

The Senate

Standing
Committee on
Regulations and
Ordinances

Annual Report 2017

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Committee information

Current members (May 2018)

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Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Linda Reynolds CSC	Western Australia, LP
Senator the Hon Lisa Singh	Tasmania, ALP
Senator Amanda Stoker	Queensland, LP

Members in 2017

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Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Jane Hume	Victoria, LP
Senator Linda Reynolds CSC	Western Australia, LP
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1 The secretariat is staffed by parliamentary officers drawn from the Department of the Senate's Legislative Scrutiny Unit, who regularly work across multiple scrutiny committee secretariats. The secretariat usually comprises three to four staff.

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Chapter 1

Introduction

Work of the committee

1.1 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, which focus on statutory requirements, the protection of individual rights and liberties, and ensuring appropriate parliamentary oversight.

1.2 In most years, thousands of instruments of delegated legislation are made, relating to many aspects of the lives of people living in, trading with, or seeking to live or work in Australia. Instruments of delegated legislation have the same force in law as primary legislation, and may form as much as half of the law of the Commonwealth of Australia.¹

1.3 The committee's work may be broadly described as technical legislative scrutiny, as it does not generally extend to the examination or consideration of the policy merits of delegated legislation. The scope of the committee's scrutiny function is formally defined by Senate standing order 23, which requires the committee to scrutinise each instrument 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 make the rights and liberties of citizens unduly dependent on 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.

1.4 The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments, established by the *Legislation Act 2003*.

1.5 This annual report covers the period from 1 January to 31 December 2017. It is the first report covering a calendar year; the committee previously reported its work on a financial year basis.²

1 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 432.

2 The committee's previous 'annual' report covered an 18-month period from July 2015 to December 2016, enabling the transition from a financial year to calendar year reporting period.

Committee membership

1.6 Senate standing order 23 provides that the committee is appointed at the commencement of each Parliament. The committee has six members: three senators drawn from the government party and three non-government party or independent senators. The committee is chaired by a government senator. The current committee membership, as well as the list of members in 2017, can be found at the beginning of this report. Current committee membership, as updated from time to time, can also be found on the committee's website.³

The committee's mode of operation

1.7 In undertaking its work the committee is supported by a secretariat usually comprising a secretary, a principal research officer, a senior research officer and a legislative research officer. The committee also obtains advice from an external legal adviser who is appointed by the committee with the approval of the President of the Senate. Mr Stephen Argument served as the committee's legal adviser during the reporting period.

Delivery of instruments

1.8 Legislative instruments must be registered on the Federal Register of Legislation as soon as practicable after being made and, within six sitting days of registration, tabled in both Houses of Parliament. Once registered, the instruments are delivered by the Office of Parliamentary Counsel to Parliament for tabling, and to the committee secretariat.⁴

Scrutiny of instruments

1.9 Instruments tabled in Parliament are scrutinised by the committee secretariat and legal adviser with reference to the committee's scrutiny principles.

1.10 The committee meets regularly, during sittings of Parliament, to consider any instruments that may give rise to concern in relation to its scrutiny principles.

1.11 Where an instrument raises such a concern, the committee's usual approach is to comment on it in its *Delegated legislation monitor*, then write to the responsible minister seeking further explanation or information, or requesting specific action to address the issue.

The committee's use of the disallowance process

1.12 The committee's scrutiny of instruments is generally conducted within the timeframes that apply to the disallowance process, as set out in chapter 2. Working within these timeframes ensures that the committee is able, if necessary,

3 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Committee_Membership

4 *Legislation Act 2003*, sections 15G and 38.

to seek disallowance of an instrument about which it has concerns. The Senate has never rejected a recommendation from the committee that an instrument should be disallowed.⁵

1.13 In cases where the 15 sitting days available for giving a notice of motion for disallowance are likely to expire before a matter is resolved, the committee may give a notice of motion for disallowance in order to protect the Senate's ability to subsequently disallow the instrument in question.⁶

1.14 In the vast majority of cases, such 'protective' disallowance notices are resolved when the committee receives a satisfactory explanation or undertaking from the relevant minister, for example to amend the instrument or its explanatory statement in a way that will address the committee's scrutiny concerns. The usual process is for the chair to withdraw the notice of motion, having notified the Senate of his or her intention to do so.⁷

Undertakings

1.15 In many cases, ministers provide an undertaking to address the committee's concerns by taking steps at some point in the future. Typically, ministers will undertake to make amendments to the relevant instrument or its explanatory statement. The acceptance of such undertakings by the committee has the benefit of securing an acceptable outcome without interrupting the administration of government by disallowing the instrument in question.

Interaction with other legislative scrutiny committees

1.16 The Regulations and Ordinances Committee is one of three legislative scrutiny committees in the Commonwealth Parliament. The work of the three committees is complementary in many respects. The committee therefore monitors the work of the two other legislative scrutiny committees—the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights—and, where appropriate, considers relevant matters raised by these committees or refers matters to them.

5 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 437.

6 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 438.

7 Senate standing order 78 provides that any other senator may take over a notice of motion for disallowance once the intention to withdraw is advised to the chamber, and before the notice is withdrawn. A senator who does so may then pursue the disallowance motion on any grounds he or she wishes.

Committee publications and resources

1.17 The following committee publications and resources may be accessed at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments.

Senate disallowable instruments list

1.18 The Senate disallowable instruments list is a list of all disallowable instruments tabled in the Senate.⁸ This online resource may be used to ascertain whether or when an instrument has been tabled in the Senate, and how many sitting days remain in which a notice of motion for disallowance may be given.

1.19 The list is updated after each sitting day.

Delegated legislation monitor

1.20 The *Delegated legislation monitor* (the monitor) is the regular scrutiny report on the work of the committee, and is published in each sitting week of the Senate. The monitor details matters of concern in relation to disallowable instruments of delegated legislation that are tabled in the Senate and scrutinised by the committee. The monitor also contains comments on any instruments that have been misclassified as exempt from disallowance, or misclassified as disallowable.

