The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislative Instruments Act 2003*.[1]

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

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1 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13th Edition (2012), Chapter 15.

2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this monitor.

General information

The Federal Register of Legislative Instruments (FRLI) should be consulted for the text of instruments, explanatory statements, and associated information.[3]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[4]

The Disallowance Alert records all notices of motion for the disallowance of instruments in the Senate, and their progress and eventual outcome.[5]

Senator John Williams (Chair)

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3 The FRLI database is part of ComLaw, see Australian Government, ComLaw, https://www.comlaw.gov.au/.

4 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

5 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2015*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 29 May 2015 and 2 July 2015 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

The committee requests an explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Instrument	**Carbon Credits (Carbon Farming Initiative—Facilities) Methodology Determination 2015 [F2015L01346]**
Purpose	Supports Emmissions Reduction Fund (ERF) projects through crediting verified emissions reductions achieved through a reduction in emissions per unit of output at facilities that report emissions under the National Greenhouse and Energy Reporting Scheme and produce a saleable product
Last day to disallow	12 November 2015
Authorising legislation	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

This instrument provides for procedures for estimating greenhouse gas abatement for offsets projects under the *Carbon Credits (Carbon Farming Initiative) Act 2011*.

Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

Subsection 106(8) of the authorising legislation for the instrument (the *Carbon Credits (Carbon Farming Initiative) Act 2011*) provides that instruments may apply, adopt or incorporate (with or without modifications) matter contained in any other

instrument or writing 'as in force or existing at a particular time' or 'as in force or existing from time to time' (thereby altering the effect of section 14 of the *Legislative Instruments Act 2003*).

With reference to the above, the committee notes that various provisions of the instrument refer to the 'NGER (Measurement) Determination' which is defined in section 5 of the instrument as the National Greenhouse and Energy Reporting (Measurement) Determination 2008. However, neither the instrument nor the explanatory statement (ES) expressly states the manner in which the determination in question is incorporated.

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee requests the advice of the minister in relation to this matter.

Instrument	**Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015 [F2015L01353]**
Purpose	Revokes the Health Insurance (Pharmacogenetic Testing - RAS (KRAS and NRAS)) Determination 2014
Last day to disallow	12 November 2015
Authorising legislation	*Health Insurance Act 1973*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requests the advice of the minister in relation to this matter; and requests that the ES be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis. These comments do not require a response.

Instrument	**Corporations Amendment (Financial Advice) Regulation 2015 [F2015L00969]**
Purpose	Amends the Corporations Regulations 2001 in relation to the Future of Financial Advice
Last day to disallow	17 September 2015
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* No. 8 of 2015

Matters more appropriate parliamentary enactment

The committee commented as follows: This instrument amends the Corporations Regulations 2000 in relation to the Future of Financial Advice (FOFA) provisions of the *Corporations Act 2001*. The ES for the instrument states that the purpose of the instrument is to:

> …reduce compliance costs for small business, financial advisers, and the broader financial services industry, whilst maintaining the quality of advice for consumers who access financial advice.

The regulation makes amendments to:

- clarify that a provider who provides advice to an employer about default funds is providing a financial service to a retail client;
- provide that the wholesale and retail client distinction that currently applies in other Parts of the *Corporations Act 2001* also applies to the FOFA provisions;

- modify best interests duty to giving advice on a basic banking product and/or a general insurance product where the subject matter of the advice being sought also relates to consumer credit insurance;
- provide a facility for making non-cash payments that is not related to a basic deposit product is a basic deposit product for the purposes of the FOFA provisions;
- clarify the application of the existing client-pays provision; and
- broaden the basic banking exemption from the ban on conflicted remuneration to include benefits relating to consumer credit insurance products.

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes legislation which fundamentally changes the law.

The ES for the instrument provides the following reason for introducing the changes via delegated legislation rather than primary legislation:

> The majority of these time sensitive FOFA amendments will also be enacted in legislation. The Government has adopted this approach to provide certainty to industry as quickly as possible.

However, along with the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee), the committee has previously questioned whether industry certainty (and benefit) amounts to a sufficient justification for effecting significant policy change via regulation. The Scrutiny of Bills committee, for example, has stated:

> …enabling a regulated industry to benefit from legislative changes 'as soon as possible' is not a sufficient justification to achieve policy change through regulations rather than Parliamentary enactment as this justification could be claimed with respect to any proposal. The fact that the changes may subsequently be enacted in primary legislation does not moderate the scrutiny concerns in this regard.

In light of these considerations, the committee considers that the changes effected by the regulation may be regarded as more appropriate for parliamentary enactment in respect of their substantive effect and the justification provided for their inclusion in delegated legislation.
The committee requested the advice of the minister in relation to this matter.

Assistant Treasurer's response

The Assistant Treasurer responded with the following advice:

> …on 20 December 2013, the Government announced a package of changes to the Future of Financial Advice (FOFA) Provisions. These changes were

implements through the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (the **Streamlining FOFA Regulation**), which came into effect on 1 July 2014. However, this Regulation was disallowed on 19 November 2014, which meant that the FOFA provisions reverted to their position prior to commencement of the Streamlining FOFA Regulation.

The disallowance of the Streamlining FOFA Regulation caused industry disruption. From the date of disallowance, the financial advice industry, having made changes to comply with the Streamlining FOFA Regulation, had to make further changes to their systems and processes to comply with the original FOFA provisions.

In response to the disallowance, ASIC announced that it would take a facilitative approach to administering the law until 1 July 2015. The Government also agreed with the Opposition that in order to alleviate industry disruption, certain minor and technical refinements to FOFA Should be progressed as a priority via regulation before ASIC's facilitative approach expired.

With bipartisan support, the first tranche of refinements was made through the Corporations Amendment (Revising Future Financial Advice) Regulation (**Revising FOFA Regulation**), which commenced on 16 December 2014. The second tranche of refinements was made, also with bipartisan support, through the Regulation, which commenced on 1 July 2015.

The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.

In summary, the purpose of amending FOFA through the Regulation was to swiftly deal in a bipartisan manner with disruption to the financial services sector caused by disallowance of the Streamlining FOFA Regulation and the expiry of ASIC's facilitative approach to compliance with FOFA provisions.

Committee's response

The committee thanks the Assistant Treasurer for the response and has concluded its examination of the instrument.

However, the committee notes that scrutiny principle (d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

The committee notes the minister's claim that the purpose of the Regulation is:

> …to swiftly deal in a bipartisan manner with disruption to the financial services sector caused by disallowance of the Streamlining FOFA Regulation and the expiry of ASIC's facilitative approach to compliance with FOFA provisions.

The committee also notes the minister's advice that:

> The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.

