



STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997

Purpose

This guideline provides information on the Senate Regulations and Ordinances Committee's (the committee) approach to regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations). The committee has identified the following three issues in relation to these regulations:

1. Availability of independent review of decisions;
2. Ordinary annual services of the government; and
3. Constitutional authority for expenditure.

This guideline provides brief background information on the FF(SP) regulations, an outline of how the identified issues relate to the committee's scrutiny principles, and, where relevant, guidance about the committee's expectations in relation to explanatory statements (ESs).

Availability of independent review of decisions

Independent review is the process by which a person or body (other than the primary decision maker) reconsiders the facts, law and policy aspects of an original decision; and determines the correct and preferable decision.

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that delegated legislation does not make rights and liberties unduly dependent on administrative decisions which are not subject to review. In simple terms, the question for the committee when scrutinising regulations which add items to Schedule 1AB to the FF(SP) regulations, is whether decisions made in connection with authorised programs or grants will be subject to independent review.

The committee expects ESs to include a description of the policy considerations and program or grant characteristics relevant to the question of whether or not decisions made pursuant to programs and grants authorised by the addition to Schedule 1AB of the FF(SP) regulations should be subject to independent review.

Ordinary annual services of the government

This matter is considered by the committee as a result of a written request from the Senate Committee on Appropriations and Staffing that the committee begin to monitor executive

expenditure being authorised by the *Financial Management and Accountability Act 1997* (now the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act)), and report on any such expenditure to the Senate.¹

Under the provisions of the FF(SP) Act, executive spending may be authorised by specifying schemes in the FF(SP) regulations. The money which funds these schemes is specified in an appropriation bill, but the details of the scheme may depend on the content of the relevant regulations. Once the details of the scheme are outlined in the regulations, questions may arise as to whether the funds allocated in the appropriation bill were inappropriately classified as ordinary annual services of the government. Ordinary annual services should not include spending on new proposals because the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure extends to all matters not involving the ordinary annual services of the government.²

The committee's response to the Appropriations and Staffing Committee's request was therefore to commence examining the arrangements, grants and programs specified in the FF(SP) regulations to ascertain whether expenditure has been previously authorised by special legislation or whether it appears to be new expenditure, not for the ordinary annual services of government. This examination also includes an assessment of whether measures may have been included in the appropriation bills as an 'ordinary annual service of the government', despite being spending on new policies.³ This is relevant to scrutiny principle 23(3)(d) of the committee's terms of reference which requires the committee to ensure that delegated legislation does not contain matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The committee reports where certain programs authorised by regulation appear to involve expenditure on new policies, and notes that such items of new expenditure may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in an appropriation bill that is not subject to direct amendment by the Senate. The committee's work complements that of the Senate Standing Committee for the Scrutiny of Bills which is tasked similarly (but in relation to primary legislation) with examining the allocation of proposed expenditure between the appropriation bills.

¹ See correspondence from the Chair of the Senate Standing Committee on Appropriations and Staffing to the Standing Committee on Regulations and Ordinances, 17 March 2014, contained in Appendix 3, *Delegated legislation monitor* 5 of 2014 (14 May 2014).

² In order to comply with the terms of a 2010 Senate resolution relating to the classification of appropriations for expenditure, new policies for which no money has been appropriated in previous years should be included in an appropriation bill that is not for the ordinary annual services of the government (and which is therefore subject to amendment by the Senate). The complete resolution is contained in *Journals of the Senate*, No. 127—22 June 2010, pp 3642-3643. See also Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2017*, pp 1-5.

³ See *Delegated legislation monitor* 5 of 2014, pp 16–18 for a more detailed account of the committee's approach to regulations made under the FF(SP) Act.

Constitutional authority for expenditure

In *Williams No. 2*,⁴ the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs.

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This has been consistently interpreted by the committee as applying to all possible legal formalities, including whether instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements. As such, in accordance with *Williams No. 2* decision, the committee requires ESs for all regulations which add items to Schedule 1AB to the FF(SP) regulations to explicitly state, for each new program or grant, the constitutional authority for the expenditure.

Specifically, the committee expects the ES to include a clear and explicit statement of the relevance and operation of each constitutional head of power relied on to support a program or grant; and where numerous constitutional heads of power are identified as supporting elements of a program or grant the committee expects the ES to include sufficient information about the link between each aspect of the constitutional authority relied on and the substance of the new program or grant.

Further information

For further information on the committee's scrutiny of regulations that amend Schedule 1AB to the FF(SP) regulations please see:

- [Delegated legislation monitors](#), Senate Standing Committee on Regulations and Ordinances
[Senate research papers](#):
- *Scrutiny committees: A vehicle to safeguarding federalism and the constitutional rights of Parliament*, Department of the Senate, Papers on Parliament, no. 67 (May 2017), Mr Glenn Ryall and Ms Jessica Strout ([PDF 182KB](#))
- *The Williams decisions and the Implications for the Senate and its Scrutiny Committees*, Department of the Senate, Papers on Parliament, no. 64 (January 2016), Mr Patrick Hodder ([PDF 124KB](#))
- *Commonwealth Executive Power and Accountability Following Williams (No. 2)*, Department of the Senate, Papers on Parliament, no. 63 (July 2015), Mr Glenn Ryall ([PDF 187KB](#))
- *Williams v. Commonwealth—A Turning Point for Parliamentary Accountability and Federalism in Australia?*, Department of the Senate, Papers on Parliament, no. 60 (March 2014), Mr Glenn Ryall ([PDF 138KB](#))

⁴ *Williams v Commonwealth (No. 2) (2014) 252 CLR 416.*

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