction Act 2020</i>
<b>Portfolio</b>	Department of Climate Change, Energy, the Environment and Water
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 14 May 2024).  Notice of motion to disallow must be given by 19 August 2024.

#### Overview

1.3 The Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024 (the instrument) regulate the export of mixed waste paper and cardboard from Australia. The instrument imposes requirements that, from 1 October 2024, exporters hold a waste paper and cardboard export licence and make an export

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024, *Delegated Legislation Monitor 6 of 2024*; [2024] AUSStaCSDLM 57.

declaration for each consignment of regulated waste paper and cardboard that is to be exported.

1.4 The instrument also provides for mandatory and non-mandatory matters which the minister must or may have regard to in determining whether to grant, renew, vary, suspend or revoke an export licence, imposing conditions for an export licence, and deciding whether to give a direction to the holder of an export licence. The instrument also imposes obligations on licence holders, including requirements for record-keeping and notifying the minister of certain events.

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

### Scrutiny concerns

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

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

1.7 Subsection 21(2) of the instrument prescribes, for the purposes of section 181 of the *Recycling and Waste Reduction Act 2020* (the Act), circumstances in which a relevant Commonwealth liability of a person is taken to have been paid for the purposes of complying with provisions of the Act relating to the granting,<sup>4</sup> renewal<sup>5</sup> and variation<sup>6</sup> of an export licence. Section 181 of the Act authorises the rules to prescribe circumstances where a relevant Commonwealth liability is taken to have been paid for the purposes of a provision in the Act prescribed by the rules. Under subsection 21(3) of the instrument, in deciding whether to accept an undertaking given by a person under subsection 21(2), the minister may consider 'any other matter' that the minister considers relevant.

1.8 The committee is concerned that subsection 21(3) appears to confer a broad discretionary power on the minister and neither the instrument nor its explanatory statement defines 'any other matter' or provides guidance on the types of matters that may be considered relevant under this provision. The committee also expects that where an instrument confers broad discretionary powers, its explanatory statement should state the nature and source of any relevant limitations and safeguards, including whether they are contained in law or in policy.

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

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

<sup>4</sup> *Recycling and Waste Reduction Act 2020*, paragraph 34(2)(c).

<sup>5</sup> *Recycling and Waste Reduction Act 2020*, paragraph 39(3)(c).

<sup>6</sup> *Recycling and Waste Reduction Act 2020*, paragraph 42(4)(b).



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

- **what factors the minister may take into account in exercising their discretion to consider 'any other matter' under subsection 21(3);**
- **whether examples can be provided of the kinds of matters that may be considered relevant under subsection 21(3); and**
- **whether there are any safeguards or limitations in relation to this discretionary power.**

***Strict liability;<sup>7</sup> significant matters in delegated legislation<sup>8</sup>***

1.10 Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties. This includes whether the instrument provides for matters relating to offences of strict liability. Further, Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment. This includes whether an instrument imposes significant penalties or sets out significant elements of the content of offence and penalty provisions under an Act.

1.11 In this regard, section 6 of the instrument prescribes export conditions, including that the export of regulated waste paper and cardboard is prohibited unless the exporter meets certain licensing requirements, or the consignment of regulated waste paper and cardboard is less than 100kg and is a trade sample.<sup>9</sup> The explanatory statement to the instrument states that section 6 is made for the purposes of section 18 of the Act, which provides that the rules may prohibit the export of regulated waste material unless conditions prescribed by the rules are complied with. The note to section 6 of the instrument states that the contravention of one or more of the prescribed export conditions is an offence and a civil penalty provision under section 20 of the Act. Section 20 of the Act imposes a criminal penalty of 5 years imprisonment or 300 penalty units, or both; and a civil penalty of 600 penalty units. Subsection 20(3) of the Act provides that strict liability applies to the criminal offence relating to the export of regulated waste material (paragraph 20(1)(b)) and the prohibition of that material unless prescribed export conditions are complied with (paragraph 20(1)(c)).

1.12 Further, section 10 of the instrument prescribes waste paper and cardboard export licence conditions. The explanatory statement states that section 10 is made

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

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

<sup>9</sup> Subsection 6(2) provides that the export of regulated waste paper and cardboard on or after 1 October 2024 is prohibited unless the exporter holds a waste paper and cardboard export licence which is in force and not suspended at the time of export and for each consignment that is exported, has given the minister an export declaration (see subparagraphs 6(2)(a)(i)-(iii) or the consignment is less than 100kg and the regulated waste paper and cardboard that is exported is a trade sample (see subparagraphs 6(2)(b)(i) and (ii)).

for the purposes of paragraph 35(1)(b) of the Act, which provides that an export licence is subject to conditions prescribed by the rules. Note 2 to paragraph 35(1)(b) of the Act states that the holder of an export licence may commit an offence or be liable to a civil penalty if a condition of the licence is contravened pursuant to section 59 of the Act. Subsections 59(5) and 59(7) impose a criminal penalty of 5 years imprisonment or 300 penalty units, or both; and a civil penalty of 600 penalty units. Subsection 59(6) of the Act provides that strict liability applies to the criminal offence relating to contravention of a licence condition during a period of licence suspension under paragraph 59(4)(d).

1.13 Finally, section 15 of the instrument requires a waste paper and cardboard export licence holder to notify the minister of certain events set out under the provision, including where the licence holder ceases to operate the export business that carries out the export operations covered by the licence.<sup>10</sup> The explanatory statement states that section 15 is made for the purposes of paragraph 61(1)(e) of the Act, which provides that a licence holder must notify the minister, in writing, as soon as practicable after an event prescribed by the rules occurs. Section 61 of the Act imposes a strict liability offence punishable by 60 penalty units, and a civil penalty of 250 penalty units, for a failure to comply with the notification requirements.