The committee notes the current progress of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, namely that it was introduced into the Senate on 1 July 2014.

The committee remains concerned that the minister's position is capable of forming a precedent for the use of delegated legislation in favour of primary legislation on the basis that, due to the timing or inherent uncertainty of the Parliament's full legislative processes, it is the most convenient or preferred means to effect (interim) policy change.

While the committee notes the minster's advice that there is bipartisan support for the changes contained in the regulation, as the committee has previously noted, it is the pre-emptive character of the use of regulation in this case that gives rise to the committee's inquiries. The committee's questions on this issue point are based on the possibility that, notwithstanding the apparent bipartisan support for the regulation, the bill may not be passed in a form which contains all the measures in the regulation. The committee considers that the potential for this approach, in this and future cases, to 'permit a temporary mechanism to turn into a permanent legislative artefact', or to continue in operation despite the clearly expressed will of the Parliament (for example, if the bill were passed with amendments to remove one of the measures in the regulation or not complemented by the operation of the regulation), is critical to the assessment of whether the legislative approach offends the committee's scrutiny principle (d).

In light of these concerns about the potential for the regulation to implement changes that are subsequently not passed by the Senate, the committee has determined to give a notice of motion for disallowance to ensure that the ability to disallow the instrument is protected prior to the finalisation of the Senate's consideration of the bill.

The committee draws this matter to the Assistant Treasurer's attention.

Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

Instruments	ASIC Corporations (Repeal) Instrument 2015/363 [F2015L01384] (sections 741, 992B and 1020F, Corporations Act 2001) Health Insurance (Pharmacogenetic Testing – RAS (KRAS and NRAS)) Revocation Determination 2015 [F2015L01353] (subsection 3C(1), Health Insurance Act 1973) Private Health Insurance (Benefit Requirements) Amendment Rules 2015 (No. 3) [F2015L01356] (section 333-20, Private Health Insurance Act 2007) Social Security (Means Test Treatment of Private Trusts – Excluded Trusts) Declaration 2015 [F2015L01363] (subsection 1207(4), Social Security Act 1991)
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

> Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[1]

1 For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511.

Chapter 2
Concluded matters

This chapter sets out matters which have been concluded to the satisfaction of the committee based on responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 1.

Instrument	**ASIC Corporations (Amendment) Instrument 2015/624 [F2015L01158]**
Purpose	Amends the ASIC Class Order [CO 08/1] to extend the transitional period for compliance with the breach reporting conditions
Last day to disallow	17 September 2015
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 9 of 2015

Extension of exemption

The committee commented as follows: This instrument amends ASIC Class Order [CO 08/1] Group purchasing bodies [F2011C00298] (principal instrument). The principal instrument gives conditional relief from the Australian Financial Services licensing regime and Chapter 5C of the *Corporations Act 2001* to certain group purchasing bodies (GPBs) who arrange or hold risk management products (such as insurance) for the benefit of third parties. GPBs include sporting and other not-for-profit organisations which arrange insurance for third parties (such as players or volunteers).

The explanatory statement (ES) for the instrument states:

> [CO 08/1] provides conditional relief to a limited class of GPBs that organise insurance on a non-commercial basis. It contains a condition that requires a GPB who rely on the relief to report to ASIC breaches of conditions of the relief. The requirement to comply with the breach reporting condition was subject to a delayed start to allow for transition. Based on the current wording of [CO 08/1], the transitional period for compliance with the breach reporting condition in [CO 08/1] ended on 30 June 2015.

This instrument amends the principal instrument to extend the transitional period until 30 June 2016 ‘while the Government and ASIC consider the issue’. The ES goes on to state:

> This extension will enable the Government and ASIC to consider how the issues raised by GPBs can be addressed by amendments to the Corporations Regulations 2001 and to consult with stakeholders in the development of the regulations.

However, the committee notes that the transitional period was originally set, by the principal instrument (made in 2010), to end on 30 June 2011. A series of nine amendments to the principal instrument have since extended that date, initially in increments of six months and more recently in increments of 12 months.

While the committee appreciates that these exemptions have been effected to allow for consultation over, and consideration of, amendments to the regulations, the committee would appreciate further advice on the current status and progress of consultations in relation to this matter.

The committee requested the advice of the minister in relation to this matter.

Assistant Treasurer's response

The Assistant Treasurer provided the following advice:

> While some consultations have taken place, due to technical complexities, no clear option to progress this matter has emerged. It is intended that further consultations will be held with stakeholders to allow a final position to be established before amendments to the Corporations Regulations 2001 can be drafted.

Committee's response

The committee thanks the Assistant Treasurer for his response and has concluded its examination of the instrument.

Instrument	**Australian Passports (Application Fees) Determination 2015 [F2015L01222]** **Foreign Passports (Law Enforcement and Security) Determination 2015 [F2015L01224]**
Purpose	These instruments amend and remake sections of the Australian Passports Determination 2005 that relate to fees and taxes into a separate, new determination; and remakes the Foreign Passports Determination 2005
Last day to disallow	20 August 2015
Authorising legislation	*Australian Passports (Application Fees) Act 2005*; *Foreign Passports (Law Enforcement and Security) Act 2005*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 9 of 2015

Drafting

Australian Passports (Application Fees) Determination 2015 [F2015L01222]

The committee commented as follows: The committee notes that the instrument is identifed as made under the *Australian Passports (Application Fees) Act 2005*. However, neither the instrument nor the ES appear to identify the specific provision of that Act that is relied on to make the instrument.

The committee's usual expectation is that an instrument or its ES identify the provision of the enabling legislation which authorises the making of the instrument, in the interests of promoting clarity and intelligibility of the instrument to anticipated users.

Foreign Passports (Law Enforcement and Security) Determination 2015 [F2015L01224]

The committee commented as follows: The committee notes that the instrument is identifed as made under the *Foreign Passports (Law Enforcement and Security) Act 2005*. However, neither the instrument nor the ES appear to identify the specific provision of that Act that is relied on to make the instrument.

The committee's usual expectation is that an instrument or its ES identify the provision of the enabling legislation which authorises the making of the instrument, in the interests of promoting clarity and intelligibility of the instrument to anticipated users.

The committee requested the advice of the minister in relation to these matters.

Minister's response

The Minister for Foreign Affairs advised:

> The Australian Passports (Application Fees) Determination 2015 is made under section 8 of the *Australian Passports (Application Fees) Act 2005* (the Application Fees Act). Section 8 gives the Minister the authority to specify any matters provided in the Application Fees Act in a determination; and
>
> The Foreign Passports (Law Enforcement and Security) Determination 2015 is made under section 24 of the *Foreign Passports (Law Enforcement and Security) Act 2005* (the Foreign Passports Act). Section 24 gives the Minister the authority to specify any matters provided in the Foreign Passports Act in a determination.