1.21 Once responses are received from ministers in relation to instruments of concern, the monitor sets out details of the responses, the committee's comment on them, and any relevant action taken.

Index of instruments

1.22 The index of instruments is an alphabetical list of all instruments about which the committee has raised a concern in a particular year. Full comments on individual matters are contained in the relevant monitor referenced in the index.

Disallowance Alert

1.23 The Disallowance Alert is a webpage listing all instruments for which a notice of motion for disallowance has been lodged in either House (whether by the committee or an individual senator or member). The progress and outcome of all disallowance notices is also recorded.

Senate seminar on scrutiny of delegated legislation

1.24 The Senate Procedure and Research Section organises half-day seminars on *Senate scrutiny of delegated legislation*. These are tailored to parliamentary staff,

8 As instruments may be tabled on different dates in the Senate and the House of Representatives respectively (and hence have different disallowance timeframes in each House), there is also a House of Representatives disallowable instruments list, available at https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/house-dissallowable-instruments.

government officers and other stakeholders whose work or interests intersect with the work of the committee.

1.25 Information on seminar dates and booking inquiries may be accessed through the Senate website.⁹

Acknowledgements

1.26 The committee acknowledges the assistance of its legal adviser during the reporting period, Mr Stephen Argument.

1.27 The committee also wishes to acknowledge the assistance of ministers and associated departments and agencies during the reporting period. The responsiveness of ministers, departments and agencies to the committee's inquiries is critical to ensuring that the committee can perform its scrutiny function effectively.

9 See Parliament of Australia website, 'Seminars for public servants' http://www.aph.gov.au/About_Parliament/Senate/Whats_On/Seminars_and_Lectures/Seminars_for_public_servants.

Chapter 2

Delegated legislation and the disallowance process

Introduction

2.1 This chapter provides an overview of delegated legislation, the disallowance process and the *Legislation Act 2003* (Legislation Act).¹

What is delegated legislation?

2.2 Many Acts of Parliament delegate to executive government (ministers, senior officials or government agencies) the power to make regulations, ordinances, rules and other instruments (such as determinations, notices, orders and guidelines). Such instruments supplement their authorising Act, and have the same force in law. 'Delegated legislation', sometimes also referred to as 'subordinate legislation', is a collective term referring to such instruments.

2.3 Because they are made under a delegated power, instruments of delegated legislation are not directly enacted by Parliament, as must happen for a bill to become an Act with the force of law. Therefore, to ensure that Parliament retains effective oversight, legislative instruments are usually:

- required to be registered on the Federal Register of Legislation;²
- required to be tabled in Parliament; and
- subject to disallowance by either House of Parliament under a process prescribed by the Legislation Act.

What is a legislative instrument?

2.4 Section 8 of the Legislation Act defines a legislative instrument. This includes any instrument declared as such by the primary law authorising or requiring it to be made, and any instrument registered as a legislative instrument on the Federal Register of Legislation. More generally, subsection 8(4) states that an instrument is a legislative instrument if:

- (a) the instrument is made under a power delegated by the Parliament;
and
- (b) any provision of the instrument:
 - (i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the

1 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

2 See <https://www.legislation.gov.au>.

law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and

(ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

2.5 The Legislation Act also provides that particular types of instruments, such as regulations and ordinances, are to be classed as legislative instruments.³

2.6 In addition, the Legislation Act provides that certain instruments are not legislative instruments. These include notifiable and commencement instruments, rules of court, and other instruments declared by an Act or particular regulations not to be legislative instruments.⁴

Requirements of the Legislation Act

2.7 The Legislation Act details various requirements relating to legislative instruments and their accompanying explanatory statements. The main elements of the scheme in the Legislation Act for the enactment of legislative instruments are:

- legislative instruments must be registered on the Federal Register of Legislation, along with an explanatory statement;
- instruments commence (take legal effect) on the day after their registration, or as otherwise provided by the instrument;
- once registered, all legislative instruments must be delivered within six sitting days to each House of Parliament for tabling;⁵ and
- any member of the Senate or the House of Representatives may initiate the process to disallow a legislative instrument within 15 sitting days of it being tabled.⁶ Once such a notice has been given, a period of 15 sitting days is available for the relevant House to decide whether to disallow the instrument.

3 *Legislation Act 2003*, section 10.

4 *Legislation Act 2003*, subsections 8(6) and 8(8).

5 Under section 38 of the *Legislation Act 2003*, an instrument that is not tabled in each House within six sitting days of registration ceases to have effect immediately after the sixth day.

6 As noted in paragraph 2.10 below, while all legislative instruments are required to be tabled in Parliament, some instruments are not subject to disallowance, in accordance with section 44 of the *Legislation Act 2003*. Paragraph 2.14 below also notes that the disallowance process may in some cases be modified by other legislation.

Disallowance

Purpose

2.8 The ability of the executive to make delegated legislation without parliamentary enactment appears to be a 'considerable violation of the principle of the separation of powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government'.⁷

2.9 The ability of either the Senate or the House of Representatives to disallow legislative instruments is therefore critical to ensuring that Parliament retains effective oversight of delegated legislation.

2.10 All legislative instruments are subject to disallowance unless they are exempted by law. Section 44 of the Legislation Act exempts certain legislative instruments from disallowance, including instruments listed in regulations made under that section,⁸ and instruments expressly exempted by another Act from the disallowance provisions of the Legislation Act.

The disallowance process

2.11 The disallowance process is set out in subsection 42(1) of the Legislation Act, which provides that any member of the Senate or House of Representatives may, within 15 sitting days of a disallowable legislative instrument being tabled, give notice that they intend to move a motion to disallow the instrument or a provision of the instrument. There is then a period of 15 sitting days from the date of the notice of motion in which that motion may be resolved. During that period, if the House in which the motion was given resolves to disallow the instrument or provision, it ceases to have legal effect.