1.14 As identified in the explanatory statement to the instrument and the enabling provisions under the Act, contraventions of sections 6, 10 and 15 of the instrument can trigger criminal and civil penalties imposed under the Act. Where an instrument provides for offences of strict liability, the explanatory statement should explain why this is considered necessary and appropriate by reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences* (the Guide). Further, where an instrument provides for significant matters, such as the content of offence and penalty provisions under the Act, the explanatory statement should set out why it is considered necessary and appropriate to include these significant elements in delegated legislation.

1.15 The explanatory statement does not address whether consideration was given to the Guide when making the instrument, noting the significant penalties that can arise from contraventions of sections 6, 10 and 15 of the instrument.

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

- **why it is considered necessary and appropriate for delegated legislation to include content of strict liability offences that carry significant criminal penalties, and significant civil penalties, through sections 6, 10 and 15 of the instrument; and**

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<sup>10</sup> See subsection 15(a) of the instrument.

- **whether consideration was given to the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, in relation to sections 6, 10 and 15 of the instrument, and if so, to what extent.**

### ***Privacy***<sup>11</sup>

1.17 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.

1.18 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).

1.19 Under subsection 19(1) of the instrument, the holder of a waste paper and cardboard export licence is required to make and maintain the following records:

- for each consignment of regulated waste paper and cardboard that is exported under the licence:
  - the export declaration made for the consignment;
  - evidence supporting the matters stated in the export declaration; and
  - photographs of the paper and cardboard in the consignment, and of the consignment once packed for export, that have sufficient resolution, brightness and contrast to show the consignment clearly and that are time and date stamped;
- a copy of the receipt for payment for the consignment issued by the licence holder to the importer or end-user of the consignment; and
- each other document, made by the licence holder or that comes into the licence holder's possession, that is relevant to showing whether the holder has complied or is complying with the applicable requirements of the Act.

1.20 Subsection 19(2) of the instrument requires the records to be retained for at least 5 years beginning on the day the record is made by the licence holder or comes into the licence holder's possession.

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

1.21 The explanatory statement to the instrument notes that, while most licence holders will be bodies corporate, licence holders may also be individuals. In this case, section 19 may require the retention of a small amount of personal information that includes the individual's name and contact details, which may be audited or required to be provided to the minister. The explanatory statement states that the keeping of such records is necessary to ensure compliance with the Act, and that an individual keeping such records has 'opted in' to the regulatory system and should therefore expect that some personal information may need to be disclosed.

1.22 However, the explanatory statement does not explain whether there are any safeguards in place to protect the use, collection or disclosure of personal information, including whether the Privacy Act applies.

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

- **the nature and scope of personal information that may be collected, used or disclosed under section 19 of the instrument, particularly whether this is likely to include personal information beyond an individual's name and contact details; and**
- **whether any safeguards apply to protect any personal information collected, used or disclosed under section 19 of the instrument and whether these are set out in law or policy, including whether the *Privacy Act 1988* applies.**

***Significant matters in delegated legislation***<sup>12</sup>

1.24 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. This includes where an instrument establishes significant elements of a regulatory scheme, such as key definitions central to the operation of the regulatory scheme.

1.25 Where an instrument includes significant matters, the committee considers that its explanatory statement should explain why it is considered necessary and appropriate to include those matters in delegated legislation.

1.26 The committee notes that the Senate Standing Committee for the Scrutiny of Bills previously reported on the Recycling and Waste Reduction Bill 2020, which became the Act under which the instrument is made.<sup>13</sup> It raised concerns that significant matters of the legislative framework were left to be determined in delegated legislation including in relation to:

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<sup>12</sup> Senate standing order 23(3)(j).

<sup>13</sup> Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 12 of 2020](#) (18 September 2020), pp. 20-22.

- what kind of waste material will be 'regulated waste material' for the purposes of the new regime for the regulation of the export of waste materials, as well as the conditions that will apply to the export of waste material; and
- the requirements for making and retaining records.

1.27 In this regard, section 5 of the instrument prescribes waste paper and cardboard as 'regulated waste material' for the purposes of the regulatory scheme, and section 6 prescribes conditions for export of this material. Part 5 of the instrument imposes requirements for making and retaining records.

1.28 The committee is concerned that these significant matters have been set out in delegated legislation and consequently may not be subject to an appropriate level of parliamentary oversight. In this regard, the explanatory statement does not indicate why it is considered necessary and appropriate to leave these matters to delegated legislation.

**1.29 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for matters relating to:**

- **prescribing the kind of material that is 'regulated waste material';**
- **conditions for export of waste material; and**
- **requirements to make and retain records.**

## Migration Amendment (Bridging Visas) Regulations 2024<sup>14</sup>

<b>FRL No.</b>	<a href="#">F2024L00441</a>
<b>Purpose</b>	The Migration Amendment (Bridging Visas) Regulations 2024 amend the Migration Regulations 1994 to clarify the circumstances in which the Minister may grant a Bridging R (Class WR) visa without application to certain eligible non-citizens who may be unlawful non-citizens at the time of grant, or who already hold a visa other than a substantive visa, a criminal justice visa or an enforcement visa.
<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 14 May 2024). Notice of motion to disallow must be given by 19 August 2024.