Committee's response

The committee thanks the minister for her response and has concluded its examination of the instruments.

Instrument	**Autonomous Sanctions Amendment (Sanctioned Commercial Activity—Russia) Regulation 2015 [F2015L00946]**
Purpose	Amends the Autonomous Sanctions Regulations 2011 to clarify the definition of 'sanctioned commercial activity'
Last day to disallow	17 September 2015
Authorising legislation	*Autonomous Sanctions Act 2011*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 8 of 2015

No description of consultation

The committee commented as follows: Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no information in relation to consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requested the advice of the minister in relation to this matter; and requested that the ES be updated in accordance with the requirements of the Legislative Instruments Act 2003.

Minister's response

The Minister for Foreign Affairs advised:

> The Regulation corrected a minor drafting error in in the Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015, which had been subject to a public consultation process in 2014. The Department of Foreign Affairs and Trade conducts regular outreach to the Australian business community to explain Australian sanction laws.

The minister further advised that the ES for the instrument had been updated as follows:

> No public consultation was undertaken in relation to the Proposed Regulation because it merely clarifies a point of drafting in the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015*, which regulation was subject to a public consultation process. The Department of Foreign Affairs and Trade conducts regular outreach to the Australian business community to explain Australian sanction laws.

Committee's response

The committee thanks the minister for her response and has concluded its examination of the instrument.

Instrument	**Comptroller-General of Customs (Places of Detention) Directions 2015 [F2015L00891]**
Purpose	Identifies places which an officer is permitted to detain a person and specifies other matters relating to the detention of persons under paragraph 219ZJE(1)(a) of the *Customs Act 1901*
Last day to disallow	17 September 2015
Authorising legislation	*Customs Act 1901*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 8 of 2015

Undue trespass on personal rights and liberties

The committee commented as follows: This instrument specifies places where an officer is permitted to detain a person and specifies other matters relating to the detention of persons under paragraph 219ZJE(1)(a) of the *Customs Act 1901*.

Item 1 of the instrument provides that a person must be detained in a room that meets certain standards or, if no such room is convenient and suitable, an Australian Border Force vehicle. Item 2 of the instrument provides that, for the purposes of paragraph 219ZJE(1)(b) of the *Customs Act 1901*, if a Customs officer conducts a search before taking a person to a place mentioned in item 1 of the direction, the officer conducting the search must afford the detainee as much personal privacy 'as the circumstances of the search allow'.

Standing Order 23, scrutiny principle (3)(b) requires the committee to ensure that an instrument does not 'unduly trespass' on personal rights and liberties. In this case, the committee notes that the requirement to allow a detainee as much privacy 'as the circumstances of the search allow' lacks definition, and would appear to provide a broad discretion to an officer conducting a search in relation to the extent of privacy afforded to a person subject to a search. It is therefore unclear whether the instrument unduly trespasses on the personal rights and liberties of persons affected by the instrument.

The committee requested the advice of the minister in relation to this matter.

Minister's response

The Minister for Immigration and Border Protection advised:

> The instrument refers to the Comptroller-General of Customs giving a direction on the places of detention available to officers when a person is detained under Division 1 BA of Part XII of the *Customs Act 1901* (Customs Act) (item 1 of the direction) and the privacy afforded a detained persons who may be searched under section 219ZJD of the Customs Act (item 2 of the direction). Division 1 BA relates to detention and search of persons for the purposes for law enforcement cooperation.
>
> Officers receive extensive training in relation to their duties which includes regular training in relation to personal search powers. This training includes the procedures that must be followed and provides guidance on officers' obligations to ensure the highest standards of care, wellbeing and privacy considerations of the person.
>
> Provisions in Division 1 BA of Part XII of the Customs Act allow officers to detain a person in certain circumstances. For example, section 219ZJB applies where a person is in a designated place (including gazetted airports and ports, and boarding stations) and the officer has reasonable grounds to suspect that the person has committed, or is committing, a serious commonwealth offence or a prescribed state or territory offence. Officers can detain the person and conduct a search of persons detained under section 219ZJD of the Act. This section allows officers to conduct a frisk or ordinary search of the person, to search the clothing that the person is wearing and any property under the person's immediate control. A search under this Division is for the purposes of determining whether a weapon or

thing capable of inflicting harm is concealed on the person or in the persons clothing or property; or to prevent the concealment, loss or destruction of evidence relating to an offence; or preventing the concealment, loss or destruction of material of interest for national security or the security of a foreign country. Under section 219ZJD of the Act, a search must be conducted as soon as practicable after the person is detained; and by an officer of the same sex as the detained person. Persons who identify as transgender are consulted as to their preference for a male or female officer to conduct the search.

The level of privacy that may be afforded a detainee who is the subject of a personal search will depend on the location of the detention. Major airports and seaports have designated rooms available for detention and the personal search of detainees. These rooms are closed off from public view and will afford a detainee a higher level of personal privacy while being searched. However, regional airports and seaports may lack identical infrastructure. While a person may be initially detained at such places, the final detention place may be some distance from the initial detention place. In these circumstances, it may preferable to conduct the personal search at the initial detention place and before the final detention space, for example to ensure officer safety. In all circumstances, therefore, the person will be provided as much personal privacy as that particular infrastructure allows.

In these circumstances, I do not consider that the Directions unduly trespass on personal rights and liberties of a detained person.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 6) Regulation 2015 [F2015L00939]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Attorney-General's Department, the Department of Communications, the Department of Education and Training, the Department of Health, the Department of Industry and Science, the Department of Infrastructure and Regional Development and the Department of Social Services
Last day to disallow	17 September 2015
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 8 of 2015

Merits review

The committee commented as follows: The instrument adds new table item 88 to Part 4 of Schedule 1AB establishing legislative authority for the Commonwealth government to fund the National Programme for Excellence in the Arts to be administered by the Ministry for Arts within the Attorney-General's Department.

The instrument also adds new table item 89 to Part 4 of Schedule 1AB establishing legislative authority for the Commonwealth government to fund a Matched Funding Programme to be administered by Creative Partnerships Australia under a grant agreement with the Attorney-General's Department.

While the ES is generally helpful in providing information about the proposed administration of these programs, no information has been provided as to whether the programs possesses the relevant characteristics that would justify the exclusion of decisions under these programs from merits review.

In order to assess whether a program in schedule 1AB possesses the characteristics justifying the exclusion from merits review, the committee's usual expectation is that ESs specifically address this question in relation to each new and/or amended program added to Schedule 1AB, including a description of the policy considerations and program characteristics that are relevant to the question of whether or not decisions should be subject to merits review.