2.12 The maximum time for the entire disallowance process to run its course is therefore 30 sitting days, assuming the maximum available period elapses for both the giving of notice and the resolution of the motion.

2.13 Subsection 42(2) of the Legislation Act further provides that, if a notice of motion to disallow a legislative instrument or a provision of an instrument remains unresolved at the end of 15 sitting days after it was given (for example, where it has not been withdrawn or put to the question), the instrument or provision is deemed to have been disallowed and therefore ceases to have effect. This provision ensures that the disallowance process cannot be frustrated by allowing a motion for disallowance to be adjourned indefinitely.

7 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 429.

8 See the Legislation (Exemptions and Other Matters) Regulation 2015 [F2018C00024].

Unusual disallowance processes

2.14 In some cases, the disallowance process may be modified by the authorising legislation under which an instrument is made, affecting the period available for giving or resolving a notice of motion for disallowance.

2.15 For example, for determinations made under subsections 78(1) or (3) of the *Public Governance, Performance and Accountability Act 2013*, the time available for both giving and resolving a notice of motion for disallowance is five sitting days.⁹ Another example of an unusual disallowance process is that applying to instruments made under subsection 8(2) of the *Commercial Broadcasting (Tax) Act 2017*, further discussed in chapter 3.

Effect of disallowance

2.16 Where a legislative instrument or a provision of an instrument is disallowed, that instrument or provision ceases to have effect from the time the disallowance motion was passed or was deemed to have passed.¹⁰ Disallowance does not remove the legal effect of the instrument, or acts done under it, between the time it commenced and the time it was disallowed.

2.17 If the disallowed instrument or provision repealed all or part of an earlier instrument, then that earlier instrument or part is revived.¹¹

Restrictions on re-making legislative instruments

2.18 In order to ensure that Parliament's power of disallowance may not be circumvented, and to preserve Parliament's intention where a House has disallowed an instrument, the Legislation Act imposes restrictions on the re-making of legislative instruments that are the 'same in substance' as an existing or recently disallowed instrument. These are:

- for a period of seven days, unless approved by resolution by both Houses of Parliament, an instrument may not be made that is the same in substance as a registered instrument that has been tabled before Parliament;¹²
- an instrument may not be made that is the same in substance as an existing instrument that remains subject to an unresolved notice of motion for disallowance;¹³ and
- for a period of six months after an instrument is disallowed under section 42, an instrument may not be made that is the 'same in substance' as the

9 *Public Governance, Performance and Accountability Act 2013*, section 79.

10 *Legislation Act 2003*, subsections 42(1), 42(2) and 45(1).

11 *Legislation Act 2003*, subsection 45(2).

12 *Legislation Act 2003*, section 46.

13 *Legislation Act 2003*, section 47.

disallowed instrument (unless the House which disallowed the instrument, or in which the instrument was deemed to have been disallowed, rescinds the resolution that disallowed the instrument, or approves it being made).¹⁴

Senate procedures relating to the disallowance process

2.19 A number of the Senate's procedures are relevant to the disallowance process in the Legislation Act.

2.20 Standing order 78 is a significant example of a relevant procedure, whereby any senator has the opportunity to take over a motion for disallowance if the original mover seeks to withdraw that motion. This ensures that the Senate is not denied the right to disallow an instrument where the time for giving notice has passed; and that the right of individual senators to move for disallowance is not lost by the withdrawal of the notice.¹⁵

2.21 Another example is standing order 86, which prohibits proposing a question that is the same in substance as any question that has been determined during the same session (the same question rule).¹⁶ This order is qualified by the proviso that it shall not prevent a motion for the disallowance of an instrument substantially the same in effect as one previously disallowed.

2.22 For further detail on Senate procedures relevant to delegated legislation and disallowance, see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

14 *Legislation Act 2003*, section 48. Significant developments in relation to the operation of section 48 were discussed in the committee's report covering 2016: see Senate Regulations and Ordinances Committee, *Report on the work of the committee in 2015-16*, pp. 26-28.

15 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 455.

16 *Odgers' Australian Senate Practice* notes, however, that 'the same question rule is seldom applied, because it seldom occurs that a motion is exactly the same as a motion moved previously. Even if the terms of a motion are the same as one previously determined, the motion almost invariably has a different effect because of changed circumstances and therefore is not the same motion. There may also be different grounds for moving the same motion again'. *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 449.

Chapter 3

Work of the committee in 2017

3.1 This chapter provides information about the work of the committee in 2017, including statistics, matters of note and some routine matters considered. Examples provided under the entries for 'matters of note' and 'routine matters' illustrate the committee's approach to its scrutiny role and identify matters of concern as assessed against the scrutiny principles outlined in Senate standing order 23(3).

Statistics

Number of instruments considered

3.2 The committee held 16 private meetings in 2017, at which it considered 1472 instruments.¹

3.3 The number of disallowable instruments received and scrutinised was marginally lower than some previous years (2904 instruments examined from July 2015 to December 2016, 1656 in the 2014–15 financial year, and 1614 in the 2013–14 financial year).

3.4 In addition, the committee examined 74 replacement or supplementary explanatory statements (ES) to instruments in 2017.

Delegated legislation monitors

3.5 In 2017 the committee tabled 16 scrutiny reports, called *Delegated legislation monitors* (No. 1 of 2017, tabled on 8 February 2017 to No. 16 of 2017, tabled on 6 December 2017).²

3.6 In total, the committee made 386 comments in its reports, including initial, further and concluding comments. In some cases, more than one initial comment may be made about a single instrument; or a single comment may be made with reference to more than one instrument.

3.7 Initial concerns were raised and ministers requested to respond in relation to 154 instruments; a further response was required for 34 instruments; advice only

1 Any instruments that were initially misclassified as disallowable but that were actually exempt from disallowance are not counted in this figure.