### Overview

1.30 The Migration Amendment (Bridging Visas) Regulations 2024 (the instrument) amend the Migration Regulations 1994 (the Migration Regulations) to remove one of the two requirements for the Minister for Immigration, Citizenship and Multicultural Affairs to grant an eligible non-citizen a further Bridging R (Class WR) visa (BVR). The instrument is one of a number of pieces of legislation made in relation to the High Court judgment of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 delivered on 8 November 2023.<sup>15</sup>

1.31 Prior to the amendments made by the instrument, the minister was empowered under regulation 2.25AB of the Migration Regulations to grant a further BVR where the eligible non-citizen already held an initial BVR (under regulation 2.25AA) and the minister determined it was appropriate to impose or vary certain visa conditions for community protection purposes. The instrument amends regulation 2.25AB to remove the requirement that an eligible non-citizen must already hold a BVR to be eligible for grant of a further BVR, replacing it with a requirement under sub-regulation 2.25AB(2) for the minister to be satisfied that the non-citizen does not have a substantive visa, criminal justice visa or enforcement visa.

<sup>14</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Bridging Visas) Regulations 2024, *Delegated Legislation Monitor 6 of 2024*; [2024] AUSStaCSDLML 58.

<sup>15</sup> *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

1.32 The instrument also amends regulation 2.04 of the Migration Regulations to clarify that, while the circumstances in which a visa may be granted are generally set out in Schedule 2 to the Migration Regulations, this is subject to other provisions of the Migration Regulations that may deal with the circumstances applicable to the grant, such as regulation 2.25AB.

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

### **Scrutiny concerns**

#### ***Consultation with persons affected<sup>16</sup>***

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

1.35 Accordingly, explanatory statements to instruments should provide details of any consultation undertaken. If no consultation was undertaken with persons likely to be affected or relevant experts, the explanatory statement should justify why no such consultation was undertaken.

1.36 In this instance, the explanatory statement to the instrument indicates that the Department of Home Affairs consulted with other Commonwealth agencies in the course of developing the instrument in accordance with section 17 of the Legislation Act. The explanatory statement also notes that the Office of Impact Analysis (OIA) was consulted.

1.37 However, the explanatory statement does not specify which other Commonwealth agencies were consulted or whether consultation with representatives of the individuals affected was undertaken, therefore the committee is unclear whether those likely to be affected by the instrument were adequately consulted. Further, the committee does not consider consultation with the Office of Impact Analysis (OIA) to be an adequate substitution for consulting with individuals affected by the instrument or relevant experts. Further, any requirements to consult with the OIA are separate to the requirements in relation to consultation under the Legislation Act.

1.38 The committee notes that it raised similar concerns regarding the explanation of consultation undertaken with the Migration Amendment (Bridging Visa Conditions)

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

Regulations 2023 in *Delegated Legislation Monitor 1 of 2024*. That instrument also affected the NZYQ-affected cohort including to set out the application, operation and review of certain visa conditions applying to BVRs.<sup>17</sup> Where the committee raises scrutiny concerns with a particular instrument, the committee expects that government departments and agencies will implement the issues identified by the committee in the preparation of future instruments and their explanatory statements.

1.39 The committee reiterates its expectations under standing order 23(3)(d) that explanatory statements should include details of the consultation undertaken, including who was consulted and the outcomes of that consultation. If no consultation was undertaken with persons likely to be affected or relevant experts, the explanatory statement should justify why no such consultation was undertaken.

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

- **which other Commonwealth agencies were consulted; and**
- **whether any persons likely to be affected by the instruments, any experts or any stakeholders representing the NZYQ-affected cohort were otherwise consulted and, if so, who or, if not, why not.**

***Availability of independent merits review;<sup>18</sup> adequacy of explanatory materials<sup>19</sup>***

1.41 Senate standing order 23(3)(i) requires the committee to consider whether an instrument unduly excludes, limits or fails to provide for the independent review of decisions affecting rights, obligations or interests. Where an instrument empowers a decision-maker to make discretionary decisions, the committee ordinarily expects that those decisions will be subject to merits review.

1.42 In this instance, the explanatory statement does not address whether merits review is available for a decision made under regulation 2.25AB of the Migration Regulations, despite the instrument amending the operation of regulation 2.25AB.

1.43 The committee notes that under paragraph 338(4)(c) of the *Migration Act 1958* (the Migration Act), a decision under a provision of the Migration Regulations prescribed for the purposes of subsection 76E(4) of the Migration Act is subject to independent merits review. Sub-regulation 2.25AD(2) of the Migration Regulations prescribes regulation 2.25AB for the purposes of subsection 76E(4) of the Migration Act. It therefore appears to the committee that decisions made under regulation 2.25AB are subject to merits review.

1.44 The committee notes that it raised similar concerns regarding the explanation of merits review and other safeguards in relation to the Migration Amendment

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<sup>17</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Bridging Visa Conditions) Regulations 2023, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp.3-8.

<sup>18</sup> Senate standing order 23(3)(i).

<sup>19</sup> Senate standing order 23(3)(g).



(Bridging Visa Conditions) Regulations 2023 in *Delegated Legislation Monitor 1 of 2024*.<sup>20</sup> The committee subsequently requested in *Delegated Legislation Monitor 5 of 2024* that the minister amend that instrument's explanatory statement so that it was clear which decisions were subject to independent merits review.<sup>21</sup> The committee's scrutiny concerns are heightened in this instance as it has identified similar scrutiny concerns with this instrument.

1.45 The committee reiterates its expectations under standing order 23(3)(i) that explanatory statements should provide details of any safeguards or limitations that apply to the exercise of a minister's powers or functions, including the availability of any review mechanisms such as independent merits review. That is because of the potential for discretionary decisions to impact individuals' rights, liberties and obligations.

**1.46 In light of the above, the committee requests the minister's advice as to whether the instrument's explanatory statement can be amended to explain any safeguards or limitations that apply to the exercise of the minister's power under regulation 2.25AB, including the availability of independent merits review and other safeguards with reference to the *Migration Act 1958* and *Migration Regulations 1994*.**

#### ***Significant matters in delegated legislation***<sup>22</sup>

1.47 Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation. As a matter of technical scrutiny, the committee is required to scrutinise each legislative instrument as to whether it contains matters more appropriate for parliamentary enactment.