The committee requested the advice of the minister in relation to this matter.

Minister's response

The Minister for Finance provided an informative response, which offered the following information on the National Programme for Excellence in the Arts:

> The allocation of funding through the National Programme for Excellence in the Arts ('the programme') will be decided on an open and competitive basis. Only projects that are consistent with and support the programme to achieve its aims and objectives will be awarded funding.
>
> Applications will be assessed in accordance with the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines*.
>
> In line with the *Commonwealth Grants Rules and Guidelines*, the programme guidelines will include clearly defined objectives and eligibility criteria, application processes, decision-making responsibilities, the appointment of independent assessors and complaint mechanisms. The draft guidelines for the programme, which were made publicly available for comment from 1 to 31July 2015 online at http://arts.gov.au/nationalexcellenceprogram, identify that assessments will be carried out on an ongoing basis with recommendations made to the Minister for the Arts.
>
> Final guidelines for the programme are expected to be released in October 2015 and will be publicly available online at http://arts.gov.au/.
>
> Individual applications will be assessed by a combination of Ministry for the Arts officials and independent assessors and all funding

> recommendations made to the Minister will be reviewed by senior Ministry officials. Where needed, the process will be informed by other Government officials (for example, consideration of applications under the International and Cultural Diplomacy stream may involve officials of the Department of Foreign Affairs and Trade). Assessors will make their assessments against set criteria and will determine the extent to which applications meet the criteria. The Ministry for the Arts will maintain a Register of Independent Assessors comprising sector and community representatives.
>
> The Ministry for the Arts currently administers a significant portion of Commonwealth arts and cultural funding through various grants programmes with similar operating processes to the National Programme for Excellence in the Arts.
>
> The National Programme for Excellence in the Arts is unsuitable for merits review as the programme has limited funds and only a proportion of applications can be met. A successful application for review would result in funding delays that would affect all grants under the programme, delaying the delivery of arts and cultural projects and collaborations in Australia and internationally, which in many cases are time sensitive.
>
> This approach is consistent with other grants programmes administered by the Ministry which are also assessed in accordance with the *Public Governance, Performance and Accountability Act 2013* and the Commonwealth Grants Rules and Guidelines and have no merits review mechanism.

In relation to the Matched Funding Programme, to be administered by Creative Partnerships Australia, the minister advised:

> New table item 89 establishes legislative authority for the Commonwealth to provide funding to Creative Partnerships Australia (CPA), a Commonwealth company, for CPA to deliver matched funding initiatives for the arts and cultural sector. As the spending authorised by this provision is a Budget decision of a policy nature and is made to a single recipient under a grant agreement with the Attorney-General's Department (which, among other things, specifies the objectives of the matched funding initiatives), this programme is not considered suitable for merits review.
>
> In delivering its matched funding initiatives using the funding provided by the Commonwealth, CPA will assess the merits of individual applications for support against criteria set out in guidelines available online at www.creativepartnershipsaustralia.org.au/how-we-can-help/programs/.
> CPA's matched funding initiatives are unsuitable for merits review as they have limited funds available and only a proportion of applications can be met. A successful application for review would result in delays affecting all successful applicants for matched funding, potentially preventing them from successfully raising funds from the private sector that are to be "matched" by CPA.

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00972]**
Purpose	Amends the Migration Regulations 1994, Australian Citizenship Regulations 2007, Migration Agents Regulations 1998, and Customs Regulations 2015 to update immigration, citizenship and customs policy
Last day to disallow	17 September 2015
Authorising legislation	*Migration Act 1958*; *Australian Citizenship Act 2007*; *Customs Act 1901*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 8 of 2015

Unclear basis for determining fees

The committee commented as follows: Schedule 7 of this instrument increases various visa application charges.

The committee notes that, while the ES identifies the basis for increases to certain application charges as being in line with the Consumer Price Index (2.3 percent), the basis for other increases is unclear—specifically, the increased application charges for economic related visas (by five per cent), family related visas (by 10 per cent) and significant investor visas (by 50 per cent).

In this regard, the ES provides only general information that these changes are made in lieu of indexation of all VACs (visa application charges) for 2015 and that the measure:

> …harmonises VACs for some visa categories by creating a uniform price point for onshore and offshore visa applications and supports a 2015-16 Budget measure.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a change to a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated.

The committee requested the advice of the minister in relation to this matter.

Minister's response

The Minister for Immigration and Border Protection advised:[1]

> In 2014, the Government commissioned the former Australian Customs and Border Protection Service, the Department of Immigration and Border Protection and the Department of Agriculture to conduct a joint review of charges, fees and taxes prior to the 2015-16 Budget.
>
> The review was commissioned to identify and recommend to the Government how charging arrangements in these portfolios could be revised to better support future border operations and industry and government outcomes.
>
> Significant analysis and benchmarking was undertaken to ensure Australia's competitiveness as a destination would not be hampered by any individual change.
>
> Historical price and demand analysis was also conducted to ensure suggested changes to prices would not negatively impact demand.
>
> As a result of the review, the Government decided to make the amendments in this instrument.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 [F2015L01114]**
Purpose	Revokes the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2008 to limit amateur access to the relevant frequency ranges
Last day to disallow	17 September 2015
Authorising legislation	*Radiocommunications Act 1992*
Department	Communications
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 9 of 2015

Incorporation of extrinsic material

1 The minister's response is contained in Attachment A of the minister's response on the Comptroller-General of Customs (Places of Detention) Directions 2015 [F2015L00891] (Correspondence relating to these matters is included at Appendix 1 to this report).

The committee commented as follows: Section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14).

The instrument incorporates or refers to a number of documents, which, in line with the committee's expectation that an ES explain the purpose and operation of the instrument, are listed in the ES as in force from time to time (as permitted by section 314A of the *Radiocommunications Act 1992*) or as in existence from time to time.

However, the committee notes that Australian Geodetic Datum (AGD66) is referenced at section 3(3) of the instrument as gazetted on 6 October 1966, but in the ES ‘as in existence from time to time’ followed by the statement ‘AGD66 was gazetted…on 6 October 1966; more information about it is available from the Geoscience Australia website at http://www.ga.gov.au’. However, that website suggests that there exists a 1984 version of AGD66, which was subsequently replaced by Geocentric Datum of Australia (GDA94). It is therefore unclear to the committee on a reading of the instrument and the ES what the intention of the rule-maker was in relation to the incorporation of the document.

The committee requested the advice of the minister in relation to this matter.