2 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index.

comments were made in relation to 109 instruments; and concluding comments were made on 167 instruments.³

Instruments of concern

3.8 Of the 1472 instruments⁴ examined by the committee in the reporting period, 263 were identified as raising one or more concerns, either requiring a response from the relevant minister or written as advice only to the minister.⁵

3.9 The issues raised by the examined instruments were referable to the committee's scrutiny principles as shown in Table 1.

Table 1: Issues identified by the committee in 2017

Type of comment	Issues raised against scrutiny principles under Senate standing order 23(3) ⁶				Total
	(a)	(b)	(c)	(d)	
Response required	121	22	9	19	171
Further response required	24	4	1	7	36
Advice only	63	0	2	8	73
Concluded	116	22	9	19	166
TOTAL	324	48	21	53	446

3.10 As Table 1 demonstrates, the large majority of issues raised by the committee were referable to scrutiny principle (a), which requires that instruments of delegated legislation are made in accordance with statute, including the *Legislation Act 2003* (Legislation Act), the *Acts Interpretation Act 1901*, the Commonwealth Constitution, and the authorising Act (or regulations) under which

3 The discrepancy between the number of response required entries and the number of concluded entries arises because some instruments will have been initially commented on in the previous reporting period, while others will have been concluded in the next reporting period.

4 As noted in chapter 2, the committee scrutinises all Commonwealth disallowable legislative instruments. The monitor may also include comment on instruments which are exempt from disallowance in cases where these were initially misclassified as disallowable.

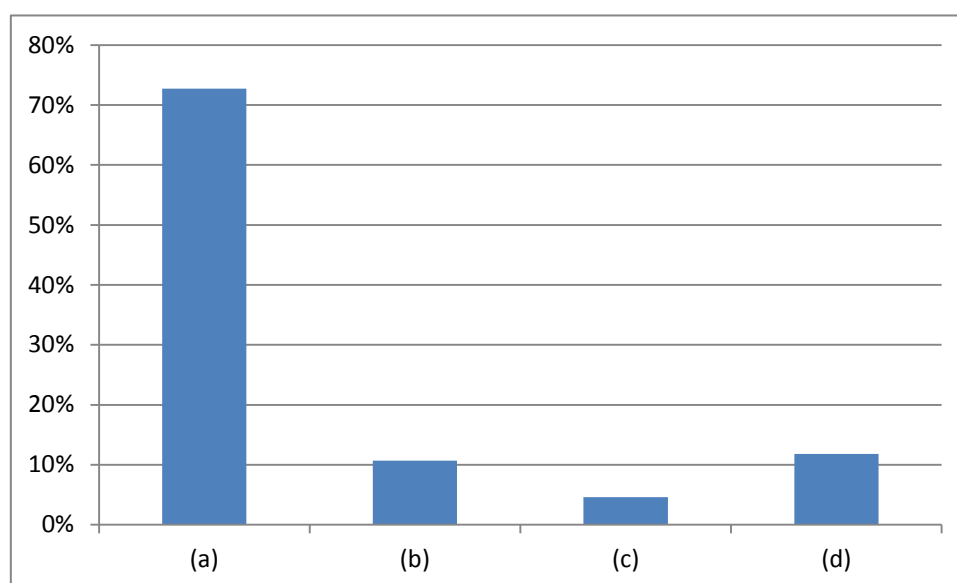
5 Details of these instruments may be found on the 'Index of Instruments' webpage at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

6 It is noted that on occasion, a comment refers to more than one scrutiny principle.

the instrument is made. The broad nature of this principle generally captures a wide variety of issues. While the spread of issues across the committee's remaining scrutiny principles is broadly comparable with previous years, there was an increase in the proportion of concerns raised under scrutiny principles (c), relating to the availability of independent merits review of administrative decisions; and (d), matters more appropriate for parliamentary enactment.

3.11 Drawing on the information from 'response required' and 'advice only' entries, Figure 3.1 shows the breakdown of instruments by issues against the committee's principles as recorded in the reporting period.

Figure 3.1: Instruments with issues against scrutiny principles



Ministerial responses

3.12 In the reporting period the committee received 108 responses from ministers in relation to instruments that had raised concerns. Until June 2017 (monitor 7 of 2017), ministers' responses to the committee were published in the monitor containing the committee's comments on them. In August 2017 the committee decided that ministerial correspondence would no longer be included in the printed copies of the monitor; instead, from monitor 8 of 2017 onwards, ministers' responses were published alongside the relevant monitor on the committee's website.⁷

Disallowance notices

3.13 The committee gave 19 notices of motion for disallowance in the reporting period. All of these were subsequently withdrawn, generally following the receipt of

7 See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor/mon2017/index.

a satisfactory ministerial response or a minister's undertaking to address the committee's concerns in relation to the relevant instruments.

3.14 Aside from the committee's notices, during the same period 19 notices of motion for disallowance were given by individual senators, and one was given by an individual member of the House of Representatives, in their own capacity. Of these, three motions resulted in three instruments being disallowed in full by the Senate, and three motions resulted in three instruments being disallowed in part. No instruments were disallowed in the House of Representatives. Seven motions were debated in the Senate but did not result in disallowance. Three motions given in the Senate by individual senators were withdrawn.

3.15 One notice of motion resulted in disallowance pursuant to subsection 42(2) of the Legislation Act (that is, 15 sitting days elapsed after the disallowance notice was given without the notice being resolved, causing the instrument to be automatically disallowed). One notice of motion was not called on, in accordance with Senate standing order 86, because it was identical in terms to a motion already passed. One notice of motion was ruled out of order.