1.48 This instrument amends the requirements for a non-citizen to be granted a visa under regulation 2.25AB of the Migration Regulations. The explanatory statement provides that it is appropriate for matters dealt with in the Migration Regulations to be implemented in regulations rather than by parliamentary enactment. The explanatory statement also states that it has been the consistent practice of the Government to provide for detailed matters of visa settings in the Migration Regulations as opposed to the Migration Act itself, to enable adaptive and effective management of Australia's visa program.

1.49 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. The committee notes that it has consistently raised

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<sup>20</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp 6 -7.

<sup>21</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), p. 15.

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

similar concerns, including in relation to the Migration Amendment (Bridging Visa Conditions) Regulations 2023, about the inclusion of significant migration and visa related matters in Home Affairs portfolio delegated legislation due to the impact on parliamentary oversight.

**1.50 In light of the above, the committee has resolved to draw its concerns about significant matters in delegated legislation related to visa arrangements to the attention of the Senate under standing order 23(4).**

## 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).

### Migration Amendment (Bridging Visa Conditions) Regulations 2023<sup>1</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 (BVR) 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 to disallow on 15 May 2024.

#### Overview

2.2 The Migration Amendment (Bridging Visa Conditions) Regulations 2023 (the instrument) makes 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.

2.3 The instrument also makes technical amendments to provisions enabling the minister to grant a BVR without application, as well as amendments consequential to

<sup>1</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Migration Amendment (Bridging Visa Conditions) Regulations 2023, *Delegated Legislation Monitor 6 of 2024*; [2024] AUSStaCSDLM 59.

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 (Bridging Visa Conditions) Act 2023* following the High Court's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor (S28/2023)*.<sup>2</sup>

2.4 The committee first raised scrutiny concerns with the instrument on 7 February 2024 in *Delegated Legislation Monitor 1 of 2024*,<sup>3</sup> and the Minister for Immigration, Citizenship and Multicultural Affairs provided a response on 3 April 2024.<sup>4</sup> The committee raised further concerns with the instrument on 17 May 2024 in *Delegated Legislation Monitor 5 of 2024*,<sup>5</sup> and the minister provided a response dated 31 May 2024.<sup>6</sup>

### Scrutiny concerns

#### ***Conferral of discretionary powers<sup>7</sup>; availability of independent merits review<sup>8</sup>***

2.5 In *Delegated Legislation Monitors 1 and 5 of 2024*,<sup>9</sup> the committee raised concerns about the conferral of discretionary powers. The instrument makes amendments to 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 holder will be subject to the conditions for 12 months. The instrument also makes amendments to require the minister to impose such conditions when a BVR is granted,<sup>10</sup> if new subclause 070.612A(3) applies,<sup>11</sup> unless the

<sup>2</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>3</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp. 2-7.

<sup>4</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (3 April 2024) p.4 - 10.

<sup>5</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), pp. 10-17.

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

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

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

<sup>9</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), pp. 2-7; Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), pp. 10-17.

<sup>10</sup> New subclause 070.612A(1), inserted by item 17 in Part 1 of Schedule 1.

<sup>11</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.

minister is satisfied that it is ‘not reasonably necessary’ to impose a condition for the protection of any part of the community.

2.6 The committee sought 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 the protection of the community, and whether any safeguards or limitations apply to the minister’s powers or functions under new subclause 070.612A(1) including any review mechanisms, such as independent merits review.

2.7 The minister’s response of 3 April 2024 advised that while there is no exhaustive list of matters relevant to the consideration of whether a condition is ‘not reasonably necessary’ for the protection of the community, the conditions have a protective purpose having regard to the risk of harm the non-citizen poses.<sup>12</sup> The minister provided lists of non-exhaustive factors and the kinds of information that would be relevant to that consideration.

2.8 The minister also provided advice about safeguards, such as the availability of independent merits review. He advised that section 76E of the *Migration Act 1958* (Migration Act) applies and, 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. The minister also noted that the 12-month period for which certain conditions are imposed on BVR visa holders under regulation 2.25AE of the instrument operates to ensure there is some form of review at least every 12 months. Finally, the minister noted the availability of review by the Commonwealth Ombudsman and judicial review.

2.9 The committee sought the minister’s further advice as to whether the instrument’s explanatory statement could be amended to include the additional information provided by the minister in his correspondence of 3 April 2024 in relation to the following matters:

- factors relevant to the minister’s consideration of whether a condition is ‘not reasonably necessary’ for the protection of the community; and

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<sup>12</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), pp. 10-17.

- clarifying which decisions of the minister to grant a BVR to a non-citizen are subject to independent merits review.

### *Minister's response*<sup>13</sup>

2.10 In his response, the minister advised that he would arrange for the Department of Home Affairs (the department) to prepare amendments to the explanatory statement for the minister's consideration and approval as soon as possible. These amendments would include the information the minister provided in his correspondence dated 3 April 2024,<sup>14</sup> as requested by the committee.

### *Committee view*

2.11 The committee welcomes the minister's undertaking to amend the explanatory statement with the additional information provided in his correspondence of 3 April 2024 regarding factors relevant to the minister's consideration of whether a condition is 'not reasonably necessary', and clarifying which decisions of the minister to grant a BVR to a non-citizen are subject to independent merits review.

**2.12 In light of the minister's undertaking to amend the explanatory statement to include the information provided relating to factors relevant to whether a decision is 'not reasonably necessary' and the availability of independent merits review, the committee concludes its examination of the instrument in relation to this issue.**

### *Consultation with persons affected*<sup>15</sup>

2.13 The instrument's explanatory statement indicates that the Office of Impact Analysis 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.