Minister's response

The Minister for Communications advised:

> The instrument correctly refers to AGD66 at section 3(3). The ACMA has advised that its intention in preparing the ES is to refer only to AGD66, as gazetted on 6 October 1966. The statement referring to AGD66 'as in existence from time to time' is not intended to indicate that AGD66 should be replaced by the newer coordinate systems in this instance.
>
> A geodetic or geocentric datum is a coordinate system which provides a standard for describing geographic locations. There are three such systems in use in Australia:
>
> • Australian Geodetic Datum (AGD66), gazetted in 1966
>
> • Australian Geodetic Datum 1984 (AGD84)
>
> • Geocentric Datum of Australia (GDA94).
>
> The ACMA's legacy information technology systems for radiocommunications licensing rely on the AGD66 coordinates. Accordingly, AGD66 is currently the preferred geodetic datum for the expression of coordinates that relate to radiocommunications licences.
>
> The ACMA is in the process of upgrading its information technology systems in relation to radiocommunications licensing, and may be in a position later this year to consider amending the instrument and ES with references to GDA94.

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Social Security (Administration) (Income Management - Crediting of Accounts) Rules 2015 [F2015L00781]**
Purpose	Provide particular circumstances in which the Income Management Record (established by section 123VA of the *Social Security (Administration) Act 1999*) and a person's income management account can be credited with an amount that is ascertained in accordance with the rules
Last day to disallow	20 August 2015
Authorising legislation	*Social Security (Administration) Act 1999*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 9 of 2015

Description of consultation

The committee commented as follows: Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the instrument states:

> Consultation on these Rules was with the Department of Human Services.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee considers that in this case the information provided does not describe the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation with the Department of Human Services).

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.

The committee requested the advice of the minister in relation to this matter; and requested that the ES be updated in accordance with the requirements of the Legislative Instruments Act 2003.

Minister's response

The Minister for Social Services advised:

> This instrument is a simple, technical amendment which explicitly allows the transfer of funds from an individual's BasicsCard to their Income Management Record (IMR), a fundamental process to the successful operation of the programme. Without this instrument in place, a customer would not have the flexibility to transfer their money from their BasicsCard back to their IMR, potentially disadvantaging individuals who may need to access their funds via an alternate payment mechanism.
>
> A consultation was undertaken by the Department of Social Services (DSS) regarding the proposal to update the Rules to clarify the circumstances in which a person's income management account can be credited with an amount, in accordance with the Rules. However, the consultation was not outlined in the Explanatory Statement. The proposed Rules would explicitly enable the Department of Human Services (OHS) to credit income management accounts in particular situations, to the benefit of the income management customers.
>
> DSS consulted with OHS, as the service delivery agency, regarding the crediting of income management accounts.
>
> The purpose of consulting with OHS was to determine whether this process is necessary. Through the consultations, DSS found the customers would be unfairly disadvantaged if OHS were not able to credit the accounts. The proposed amendments address these issues, removing any ambiguity regarding the situations in which OHS can credit a customer's account, allowing DHS to credit such accounts where appropriate.

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Work Health and Safety Amendment Regulation 2015 (No. 1) [F2015L00951]**
Purpose	Amends the Work Health and Safety Regulations 2011 to make technical amendments agreed by the Select Council on Workplace Relations
Last day to disallow	17 September 2015
Authorising legislation	*Work Health and Safety Act 2011*
Department	Employment
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* No. 8 of 2015

Insufficient information regarding strict liability offences

The committee commented as follows: This instrument amends the Work Health and Safety Regulations 2011 to implement changes to the model of work health and safety laws agreed to by Safe Work Australia. The instrument creates a number of strict liability offences for various work health and safety offences.

Given the limiting nature and potential consequences for individuals of strict and vicarious liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences (particularly strict liability offences) in delegated legislation. The committee notes that in this case the ES provides no explanation of or justification for the framing of the offences.

The committee requested the advice of the minister in relation to this matter.

Minister's response

The Minister for Employment provided an informative response, which offered the following advice:

> As was noted in the explanatory statement for the *Work Health and Safety Regulations 2011* (the Principal Regulations), the use of strict liability offences was agreed by Commonwealth state and territory workplace relations ministers during the development of the model work health and safety laws and was carefully considered during the drafting of the Principal Regulations. The use was considered justified because of the regulatory context where, because of the importance of the safety of workers and the general public, the sanction of criminal penalties is justified.
>
> Offences under the Principal Regulations are predominately targeted at specific high risk industries or workplaces where defendants can reasonably be expected, because of their professional involvement, to know the requirements of the law. Subsequently, the mental or fault element can justifiably be excluded. Further, most offences under the Principal Regulations are subject to qualifiers such as reasonable practicability, due diligence or reasonable care.
>
> The amending Regulation was principally technical in nature. As a result, the majority of offences inserted by the amending Regulation were re-enactments of existing offences with minor changes to wording, structure or application. For example, item 59 re-enacts a set of obligations in relation to amusement devices, with the only change being the extension of these obligations to passenger ropeways. The offences contained in these provisions were not new offences—these were existing offences repealed and re-inserted with minor modifications.
>
> The amending Regulation inserted three substantively new offences. These were consistent with the existing Principal Regulations, and so were considered justified on the same basis as existing strict liability offences. New regulation 85(2A) creates an offence for directing or permitting an unlicensed worker to carry out high risk work without seeing written evidence that an exemption applies. This is consistent with the other offences in regulation 85. New regulation 288D creates an offence for

failure to return a registration document. This is consistent with equivalent provisions requiring the return of other licensing or registration documents on the request of the regulator—for example, see regulations 111 and 607. The insertion of penalty provisions in subregulation 343(2) created an offence for failing to label containers containing hazardous chemicals, which is consistent with other provisions concerning labelling of hazardous chemicals.

Finally, the amending Regulation moved and inserted penalty provisions in regulation 418. This did not create a substantive new offence. Instead, it clarified the structure of an existing offence by moving the penalty provisions to the subsections containing the obligations in the regulation.

The strict liability offences inserted by the amending Regulation are either the re-enactment of existing offences with minor changes, or are new offences that are consistent with existing offences in the Principal Regulations. As such, these strict liability offences are considered justified on the same basis as those previously contained in the Principal Regulations.

The committee thanks the minister for his response and has concluded its examination of the instrument.

Appendix 1
Correspondence

Assistant Treasurer

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

28 AUG 2015

Dear Senator John Williams

On 13 August 2015, Mr Ivan Powell, Committee Secretary, wrote on behalf of the Senate Standing Committee on Regulations and Ordinances requesting information in relation to the Corporations Amendment (Financial Advice) Regulation 2015 (**the Regulation**), as per *Delegated Legislation Monitor No. 8* of 2015. The Committee has requested advice regarding the decision to make changes to the Corporations law through the Regulation.