3.16 Details of all disallowance motions given during the period are provided on the committee's 'Disallowance Alert' webpage for 2017.⁸

Impact of the committee's work

3.17 In 2017 the committee continued work undertaken in recent years to consolidate and articulate consistent lines of commentary on recurring and long-standing matters of concern arising from its scrutiny of legislative instruments. In general terms, the committee has observed that its regular and consistent public commentary and engagement with rule-makers has had a positive impact on the number of instruments introduced that raise these types of scrutiny concerns.⁹

3.18 The long-standing concerns of the committee relate to a number of matters, including but not limited to:

- manner of incorporation of documents by reference and free access to incorporated documents;
- insufficient description of consultation undertaken in making instruments;
- omission of a statement of compatibility with human rights;
- unclear basis for determining fees imposed;

8 See Parliament of Australia, *Disallowance Alert 2017*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2017.

9 During this reporting period, 12.5 per cent of the instruments examined by the committee raised issues of concern. This was a slight increase on the 11 per cent recorded in the previous reporting period, but remains significantly lower than the proportion of instruments raising concerns in earlier years.

-
- trespassing unduly on personal rights and liberties, including privacy;
 - disadvantage to persons caused by the retrospective effect of instruments;
 - offence and penalty provisions in delegated legislation;
 - failure to provide for independent merits review of discretionary decisions;
 - broad sub-delegation of legislative or administrative power;
 - authorisation of Commonwealth expenditure via delegated legislation; and
 - misclassification of instruments.

3.19 While difficult to quantify, the committee has had an apparent 'unseen influence' on the drafting of instruments. Legislative drafters in both the Office of Parliamentary Counsel (OPC) and government agencies increasingly refer to the reports, guidance and long-standing scrutiny concerns of the committee. The committee has observed a general improvement in the compliance of instruments and their ESs with some of the basic requirements of the Legislation Act, frequently drawn to rule-makers' attention by the committee over recent years, such as describing consultation undertaken, including statements of compatibility with human rights, and providing information about documents incorporated by reference.

3.20 The committee's work in 2017 also resulted in specific amendments to numerous ESs to instruments and, in some cases, amendments made to instruments themselves, in response to its concerns.

3.21 In addition to the committee's influence on the legislative drafting process and the quality of legislative instruments and explanatory material, the committee's work and published commentary also contributes to more informed consideration of relevant issues in other parliamentary committees' reports, and more informed debate relating to delegated legislation in the Senate, the House of Representatives and committees.

3.22 In 2017 the committee developed or amended the following guidelines, available from the committee's website:¹⁰

- *Guideline on consultation;*
- *Guideline on incorporation of documents;*
- *Guideline on regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997; and*
- *Guideline on instruments that amend or repeal other instruments.*

10 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines.

3.23 The committee's secretariat also continued to engage directly with government departments by providing targeted or requested advice on legislative requirements applicable to the drafting of various instruments or their ESs.

3.24 In some cases the committee worked proactively toward finding longer-term solutions to its scrutiny concerns. During 2017 the committee's secretariat met with representatives of the Department of Finance to discuss matters arising from the committee's scrutiny of instruments made under the Financial Framework (Supplementary Powers) Regulations 1997. As noted below, the committee saw a positive impact from this work, reflected in updated guidance issued by the department to government agencies, and in the committee's scrutiny concerns being better addressed in the ESs to more recent instruments.

3.25 The committee also engaged with the government to discuss the accessibility of standards incorporated in delegated legislation, which informed the government's ongoing work toward improving the public accessibility of Australian standards. In addition, the committee, along with the Scrutiny of Bills committee and the Parliamentary Joint Committee on Human Rights, submitted views to the Attorney-General's Department's 2017 review on the sunseting of legislative instruments, and engaged with the department on the outcomes of that review. These initiatives are discussed further below.

3.26 The committee's influence continues to be reflected in formal government guidance available to departments and agencies as part of their legislative drafting process. In particular, the OPC's *Instruments Handbook*¹¹ and the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*¹² draw attention to long-standing scrutiny concerns of the committee.

3.27 The following section notes some significant developments relevant to the committee's mandate during 2017, as well as highlighting the committee's work in relation to some of its more routine scrutiny concerns.

11 Office of Parliamentary Counsel, Document release 3.0, reissued July 2016, available from <http://www.opc.gov.au/about/documents.htm>.

12 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, available at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Ch%20Offences.pdf>.

Matters of note

Misclassification of instruments

3.28 In 2017 the committee continued to raise concerns about instruments that had been erroneously registered and/or tabled either as exempt from disallowance when they were in fact disallowable, or as disallowable when they were exempt from disallowance.¹³

3.29 On 8 February 2017, when providing notice to the Senate of his intention to withdraw notices of motion for disallowance of three instruments misclassified as exempt from disallowance in 2016, the committee chair addressed the Senate about the committee's concerns in this regard. The chair advised the Senate that, while the committee had concluded its consideration of the instruments in question:

The committee remains concerned more generally about the classification process for instruments and the potential for administrative errors to hinder the effective oversight of instruments by parliament. In this respect, there may be circumstances in which the committee considers that the incorrect classification of an instrument as exempt from disallowance may warrant its urgent re-making.¹⁴

3.30 During 2017 the committee raised concerns about the misclassification of 15 further legislative instruments.

Instruments misclassified as exempt from disallowance

3.31 While the committee is concerned about all misclassification of legislative instruments, the erroneous classification of instruments as exempt from disallowance causes particular concern due to its potential to hinder the effective oversight of instruments by Parliament. This is because section 42 of the Legislation Act allows senators and members 15 sitting days, following the tabling of a disallowable instrument in the relevant House of Parliament, to lodge a notice of motion to disallow that instrument. Where an instrument is initially and incorrectly tabled as exempt from disallowance, members and senators have no opportunity to lodge a notice of motion to disallow the instrument during the period that it is incorrectly classified.

3.32 In response to these concerns, in 2017 the committee resolved to place notices of motion for disallowance on four instruments initially and incorrectly tabled

13 See Senate Standing Committee on Regulations and Ordinances, *Report on the work of the committee in 2015-16*, pp. 19-22.