2.14 The minister's response of 3 April 2024 advised that the instrument and measures in the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* were informed by consideration of the High Court's written reasons in the NZYQ case, and consultation between the department and the Attorney-General's Department, the Australian Government Solicitor and the Office of Parliamentary Counsel in the course of developing and

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<sup>13</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>14</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), pp. 10-17.

<sup>15</sup> Senate standing order 23(3)(d).

drafting the instrument.<sup>16</sup> 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.

2.15 The committee welcomed the engagement with these stakeholders but emphasised the obligation under 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 sought clarity on why a broader range of stakeholders were not consulted or involved in the roundtable discussions. The committee therefore sought the minister's further 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
- whether consideration could be given to further amending the Migration Regulations to address feedback provided as part of this consultation process.

#### *Minister's response*<sup>17</sup>

2.16 In the minister's response, he advised that the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross are key stakeholders with which the department regularly engages on immigration matters. The minister advised that the purpose of the three roundtable discussions with these organisations was to share information on the implications of the High Court's NZYQ decision and the Government's response, including amendments made to the Migration Regulations. The response noted that the roundtable discussions focussed on the legislative framework established in response to the NZYQ decision, rather than seeking stakeholder feedback on potential reforms. The minister also advised that the department addressed stakeholder questions relating to specific conditions imposed on the BVRs of individuals in the NYZQ-affected cohort, the implementation of conditions relating to electronic monitoring devices and curfews,

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<sup>16</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2024](#) (17 May 2024), pp. 10-17.

<sup>17</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

and support provided to individuals in the NYZQ-affected cohort following release from immigration detention.

#### *Committee view*

2.17 The committee thanks the minister for his engagement and the additional information provided. The committee notes the minister's advice that roundtable discussions were held with key stakeholders with whom the department has established relationships, and welcomes a forum for stakeholders to ask questions about immigration matters. However, it remains unclear to the committee why a broader range of organisations were not consulted or involved in the roundtable discussions, such as those representing the interests of individuals who may be affected by the instrument. The committee considers that those with the potential to be significantly impacted by the instrument, notably the NZYQ-affected cohort, are easily identifiable for the purposes of consultation.

2.18 In addition, the minister's correspondence indicated that the purpose of these discussions was information sharing about the implications of the NZYQ decision and the Government's response. Consequently, it appears to the committee that the nature of the roundtable discussions did not amount to consultation in line with its expectations, noting the requirements in the Legislation Act.

2.19 In this regard, the committee wishes to emphasise the importance of undertaking genuine consultation, particularly with organisations representing the interests of those likely to be affected by the instrument *prior* to the instrument being made, as reflected in the Legislation Act and Senate standing order 23(3)(d). The committee reiterates its view that consultation with affected persons before an instrument is made is crucial to ensure that it is fit-for-purpose and best suited to achieve the instrument's objectives. Further, ensuring that adequate consultation has occurred is particularly significant where the relevant legislative instrument has the potential to impact individuals' legal rights and liberties, as is the case with this instrument.

2.20 The committee further notes that undertaking consultation prior to an instrument being made helps to ensure that those affected have an adequate opportunity to comment on the proposed legislation before it comes into effect. The committee is particularly concerned that, in this instance, there did not appear to be consultation with those most likely to be affected by the instrument or with relevant experts, and that the roundtable discussions occurred after the instrument was made. The committee expects that, if consultation with affected persons or relevant experts does not occur, the explanatory statement to the instrument should outline the reasons for not consulting such persons.

2.21 The committee's concerns regarding consultation are heightened by the fact that it has raised similar matters in this monitor regarding the Migration Amendment (Bridging Visas) Regulations 2024 which was registered on the Federal Register of



Legislation on 11 April 2024, nearly two months after the committee first raised concerns regarding the consultation undertaken in relation to this instrument in *Delegated Legislation Monitor 1 of 2024*.

**2.22** Noting the minister's advice, the committee concludes its examination of the instrument in relation to this issue. However, the committee reiterates its expectations that consultation should occur on the specific instrument with those likely to be affected by an instrument and/or relevant experts prior to the instrument being made. If no consultation was undertaken, the explanatory statement should justify why no such consultation was undertaken. The committee will continue to monitor this issue in relation to future instruments made relating to the Bridging (Removal Pending) visa scheme.

**2.23** The committee has resolved to draw its concerns regarding the consultation undertaken in relation to this instrument to the attention of the Senate under Senate standing order 23(4).

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

## Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023<sup>18</sup>

<b>FRL No.</b>	<a href="#">F2023L01551</a>
<b>Purpose</b>	This instrument deals with a number of matters to facilitate and regulate safe and sustainable greenhouse gas injection and storage operations in offshore areas. It remakes the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011 in substantially the same form, with minor amendments to provide consistency with current drafting practices, simplify language, restructure provisions to provide for ease of navigation, and remove duplicative processes.
<b>Authorising legislation</b>	<i>Offshore Petroleum and Greenhouse Gas Storage Act 2006</i>
<b>Portfolio</b>	Industry, Science and Resources
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 28 November 2023). Committee gave notice to disallow on 19 March 2024.

### Overview

2.25 This instrument is made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act). It remakes the Offshore Petroleum and Greenhouse Gas (Greenhouse Gas Injection and Storage) Regulations 2011, which sunset on 11 April 2024. The measures in the instrument facilitate and regulate safe and sustainable greenhouse gas injection and storage operations in offshore areas.

2.26 The committee initially raised scrutiny concerns with the instrument on 7 February 2024 in *Delegated Legislation Monitor 1 of 2024*,<sup>19</sup> and the minister provided a response dated 14 February 2024.<sup>20</sup> As the committee retained concerns, it sought the minister's further advice on 28 February 2024 in *Delegated Legislation*

<sup>18</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023, *Delegated Legislation Monitor 6 of 2024*; [2024] AUSStaCSDLM 60.