As you would be aware, on 20 December 2013, the Government announced a package of changes to the Future of Financial Advice (FOFA) provisions. These changes were implemented through the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (**the Streamlining FOFA Regulation**), which came into effect on 1 July 2014. However, this Regulation was disallowed on 19 November 2014, which meant that the FOFA provisions reverted to their position prior to the commencement of the Streamlining FOFA Regulation.

The disallowance of the Streamlining FOFA Regulation caused industry disruption. From the date of disallowance, the financial advice industry, having made changes to comply with the Streamlining FOFA Regulation, had to make further changes to their systems and processes to comply with the original FOFA provisions.

In response to the disallowance, ASIC announced that it would take a facilitative approach to administering the law until 1 July 2015. The Government also agreed with the Opposition that in order to alleviate industry disruption, certain minor and technical refinements to FOFA should be progressed as a priority via regulation before ASIC's facilitative approach expired.

With bipartisan support, the first tranche of refinements was made through the Corporations Amendment (Revising Future of Financial Advice) Regulation 2014 (**Revising FOFA Regulation**), which commenced on 16 December 2014. The second tranche of refinements was made, also with bipartisan support, through the Regulation, which commenced on 1 July 2015.

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The majority of the amendments made through the Revising FOFA Regulation and the Regulation will also be enacted in legislation through the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014, which is currently before the Senate and will be subject to full Parliamentary scrutiny.

In summary, the purpose of amending FOFA through the Regulation was to swiftly deal in a bipartisan manner with disruption to the financial services sector caused by the disallowance of the Streamlining FOFA Regulation and the expiry of ASIC's facilitative approach to compliance with the FOFA provisions.

I hope this answers your inquiries.

Kind regards

JOSH FRYDENBERG

Assistant Treasurer

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 20 August 2015 providing comments on the ASIC Corporations (Amendment) Instrument 2015/624 contained in your Committee's *Delegated legislation monitor* No.9 of 2015. You have sought advice on the current status and progress on consultations in relation to this matter.

While some consultations have taken place, due to technical complexities, no clear option to progress this matter has emerged. It is intended that further consultations will be held with stakeholders to allow a final position to be established before amendments to the *Corporations Regulations 2001* can be drafted.

Thank you for bringing this matter to my attention. I trust the information provided is helpful.

Yours faithfully

JOSH FRYDENBERG

Parliament House Canberra ACT 2600
Australia
Telephone: 61 2 6277 7360 Facsimile: 61 2 6273 4125

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the letter of 20 August 2015 concerning issues identified by the Senate Regulations and Ordinances Committee (the Committee) in relation to the Australian Passports (Application Fees) Determination 2015 and the Foreign Passports (Law Enforcement and Security) Determination 2015.

In response to the Committee's questions:

- The Australian Passports (Application Fees) Determination 2015 is made under section 8 of the *Australian Passports (Application Fees) Act 2005* (the Application Fees Act). Section 8 gives the Minister the authority to specify any matters provided in the Application Fees Act in a determination; and
- The Foreign Passports (Law Enforcement and Security) Determination 2015 is made under section 24 of the *Foreign Passports (Law Enforcement and Security) Act 2005* (the Foreign Passports Act). Section 24 gives the Minister the authority to specify any matters provided in the Foreign Passports Act in a determination.

I trust this information is of assistance.

Yours sincerely Best wishes

Julie Bishop

09 SEP 2015

Telephone (02) 6277 7500 Parliament House, Canberra ACT 2600, Australia Facsimile (02) 6273 4112

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
Canberra

Dear Senator

Thank you for your Committee's letter of 13 August 2015 to my office concerning the *Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015* (the Regulation).

As noted in Delegated Legislation Monitor No.8 of 2015, the Explanatory Statement to the Regulation does not provide information on consultation undertaken in relation to the Regulation. The Regulation corrected a minor drafting error in in the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015*, which had been subject to a public consultation process in 2014. The Department of Foreign Affairs and Trade conducts regular outreach to the Australian business community to explain Australian sanction laws.

As requested in Delegated Legislation Monitor No.8 of 2015, the Department of Foreign Affairs and Trade has updated the Explanatory Statement to include this information. I attach a copy of the updated Explanatory Statement for your information.

I have asked the Department of Foreign Affairs and Trade to ensure that this information is included in explanatory materials pertaining to future regulations for which I have responsibility.

Yours sincerely

Julie Bishop

14 SEP 2015

Telephone (02) 6277 7500 Parliament House, Canberra ACT 2600, Australia Facsimile (02) 6273 4112

EXPLANATORY STATEMENT

Select Legislative Instrument No.100 of 2015

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Act 2011

Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015

Section 28 of the *Autonomous Sanctions Act* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Autonomous Sanctions Regulations 2011* (the Principal Regulations) facilitate the conduct of Australia's relations with certain countries, and with specific entities or persons outside of Australia, through the imposition of autonomous sanctions in relation to those countries, or targeting those entities or persons.

The purpose of the *Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015* (the Regulation) is to amend autonomous sanctions measures in relation to Russia.

Specifically, the Regulation amends subregulation of 5B(3) of the Principal Regulation to clarify that 'sanctioned commercial activity' also means directly or indirectly making, or being part of any arrangement to make, loans or credit if the loan or credit is made to an entity specified in subregulation 5B(6) and has a specified maturity period.

Details of the Regulation are set out in the Attachment.

No public consultation was undertaken in relation to the Proposed Regulation because it merely clarifies a point of drafting in the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015*, which regulation was subject to a public consultation process. The Department of Foreign Affairs and Trade conducts regular outreach to the Australian business community to explain Australian sanction laws.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015

The *Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015* does not engage, and is therefore compatible with, the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ATTACHMENT

Details of the *Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015*

Section 1 – Name
Section 1 provides that the name of the Regulation is the *Autonomous Sanctions Amendment (Sanctioned Commercial Activity – Russia) Regulation 2015*.

Section 2 – Commencement
Section 2 provides that the Regulation commences on the day after it is registered.

Section 3 – Authority
Section 3 provides that the Regulation is made under the *Autonomous Sanctions Act 2011*.

Section 4 – Schedules
Section 4 provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item [1] – Paragraph 5B(3(a)

Item [1] omits ‘made after the commencement of this subregulation, by’, and substitutes ‘made, after the commencement of this subregulation, to’.

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MC15-219780

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John.

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 13 August 2015 concerning the Delegated Legislation Monitor No. 8 of 2015 in which the Committee requested a response regarding two legislative instruments.

The response in relation to these legislative instruments is attached, as follows:

- Attachment A – *Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015* [F2015L00972]; and
- Attachment B – *Comptroller-General of Customs (Places of Detention) Directions 2015* [F2015L00891].