14 Senator John Williams, *Senate Hansard*, 8 February 2017, p. 319.

in Parliament as exempt from disallowance, to extend the disallowance period by 15 sitting days.¹⁵

3.33 In other cases, where the misclassification of an instrument was identified and corrected prior to its tabling in Parliament, the committee commented on an advice only basis, while continuing to express its general concern about the misclassification of instruments.¹⁶

Instruments including both disallowable and non-disallowable provisions

3.34 Three of the misclassified instruments commented on by the committee in 2017 occurred where a single instrument contained both disallowable and non-disallowable provisions, but was classified in its entirety as exempt from disallowance.

3.35 In *Delegated legislation monitor 6 of 2017* (14 June 2017), the committee sought advice from the Minister for Immigration and Border Protection about a migration instrument registered on the Federal Register of Legislation (FRL) as exempt from disallowance, but whose ES stated that it was subject to disallowance.¹⁷

3.36 In doing so, the committee reiterated concerns raised in 2015 about the appropriateness of exempting a large number of instruments made under particular parts and schedules of the *Migration Act 1958* and Migration Regulations 1994 (Migration Regulations) from disallowance.¹⁸ In that context, it was unclear to the committee whether the instrument, which specified occupations eligible for skilled migration visas and related matters, was appropriately classified as exempt from disallowance, and thereby removed from the effective oversight of Parliament.

15 Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017 [F2017L01236]; Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2) [F2017L01302]; Radiocommunications (Spectrum Licence Allocation - Multi-band Auction) Determination 2017 [F2017L01255]; Retirement Savings Accounts Tax File Number approval No. 1 of 2017 [F2017L01270]. Each of the notices of motion for disallowance was removed at the end of the 15 sitting day period, on 28 March 2018: see Parliament of Australia, *Disallowance Alert 2017*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts/alert2017.

16 See *Delegated legislation monitor 8 of 2017*, at p. 54, relating to the Amendment of the List of Exempt Native Specimens (Queensland East Coast Otter Trawl Fishery) (23/05/2017) [F2017L00601]; and *Delegated legislation monitor 14 of 2017* (15 November 2017), p. 45, relating to the Reporting of event-based transfer balance account information in accordance with the Taxation Administration Act 1953 [F2017L01273].

17 Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040 - IMMI 17/040 [F2017L00450].

18 See Senate Standing Committee on Regulations and Ordinances, *Report on the work of the committee in 2015-16*, pp. 18-19.

3.37 In response, while the minister confirmed that all instruments made under Schedules 1 and 2 of the Migration Regulations were exempt from disallowance, he advised that the instrument in question specified matters under provisions in Parts 1, 2A and 5 as well as Schedules 1 and 2 of the Migration Regulations, and that an instrument or provision of an instrument specifying matters under Part 2A of the Migration Regulations was disallowable. Consequently, the ES should have identified which parts of the instrument were or were not disallowable, rather than stating that the instrument as a whole was disallowable.

3.38 The minister advised that the instrument had been repealed and replaced with instruments which did not combine disallowable and non-disallowable provisions. The minister also advised that in future, disallowable and non-disallowable provisions would not be combined in one instrument.¹⁹

3.39 In its concluding comments, the committee expressed its concern that when the instrument was received by the Parliament and the committee it had been classified, and subsequently tabled, as wholly exempt from disallowance, which may have hindered effective oversight by Parliament. The committee reiterated its concern about the classification process generally, and drew the initial incorrect classification to the attention of senators, ministers, instrument-makers, and the OPC.²⁰

3.40 In *Delegated legislation monitor 14 of 2017* (15 November 2017), the committee also commented on two legislative instruments classified, registered and tabled as exempt from disallowance, relating to broadcasting services and radiocommunications.²¹

3.41 Each instrument was made under two enabling provisions in the *Radiocommunications Act 1992* (Radiocommunications Act). In both cases, instruments made under one of the provisions were exempt from disallowance by table item 29 of section 10 of the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM regulation), but instruments made under the second provision were not exempt. The committee also noted that the ES to one of the instruments stated that the instrument was disallowable, despite its being registered and tabled as exempt.

19 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2017* (9 August 2017), p. 103.

20 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 8 of 2017* (9 August 2017), p. 104.

21 Broadcasting Services (Technical Planning) Guidelines (Consequential Amendments) Instrument 2017 (No. 2) [F2017L01302] and Radiocommunications (Spectrum Licence Allocation – Multiband Auction) Determination 2017 [F2017L01255].

3.42 The committee was again concerned that classifying both instruments in their entirety as exempt from disallowance had removed Parliament's ability to disallow the provisions of the instruments which were in fact disallowable.

3.43 The committee expressed its expectation that disallowable and non-disallowable provisions should not be combined in the same instrument unless this was entirely unavoidable. Should it be necessary to combine disallowable and non-disallowable provisions in the same instrument, the committee expects, at a minimum, that any such instrument should be classified as disallowable, and the instruments or their ESs should clearly specify the provisions which are able to be disallowed, in order to ensure that Parliament's prerogative to disallow those provisions is preserved.

3.44 In response, the minister advised that the instruments were misclassified as exempt from disallowance due to an administrative error, and that in future, disallowable and non-disallowable provisions would be enacted in separate instruments where possible. Where this was not practicable, any instruments which contained both disallowable and non-disallowable provisions would clearly distinguish the provisions which were subject to disallowance.²² The instruments were re-classified as disallowable by the OPC once the matter was brought to its attention by the committee's secretariat.

3.45 In its concluding comments, the committee noted its concern about the classification process for instruments generally, and the potential for administrative errors to hinder the effective oversight of the instruments by Parliament. The committee resolved to place notices of motion for disallowance on the instruments, to extend the disallowance period by 15 sitting days, and noted that it would continue to monitor the misclassification of instruments.²³

Instruments relating to superannuation

3.46 A particular area in which the committee identified concerns regarding the misclassification of instruments was the application of the exemption from disallowance of instruments (other than regulations) 'relating to superannuation', under table item 3 of section 9 of the LEOM regulation.