<sup>19</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024) pp.16-22.

<sup>20</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (14 February 2024) p. 5.

Monitor 2 of 2024,<sup>21</sup> and the minister provided a response dated 11 March 2024.<sup>22</sup> However, the committee continued to retain scrutiny concerns about the availability of independent merits review and the conferral of discretionary powers and accordingly sought the minister's further advice in *Delegated Legislation Monitor 4 of 2024*.<sup>23</sup> On 22 May 2024, the minister provided a response dated 16 May 2024.<sup>24</sup>

## Scrutiny concerns

### ***Availability of independent merits review***<sup>25</sup>

2.27 In *Delegated Legislation Monitors 1, 2 and 4 of 2024*, the committee raised concerns about the exclusion of independent merits review of decisions made by the minister under the instrument, to:

- approve or refuse to approve a draft site plan, if satisfied that it meets the criteria in Division 2 of the instrument (subsections 25(1) and 25(2)); and
- withdraw approval of a site plan where the licensee has failed to meet the conditions in paragraph 32(1)(b) (subsection 32(2)).

2.28 The instrument's explanatory statement justifies the exclusion of decisions under subsection 25(1) on the basis that they are a preliminary step to decisions under the OPGGS Act to provide an offer document advising that the minister is prepared to subsequently grant a greenhouse gas injection licence. The explanatory statement justifies the exclusion of decisions under subsection 32(2) on the basis that they are of a law enforcement nature. While the Administrative Review Council's Guide, *What decisions should be subject to merits review?* (the ARC guide)<sup>26</sup> recognises that these are appropriate grounds for excluding merits review, in line with the committee's guidelines, the committee was unclear as to how decisions under subsections 25(1) and 32(2) fell within those categories. Accordingly, the committee sought the minister's advice about whether further justification could be provided for the exclusion of merits review with reference to these or any other grounds referred to in the ARC guide in *Delegated Legislation Monitors 1, 2 and 4*.<sup>27</sup>

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<sup>21</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 2 of 2024](#) (28 February 2024) pp. 11-16.

<sup>22</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation (12 March 2024) p.8.

<sup>23</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 4 of 2024](#) (28 March 2024) pp. 8-16.

<sup>24</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

<sup>25</sup> Senate standing order 23(3)(i).

<sup>26</sup> Administrative Review Council, [What decisions should be subject to merits review?](#) (1999).

<sup>27</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitors 1 of 2024* (7 February 2024), p.19; *2 of 2024* (28 February 2024), p.14; and *4 of 2024* (28 March 2024), p. 13.

2.29 The minister's advice in response included to reiterate that the exclusion of review was appropriate because decisions under subsection 25(1) are preliminary in nature and decisions under subsection 32(2) have the character of law enforcement decisions.<sup>28</sup> The minister also provided advice that merits review would be further considered as part of an upcoming policy review (the Review of the Offshore Carbon Capture and Storage Regime)<sup>29</sup> and, in response to the committee's request, advised further on 11 March 2024 that any proposed reforms resulting from this review would be progressed in the 2025-26 financial year.<sup>30</sup>

#### *Minister's response*<sup>31</sup>

2.30 In her most recent correspondence of 22 May 2024, the minister advised that the committee's comments would be helpful to inform consideration of the appropriateness for the exclusion or application of merits review in the upcoming policy review. However, the minister indicated that it was her strong preference not to apply a piecemeal approach to implementing merits review for the decisions in subsections 25(1) and 32(2), as this could lead to inconsistency with the availability of merits review for other decisions in the regulatory regime for greenhouse gas injection and storage. Rather, her preference was to undertake a comprehensive, holistic consideration to ensure a consistent policy approach for the application of merits review to decisions in the regulatory regime, in line with the ARC guide, and the upcoming review was the appropriate opportunity to do so.

2.31 In relation to the justifications for excluding decisions under subsections 25(1) and 32(2), the minister reiterated her earlier advice that decisions under subsection 25 (1) were preliminary in nature and those under subsection 32(2) related to law enforcement.

#### *Committee view*

2.32 The committee welcomes the minister's advice that the appropriateness of merits review, in line with the ARC guide, will be considered holistically as part of the upcoming policy review. However, while welcoming this advice, the committee remains unclear about the application of the justifications for excluding merits review cited in the instrument's explanatory statement and in the minister's ongoing correspondence, and how these decisions are analogous to the examples in the ARC guide.

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<sup>28</sup> See correspondence to the Senate Standing Committee for the Scrutiny of Delegated Legislation on [14 February 2024](#), pp. 5-6; and [11 March 2024](#); pp.9-11.

<sup>29</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 14 February 2024, pp. 6-7.

<sup>30</sup> See [correspondence](#) to the Senate Standing Committee for the Scrutiny of Delegated Legislation on 11 March 2024, pp. 10-11.

<sup>31</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

2.33 Therefore, the committee emphasises the importance of giving thorough consideration to the application of merits review in line with the ARC guide, particularly noting the impact that discretionary decisions can have on rights, liberties, obligations and interests.

2.34 The committee further reiterates its concern that discretionary decisions under the instrument will remain excluded from independent merits review until at least the 2025-26 financial year when the minister indicated that any proposed reforms would be progressed. The committee will continue to monitor this issue.