Thank you again for bringing these matters to my attention. I trust the information provided is helpful.

Yours sincerely

PETER DUTTON 15/9/15

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

ATTACHMENT A

***Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015* – [F2015L00972]**

In 2014, the Government commissioned the former Australian Customs and Border Protection Service, the Department of Immigration and Border Protection and the Department of Agriculture to conduct a joint review of charges, fees and taxes prior to the 2015-16 Budget.

The review was commissioned to identify and recommend to the Government how charging arrangements in these portfolios could be revised to better support future border operations and industry and government outcomes.

Significant analysis and benchmarking was undertaken to ensure Australia's competitiveness as a destination would not be hampered by any individual change. Historical price and demand analysis was also conducted to ensure suggested changes to prices would not negatively impact demand.

As a result of the review, the Government decided to make the amendments in this instrument.

ATTACHMENT B

***Comptroller-General of Customs (Places of Detention) Directions 2015* – [F2015L00891]**

The instrument refers to the Comptroller-General of Customs giving a direction on the places of detention available to officers when a person is detained under Division 1BA of Part XII of the *Customs Act 1901* (Customs Act) (item 1 of the direction) and the privacy afforded a detained persons who may be searched under section 219ZJD of the Customs Act (item 2 of the direction). Division 1BA relates to detention and search of persons for the purposes for law enforcement cooperation.

Officers receive extensive training in relation to their duties which includes regular training in relation to personal search powers. This training includes the procedures that must be followed and provides guidance on officers' obligations to ensure the highest standards of care, wellbeing and privacy considerations of the person.

Provisions in Division 1BA of Part XII of the Customs Act allow officers to detain a person in certain circumstances. For example, section 219ZJB applies where a person is in a designated place (including gazetted airports and ports, and boarding stations) and the officer has reasonable grounds to suspect that the person has committed, or is committing, a serious commonwealth offence or a prescribed state or territory offence. Officers can detain the person and conduct a search of persons detained under section 219ZJD of the Act. This section allows officers to conduct a frisk or ordinary search of the person, to search the clothing that the person is wearing and any property under the person's immediate control. A search under this Division is for the purposes of determining whether a weapon or thing capable of inflicting harm is concealed on the person or in the persons clothing or property; or to prevent the concealment, loss or destruction of evidence relating to an offence; or preventing the concealment, loss or destruction of material of interest for national security or the security of a foreign country. Under section 219ZJD of the Act, a search must be conducted as soon as practicable after the person is detained; and by an officer of the same sex as the detained person. Persons who identify as transgender are consulted as to their preference for a male or female officer to conduct the search.

The level of privacy that may be afforded a detainee who is the subject of a personal search will depend on the location of the detention. Major airports and seaports have designated rooms available for detention and the personal search of detainees. These rooms are closed off from public view and will afford a detainee a higher level of personal privacy while being searched. However, regional airports and seaports may lack identical infrastructure. While a person may be initially detained at such places, the final detention place may be some distance from the initial detention place. In these circumstances, it may preferable to conduct the personal search at the initial detention place and before the final detention space, for example to ensure officer safety. In all circumstances, therefore, the person will be provided as much personal privacy as that particular infrastructure allows.

In these circumstances, I do not consider that the Directions unduly trespass on personal rights and liberties of a detained person.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MC15-002249

Senator John Williams
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 13 August 2015 sent to my office seeking further information about two items in the *Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 6) Regulation 2015* (the Regulation).

In the *Delegated legislation monitor* No. 8 of 2015, 12 August 2015, the Senate Committee on Regulations and Ordinances (the Committee) requested information about the application of merits review to the National Programme for Excellence in the Arts and the matched funding programme.

The Ministry for the Arts, which is part of the Attorney-General's Department, administers both programmes and has provided the following advice:

National Programme for Excellence in the Arts

The allocation of funding through the National Programme for Excellence in the Arts ('the programme') will be decided on an open and competitive basis. Only projects that are consistent with and support the programme to achieve its aims and objectives will be awarded funding.

Applications will be assessed in accordance with the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines*.

In line with the *Commonwealth Grants Rules and Guidelines,* the programme guidelines will include clearly defined objectives and eligibility criteria, application processes, decision-making responsibilities, the appointment of independent assessors and complaint mechanisms. The draft guidelines for the programme, which were made publicly available for comment from 1 to 31 July 2015 online at http://arts.gov.au/nationalexcellenceprogram, identify that assessments will be carried out on an ongoing basis with recommendations made to the Minister for the Arts.

Final guidelines for the programme are expected to be released in October 2015 and will be publicly available online at http://arts.gov.au/.

Individual applications will be assessed by a combination of Ministry for the Arts officials and independent assessors and all funding recommendations made to the Minister will be reviewed by senior Ministry officials. Where needed, the process will be informed by other Government officials (for example, consideration of applications under the International and Cultural Diplomacy stream may involve officials of the Department of Foreign Affairs and Trade). Assessors will make their assessments against set criteria and will determine the extent to which applications meet the criteria. The Ministry for the Arts will maintain a Register of Independent Assessors comprising sector and community representatives.

The Ministry for the Arts currently administers a significant portion of Commonwealth arts and cultural funding through various grants programmes with similar operating processes to the National Programme for Excellence in the Arts.

The National Programme for Excellence in the Arts is unsuitable for merits review as the programme has limited funds and only a proportion of applications can be met.
A successful application for review would result in funding delays that would affect all grants under the programme, delaying the delivery of arts and cultural projects and collaborations in Australia and internationally, which in many cases are time sensitive.

This approach is consistent with other grants programmes administered by the Ministry which are also assessed in accordance with the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines* and have no merits review mechanism.

Matched Funding programme

New table item 89 establishes legislative authority for the Commonwealth to provide funding to Creative Partnerships Australia (CPA), a Commonwealth company, for CPA to deliver matched funding initiatives for the arts and cultural sector. As the spending authorised by this provision is a Budget decision of a policy nature and is made to a single recipient under a grant agreement with the Attorney-General's Department (which, among other things, specifies the objectives of the matched funding initiatives), this programme is not considered suitable for merits review.

In delivering its matched funding initiatives using the funding provided by the Commonwealth, CPA will assess the merits of individual applications for support against criteria set out in guidelines available online at www.creativepartnerships australia.org.au/how-we-can-help/programs/. CPA's matched funding initiatives are unsuitable for merits review as they have limited funds available and only a proportion of applications can be met. A successful application for review would result in delays affecting all successful applicants for matched funding, potentially preventing them from successfully raising funds from the private sector that are to be "matched" by CPA.