3.47 In *Delegated legislation monitor 6 of 2017* (14 June 2017), the committee commented on the Family Law (Superannuation) (Interest Rate for Adjustment Period) Determination 2017 [F2017L00471]. While the instrument was tabled as

22 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 16 of 2017* (6 December 2017), pp. 36-38.

23 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 16 of 2017* (6 December 2017), p. 38.

exempt from disallowance, its statement of compatibility referred to it as a disallowable legislative instrument.

3.48 The committee sought the Attorney-General's advice as to whether the instrument had been properly classified as exempt from disallowance, and thereby removed from the effective oversight of the Parliament. The Attorney-General confirmed that the instrument was exempt from disallowance under the LEOM regulation, and undertook to register a revised version of the instrument and its supplementary materials on the FRL as soon as practicable.²⁴

3.49 In *Delegated legislation monitor 14 of 2017* (15 November 2017), the committee queried the Minister for Revenue and Financial Services in relation to Retirement Savings Accounts Tax File Number approval No. 1 of 2017 [F2017L01270], which was registered on the FRL and tabled in Parliament as exempt from disallowance.

3.50 The instrument was made under sections 135, 136, 138, 139 and 142 of the *Retirement Savings Accounts Act 1997*. The committee was not aware of any specific exemption from disallowance applying to instruments made under those provisions. In addition, the ES stated that the instrument was not exempt from sunseting under table item 6 of section 11 of the LEOM regulation, which provided a sunseting exemption for instruments (other than regulations) 'relating to superannuation'. It was unclear to the committee, if the retirement instrument did not fall within the sunseting exemption for instruments relating to superannuation, how it could fall within the identically-worded disallowance exemption for instruments relating to superannuation.

3.51 The minister's response indicated that the instrument was not exempt from disallowance, and that its misclassification occurred while the instrument was with the OPC. While the instrument was reclassified as subject to disallowance after being drawn to OPC's attention by the committee's secretariat, the committee again expressed its concern about the processes for classification of instruments generally, and the potential for administrative errors to hinder the effective oversight of instruments by Parliament. The committee resolved to place a notice of motion for disallowance on the instrument, to extend its disallowance period by 15 sitting days, and again noted that it would continue to monitor the misclassification of instruments.²⁵

24 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 10 of 2017* (16 August 2017), p. 38.

25 Senate Standing Committee on Regulations and Ordinances, *Delegated legislation monitor 16 of 2017* (6 December 2017), p. 68.

Alternative disallowance procedures

3.52 In *Delegated legislation monitor 15 of 2017* (29 November 2017), the committee wrote to the Minister for Communications in relation to the Commercial Broadcasting (Tax) (Individual Transmitter Amounts) Determination 2017 [F2017L01375], which was classified as exempt from disallowance when received by Parliament and by the committee, and was tabled in the House of Representatives and the Senate on that basis.

3.53 The instrument was made under subsection 8(2) of the *Commercial Broadcasting (Tax) Act 2017* (CB (Tax) Act). Subsection 13(5) of the CB (Tax) Act provides that subsection 42 of the Legislation Act, which provides for the disallowance of legislative instruments, does not apply to determinations made under subsection 8(2) of the CB (Tax) Act. However, subsection 13(2) of the CB (Tax) Act replaces disallowance under the Legislation Act with an alternative disallowance procedure, under which either House of Parliament may pass a resolution disallowing an instrument made under subsection 8(2). Consequently, although the instrument was not disallowable under the Legislation Act, it was a disallowable instrument. In this regard, the committee noted that the ES to the instrument stated that it was subject to disallowance under section 13 of the Tax Act.

3.54 While the instrument was re-classified correctly after the misclassification had been drawn to the attention of the OPC by the committee's secretariat, the committee continued to be concerned about the classification process and the potential for removing the instrument from parliamentary oversight.

Instruments misclassified as disallowable

3.55 In *Delegated legislation monitors 6 and 8 of 2017* (14 June and 9 August 2017), the committee wrote to the Minister for Small Business in relation to the following instruments that were exempt from disallowance but were initially misclassified as disallowable:

- Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standard 2017 [F2017L00516];
- Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017 [F2017L00452]; and
- Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices [F2017L00518].

3.56 The committee noted that the ES to these instruments stated that they were exempt from disallowance because they facilitated an intergovernmental scheme, the Australian Consumer Law (ACL). Subsection 44(1) of the Legislation Act provides that instruments or provisions that facilitate the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more states are exempt from disallowance.

3.57 The committee was interested to understand more about the apparently inconsistent approach to the classification of instruments made under the ACL. For example, while the above instruments were classified as disallowable another instrument made at a similar time, the Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017 [F2017L00474], was classified as exempt from disallowance.

3.58 In response, the minister advised that all three of the instruments raised by the committee should have been classified as exempt from disallowance, and that the Australian Competition and Consumer Commission had implemented processes to provide for the correct classification of future instruments made under the ACL.²⁶

3.59 In other cases the committee commented on an advice only basis, continuing to express its concern about the misclassification of instruments generally.²⁷

Impact of the *Williams* cases on the work of the committee: regulations authorising expenditure on government programs

3.60 The judgments of the High Court in the two *Williams* cases²⁸ had the effect of casting doubt over the constitutional validity of a significant proportion of Commonwealth expenditure, and requiring a constitutional head of power to support Commonwealth spending programs. The government's response to these judgments led to a new legal framework for authorising expenditure on government programs, by making regulations which add items to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations).

26 *Delegated legislation monitor 11 of 2017*, pp. 60-61.

27 *Delegated legislation monitor 7 of 2017*, pp. 23-24, in relation to the Australian Communications and Media Authority (Annual Carrier Licence Charge) Direction 2017 [F2017L00542]; and *Delegated legislation monitor 8 of 2017*, pp. 67-68, in relation to the Higher Education Support (Australian Business Academy Pty Ltd) VET Provider Approval Revocation 2017 [F2017L00639] and the Terrorism Insurance Act 2003 – Risk Retention Direction 2017 [F2017L00610].