**2.35 In light of the minister's advice that merits review will be considered as part of the upcoming policy review, the committee has resolved to conclude its examination of the instrument in relation to this issue.**

### ***Conferral of discretionary powers***<sup>32</sup>

2.36 The committee also raised concerns about the scope of the discretion under subsections 25(3) and 42(3) of the instrument which enable the minister, in deciding whether to approve a draft site plan or variation to a site plan, to have regard to 'any other matters' they consider relevant. In *Delegated Legislation Monitor 1 of 2024*, the committee sought the minister's advice as to examples of the types of 'any other matters' that may be relevant and whether there are any safeguards or limitations on the discretionary powers in these provisions.<sup>33</sup>

2.37 In her response dated 11 March 2024, the minister reiterated her earlier advice of 14 February that the discretion is appropriately constrained by the wording of the provisions which ensure that any other relevant matters are directly relevant to the decision under consideration. As such, she advised that these matters are likely to include consideration of relevant government policy or requirements set out in guidelines and the minister cannot take into account irrelevant considerations. The minister further undertook to amend the explanatory statement to reflect this information, and this undertaking was implemented on 18 March 2024.

2.38 However, in her response of 11 March 2024, the minister also provided additional detail. She advised that offshore greenhouse gas proponents are required to obtain approvals across a range of legislative frameworks including the OPGGS Act, the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and *Environment Protection (Sea Dumping) Act 1981* (Sea Dumping Act). All three frameworks require overlapping assessments of geological considerations and the environmental impacts of projects and provide differing discretions to ministers in applying conditions and compliance obligations on titleholders, which include ongoing monitoring obligations under all three frameworks. Further, there is a guidance note

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<sup>32</sup> Senate standing order 23(3)(c).

<sup>33</sup> Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 1 of 2024](#) (7 February 2024), p. 20.

which provides recommendations on a best practice approach to sequencing approvals. The discretion under subsection 25(3) will enable the minister to take into account the approval terms, including conditions of an earlier permit approval under the Sea Dumping Act or EPBC Act, when considering the content of a site plan. Given that site plans consider similar environmental and geological factors to approvals under the other frameworks, the minister's discretion to have regard to these materials will limit the potential for the imposition of incompatible obligations and conditions and assist to mitigate the risk of inconsistent decision making across the frameworks.

2.39 Similarly, in considering whether to approve a variation of an approved site plan, under subsection 42(3), the minister can take into account the approval terms and conditions of previous approvals under the EPBC Act and Sea Dumping Act for the relevant project. The site plan variation will address similar environmental and geological factors as approvals under the other legislative frameworks and, as such, the flexibility afforded to the minister to consider these materials will further assist to mitigate the risk of introducing inconsistencies in obligations and approval conditions between the three frameworks.

2.40 The committee considered that this detailed background and the examples provided were the kind of substantive guidance that would be helpful for inclusion in the explanatory statement, to assist users of the law to understand their rights and obligations on the face of the instrument and its explanatory statement. Accordingly, the committee requested the minister's additional advice as to whether the explanatory statement could be further amended to include the detailed examples of other matters that may be taken into account under subsections 25(3) and 42(3).

#### *Minister's response*<sup>34</sup>

2.41 In her response of 16 May 2024, the minister advised that she would arrange for a further replacement explanatory statement to include this additional detail but noted that the detailed examples are not intended to limit the decision-making power.

#### *Committee view*

2.42 The committee welcomes the minister's undertaking to further amend the explanatory statement with the detailed examples and context. While noting this does not limit the decision-making power, the committee considers this information will be helpful context to enable users of the law to better understand their rights and obligations under the instrument.

**2.43 In light of the minister's undertaking to further amend the explanatory statement with the detailed examples of 'any other matters' in relation to the**

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<sup>34</sup> This correspondence was tabled with this monitor and will be accessible via the [Delegated Legislation Monitors](#) page on the committee's website.

**discretion under subsections 25(3) and 42(3), the committee concludes its examination of the instrument in relation to this issue.**

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





## 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> Engagement on instruments marked with an asterisk was on an advice only basis.

#### Instrument

Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards Amendment Instrument (No. 1) 2024 [F2024L00521]

Competition and Consumer (Designated Complaints) Determination 2024 [F2024L00494]

Currency (Australian Coins) Amendment (2024 Royal Australian Mint No. 2) Determination 2024 [F2024L00431]\*

Defence (Non-foreign work restricted individual) Determination 2024 [F2024L00519]

Defence (Non-relevant foreign country) Determination 2024 [F2024L00518]

Defence (Visiting Forces) Amendment (Australia Timor Leste Defence Cooperation Agreement) Regulations 2024 [F2024L00456]

Environment Protection and Biodiversity Conservation (Recovery Plans) Revocation Instrument 2024 [F2024L00602]

Fuel Quality Standards (Ethanol E85) Determination 2024 [F2024L00477]

Fuel Quality Standards (Petrol) Determination 2024 [F2024L00475]

Intellectual Property Laws Amendment (Regulator Performance) Regulations 2024 [F2024L00525]

Migration Amendment (Dependent Secondary Partner Visa Applicants) Regulations 2024 [F2024L00417]

<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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Migration (English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Amendment (Pathway Programs) Specification 2024 [F2024L00471]

National Health (Continued Dispensing) Amendment Determination 2024 (No. 1) [F2024L00507]

National Health (Pharmaceutical Benefits) Amendment (2024 Measures No. 1) Regulations 2024 [F2024L00380]

Part 101 Manual of Standards (Chief Remote Pilot Licence Instructor and Other Matters) Amendment Instrument 2024 [F2024L00433]

Work Health and Safety (Operation Sovereign Borders) Declaration 2024 [F2024L00425]

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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**

Australian National Audit Office Auditing Standards 2024 [F2024L00057]

Fuel Quality Standards (Ethanol E85) Determination 2024 [F2024L00477]

National Health (Continued Dispensing) Amendment Determination 2024 (No. 1) [F2024L00507]

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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 those that the committee is aware have been implemented as at 19 June 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
Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 [F2024L00286]	The Australian Prudential Regulation Authority and Australian Securities and Investments Commission undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	10 May 2024
Financial Accountability Regime Act (Information for register) Regulator Rules 2024 [F2024L00285]	The Australian Prudential Regulation Authority and Australian Securities and Investments Commission undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	10 May 2024
Fuel Quality Standards (Ethanol E85) Determination 2024 [F2024L00477]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	12 June 2024
Fuel Quality Standards (Petrol) Determination 2024 [F2024L00475]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	12 June 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.