I trust this information addresses the Committee's concerns.

Thank you for bringing the Committee's views to the attention of the Government.

Kind regards

Mathias Cormann
Minister for Finance

9 September 2015

The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

08 SEP 2015

Senator John Williams
Chairman
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 [F2015L01114]

Dear Senator

Thank you for your recent letter concerning the report of the Senate Regulations and Ordinances Committee (the Committee), *Delegated legislation monitor* No. 9 of 2015.

The Committee has raised concerns regarding the consistency of references to the Australian Geodetic Datum (AGD66) in the Radiocommunications (Overseas Amateurs Visiting Australia) Class Licence 2015 (the instrument) and the accompanying explanatory statement (ES), made by the Australian Communications and Media Authority (ACMA) on 29 June 2015.

The instrument correctly refers to AGD66 at section 3(3). The ACMA has advised that its intention in preparing the ES is to refer only to AGD66, as gazetted on 6 October 1966. The statement referring to AGD66 'as in existence from time to time' is not intended to indicate that AGD66 should be replaced by the newer coordinate systems in this instance.

A geodetic or geocentric datum is a coordinate system which provides a standard for describing geographic locations. There are three such systems in use in Australia:

- Australian Geodetic Datum (AGD66), gazetted in 1966
- Australian Geodetic Datum 1984 (AGD84)
- Geocentric Datum of Australia (GDA94).

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The ACMA's legacy information technology systems for radiocommunications licensing rely on the AGD66 coordinates. Accordingly, AGD66 is currently the preferred geodetic datum for the expression of coordinates that relate to radiocommunications licences.

The ACMA is in the process of upgrading its information technology systems in relation to radiocommunications licensing, and may be in a position later this year to consider amending the instrument and ES with references to GDA94.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance.

Yours sincerely

Malcolm Turnbull

The Hon Scott Morrison MP

Minister for Social Services

MS15-001663

Mr Ivan Powell
Senate Standing Committee on Regulations and Ordinances
Committee Secretary
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Powell

Thank you for your letter of 13 August 2015, concerning the *Social Security (Administration) (Income Management - Crediting of Accounts) Rules 2015* (Rules). I appreciate the time you have taken to bring this to my attention.

In the letter the Committee has raised questions regarding the consultation process for the development of the Rules. In particular, the Committee raised concern that the consultation provision in the Explanatory Statement does not sufficiently address the recommended consultation process.

This instrument is a simple, technical amendment which explicitly allows the transfer of funds from an individual's BasicsCard to their Income Management Record (IMR), a fundamental process to the successful operation of the programme. Without this instrument in place, a customer would not have the flexibility to transfer their money from their BasicsCard back to their IMR, potentially disadvantaging individuals who may need to access their funds via an alternate payment mechanism.

A consultation was undertaken by the Department of Social Services (DSS) regarding the proposal to update the Rules to clarify the circumstances in which a person's income management account can be credited with an amount, in accordance with the Rules. However, the consultation was not outlined in the Explanatory Statement. The proposed Rules would explicitly enable the Department of Human Services (DHS) to credit income management accounts in particular situations, to the benefit of the income management customers. DSS consulted with DHS, as the service delivery agency, regarding the crediting of income management accounts.

The purpose of consulting with DHS was to determine whether this process is necessary. Through the consultations, DSS found the customers would be unfairly disadvantaged if DHS were not able to credit the accounts. The proposed amendments address these issues, removing any ambiguity regarding the situations in which DHS can credit a customer's account, allowing DHS to credit such accounts where appropriate.

Thank you for raising this matter with me.

Yours sincerely

The Hon Scott Morrison MP
Minister for Social Services
8/9/2015

SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

8 SEP 2015

Dear Senator John,

This letter is in response to the Senate Standing Committee on Regulations and Ordinances' request of 13 August 2015 for advice in its Delegated Legislation Monitor No. 8 of 2015 on the inclusion of strict liability offences in the *Work Health and Safety Amendment Regulation 2015 (No. 1)* (the amending Regulation).

As was noted in the explanatory statement for the *Work Health and Safety Regulations 2011* (the Principal Regulations), the use of strict liability offences was agreed by Commonwealth state and territory workplace relations ministers during the development of the model work health and safety laws and was carefully considered during the drafting of the Principal Regulations. The use was considered justified because of the regulatory context where, because of the importance of the safety of workers and the general public, the sanction of criminal penalties is justified.

Offences under the Principal Regulations are predominately targeted at specific high risk industries or workplaces where defendants can reasonably be expected, because of their professional involvement, to know the requirements of the law. Subsequently, the mental or fault element can justifiably be excluded. Further, most offences under the Principal Regulations are subject to qualifiers such as reasonable practicability, due diligence or reasonable care.

The amending Regulation was principally technical in nature. As a result, the majority of offences inserted by the amending Regulation were re-enactments of existing offences with minor changes to wording, structure or application. For example, item 59 re-enacts a set of obligations in relation to amusement devices, with the only change being the extension of these obligations to passenger ropeways. The offences contained in these provisions were not new offences—these were existing offences repealed and re-inserted with minor modifications.

The amending Regulation inserted three substantively new offences. These were consistent with the existing Principal Regulations, and so were considered justified on the same basis as existing strict liability offences. New regulation 85(2A) creates an offence for directing or permitting an unlicensed worker to carry out high risk work without seeing written evidence that an exemption applies. This is consistent with the other offences in regulation 85. New regulation 288D creates an offence for failure to return a registration document. This is consistent with equivalent provisions requiring the return of other licensing or registration documents on the request of the regulator—for example, see regulations 111 and 607. The insertion of penalty provisions in sub regulation 343(2) created an offence for failing to label containers containing hazardous chemicals, which is consistent with other provisions concerning labelling of hazardous chemicals.

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Finally, the amending Regulation moved and inserted penalty provisions in regulation 418. This did not create a substantive new offence. Instead, it clarified the structure of an existing offence by moving the penalty provisions to the subsections containing the obligations in the regulation.

The strict liability offences inserted by the amending Regulation are either the re-enactment of existing offences with minor changes, or are new offences that are consistent with existing offences in the Principal Regulations. As such, these strict liability offences are considered justified on the same basis as those previously contained in the Principal Regulations.

I thank the Committee for the opportunity to provide this clarification.

Yours sincerely

ERIC ABETZ

Appendix 2
Guideline on consultation

Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislative Instruments Act 2003* (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the *Legislative Instruments Act 2003*

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 26 of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation**: An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted**: An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes**: An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 26 of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Specific examples listed in the Act**: Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Seeking further advice or information

Further information is available through the committee's website at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances or by contacting the committee secretariat at:

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