Migration Amendment (Bridging Visa Conditions) Regulations 2023 [F2023L01629]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	31 May 2024
Migration (English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visa) Amendment (Pathway Programs) Specification 2024 [F2024L00471]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's concerns.	11 June 2024
National Health (Pharmaceutical Benefits) Amendment (2024 Measures No. 1) Regulations 2024 [F2024L00380]	The department undertook to progress a supplementary explanatory statement to the instrument in response to the committee's concerns.	12 June 2024
Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023 [F2023L01551]	The minister made a further undertaking to amend the explanatory statement to the instrument in response to the committee's concerns.	16 May 2024

## Implemented undertakings

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

Instrument	Undertaking	Date implemented
Auditing Standard ASA 2023-1 Amendments to Australian Auditing Standards [F2023L00295]	The department undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	31 May 2024
Auditing Standard ASA 600 Special Considerations—Audits of a Group Financial Report (Including the Work of Component Auditors) [F2022L00709]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	30 May 2024
Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards 2022 [F2022L00137]	The department undertook to progress amendments to the instrument in response to the committee's scrutiny concerns.	8 May 2024
Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards 2022 [F2022L00137]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	8 May 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.	11 June 2024
Long Service Leave (Commonwealth Employees) Amendment (Recognising Transferring Employees) Regulations 2023 [F2023L00834]	The department undertook to progress amendments to the explanatory statement to the instrument in response to the committee's scrutiny concerns.	10 August 2023
National Measurement (Australian Certified Reference Materials) Determination 2023 [F2023L01537]	The department undertook to amend the explanatory statement to the instrument in response to the committee's scrutiny concerns.	26 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.<sup>1</sup> This includes expenditure-related instruments and instruments that levy taxation.

#### Commonwealth expenditure

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

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

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

Instrument	Amount	Grant/Program
Financial Framework (Supplementary Powers) Amendment (Agriculture, Fisheries and Forestry Measures No. 1) Regulations 2024 [F2024L00524]	\$9.5 million over three years from 2023-24	Forestry Workforce Training Program
Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2024 [F2024L00532]	\$50.0 million in 2023-24	International Fund for Ukraine
Financial Framework (Supplementary Powers) Amendment (Education Measures No. 2) Regulations 2024 [F2024L00526]	\$0.33 million over three years from 2023-24 \$14.5 million over four years from 2023-24	World Schools Debating Championships International Education Innovation Fund
Financial Framework (Supplementary Powers) Amendment (Home Affairs	\$2.6 million over four years from 2023-24	Supporting an online terrorist crisis response capability

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

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

Measures No. 1) Regulations 2024 [F2024L00527]	\$3.5 million over four years from 2023-24	Expanded domestic monitoring and referral capability for terrorist and violent extremist content online
	\$9.6 million over three years from 2024-25	Cyber Awareness—Piloting a Support for Vulnerable Groups Grants Program
	\$6.4 million over three years from 2023-24	Information Sharing and Analysis Centre Acceleration Grant Pilot Program
	\$1.9 million over two years from 2023-24	Professionalisation of the Cyber Workforce Grant Program
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 2) Regulations 2024 [F2024L00528]	\$1.0 million over three years from 2024-25	Grant to Nordoff-Robbins Music Therapy Australia Limited
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2024 [F2024L00530]	\$15.8 million over three years from 2022-23	New Jobs Program Trial
Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 1) Regulations 2024 [F2024L00531]	\$30 million over five years from 2024-25	Veterans' Acute Housing – Specialist Services program

## 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>1</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>2</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>3</sup>
- overrides or modifies primary legislation;

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<sup>1</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>2</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>3</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>4</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
Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 10) Determination 2024 [F2024L00457]	Subsection 9(5) of the <i>Federal Financial Relations Act 2009</i>
Federal Financial Relations (GST Revenue Sharing Relativities for 2024-25) Determination 2024 [F2024L00523]	Subsection 44(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 10) Determination 2024 [F2024L00429]	Subsection 16(5) of the <i>Federal Financial Relations Act 2009</i>
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 11) Determination 2024 [F2024L00458]	Subsection 16(5) of the <i>Federal Financial Relations Act 2009</i>

<sup>4</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
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 12) Determination 2024 [F2024L00510]	Subsection 16(5) of the <i>Federal Financial Relations Act 2009</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>5</sup>

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

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

<sup>5</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](#).

- 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>6</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>7</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 and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.<sup>8</sup>

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<sup>6</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>7</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.

<sup>8</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.

**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>
Agricultural and Veterinary Chemicals Code (Agricultural Active Constituents) Standards Amendment Instrument (No. 1) 2024 [F2024L00521]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Defence (Visiting Forces) Amendment (Australia Timor Leste Defence Cooperation Agreement) Regulations 2024 [F2024L00456]	Section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015
Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 10) Determination 2024 [F2024L00457]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (GST Revenue Sharing Relativities for 2024-25) Determination 2024 [F2024L00523]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 10) Determination 2024 [F2024L00429]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments—2023-24 Payment No. 11) Determination 2024 [F2024L00458]	Subsection 54(1) of the <i>Legislation Act 2003</i>
Federal Financial Relations (National Partnership Payments— 2023-24 Payment No. 12) Determination 2024 [F2024L00510]	Subsection 54(1) of the <i>Legislation Act 2003</i>

**Senator Deborah O'Neill**  
**Chair**