The committee was also aware of several other instruments initially and incorrectly misclassified in 2017, which were rectified by the OPC prior to their tabling in Parliament, including: Australia New Zealand Food Standards Code — Schedule 20 – Maximum residue limits Variation Instrument No. APVMA 3, 2017 [F2017L00264]; Direction to the Independent Hospital Pricing Authority on the performance of its functions under section 226 of the National Health Reform Act 2011 - No. 2/2016 [F2017L00179], Health Insurance (Extended Medicare Safety Net) Determination 2017 [F2017L01082], Higher Education Support (Beauty & Hair Academy of Australia Pty Ltd) VET Provider Approval Revocation 2017 [F2017L00458], and Standards for VET Regulators (Amendment) 2017 [F2017L00432].

28 *Williams v Commonwealth* [2012] HCA 23 and *Williams v Commonwealth* (No. 2) [2014] HCA 23.

3.61 The committee scrutinises all such regulations (referred to herein as FF(SP) instruments) in accordance with its scrutiny principles. The committee's consideration has focused on three matters in particular:

- constitutional authority for the expenditure;
- previously unauthorised expenditure; and
- availability of independent merits review of funding decisions.

3.62 During 2017, the committee continued to comment on FF(SP) instruments raising concerns in relation to all three of these issues.

3.63 On 15 February 2017, when providing notice to the Senate of his intention to withdraw a notice of motion for disallowance of such a regulation lodged in 2016, the committee chair addressed the Senate about the committee's concerns in relation to constitutional authority for expenditure. The chair emphasised to the Senate the committee's requirement that the ESs to all instruments authorising programs under the FF(SP) regulations explicitly state the constitutional authority for the expenditure:

This means that where multiple heads of legislative power are relied on in an instrument to support a program or initiative the committee expects an explanatory statement to provide a clear and explicit statement of the relevance and operation of each head of power relied on. This enables the Regulations and Ordinance[s] Committee to effectively undertake its scrutiny of such regulations...The committee also wishes to remind ministers that the Senate has rejected government claims that there is a longstanding practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interests.²⁹

3.64 In 2017 the committee reported on 12 further instruments authorising expenditure on programs whose ESs had provided insufficient information about the

29 Senator John Williams, *Senate Hansard*, 15 February 2017, p. 1010.

constitutional authority for the expenditure.³⁰ In most cases the instrument provided a bare listing of the constitutional heads of power relied on for the expenditure, and the committee stated its expectation that the ES should include a clear statement of the relevance and operation of each constitutional head of power relied on to support the programs or initiatives authorised.

3.65 As noted above, in addition to consistently expressing these expectations in the monitor, and corresponding with the Minister of Finance in relation to specific instruments of concern, the committee engaged directly with the Department of Finance to discuss how the constitutional authority for expenditure authorised by FF(SP) instruments could be better explained in their ESs. The committee was therefore pleased to note a marked improvement during the year in the amount of detail provided in the ESs to FF(SP) instruments about the constitutional authority for the authorised programs.

3.66 In 2017, the committee drew the attention of the Senate and relevant standing committees to 24 FF(SP) instruments authorising expenditure on programs

30 See *Delegated legislation monitors 1 and 4 of 2017* (8 February 2017 and 29 March 2017), in relation to the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016 [F2016L01924]; Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921]; Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925]; Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 4) Regulation 2016 [F2016L01922]; Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217]; Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017 [F2017L00215]; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017 [F2017L00211]; Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017 [F2017L00220]; and Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751]; *Delegated legislation monitors 7 and 8 of 2017* (21 June 2017 and 9 August 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 [F2017L00544]; *Delegated legislation monitor 13 of 2017* (18 October 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2017 [F2017L01086]; and *Delegated legislation monitor 14 of 2017* in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 5) Regulations 2017 [F2017L01211].

that may not constitute the ordinary annual services of government.³¹ Where the committee identifies items of expenditure that may have been inappropriately classified as the ordinary annual services of the government, the committee draws this to the attention of the Senate and the relevant standing committee because, following the *Williams* judgments, it is possible for such expenditure to be authorised

31 See *Delegated legislation monitor 1 of 2017* (8 February 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 4) Regulation 2016 [F2016L01924]; Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 1) Regulation 2016 [F2016L01921] and Financial Framework (Supplementary Powers) Amendment (Infrastructure and Regional Development Measures No. 2) Regulation 2016 [F2016L01925]; *Delegated legislation monitor 4 of 2017* (29 March 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217]; Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2017 [F2017L00215]; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2017 [F2017L00211]; Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulations 2017 [F2017L00216]; and Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2017 [F2017L00220]; *Delegated legislation monitor 6 of 2017* (14 June 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 2) Regulations 2017 [F2017L00442] and Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 1) Regulations 2017 [F2017L00439]; *Delegated legislation monitor 7 of 2017* (21 June 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2017 [F2017L00548]; Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 2) Regulations 2017 [F2017L00560]; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017 [F2017L00544]; and Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 1) Regulations 2017 [F2017L00558]; *Delegated legislation monitor 8 of 2017* (9 August 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 4) Regulations 2017 [F2017L00787]; Financial Framework (Supplementary Powers) Amendment (Health Measures No. 3) Regulations 2017 [F2017L00785] and Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulations 2017 [F2017L00783]; *Delegated legislation monitor 10 of 2017* (16 August 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 3) Regulations 2017 [F2017L00790]; Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 2) Regulations 2017 [F2017L00820] and Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 3) Regulations 2017 [F2017L00807]; *Delegated legislation monitor 13 of 2017* (18 October 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2017 [F2017L01086]; and *Delegated legislation monitor 14 of 2017* in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 5) Regulations 2017 [F2017L01211]; Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 3) Regulations 2017 [F2017L01210]; and Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 3) Regulations 2017 [F2017L01209].

by regulations without direct parliamentary approval, effectively reducing the scope of the Senate's scrutiny of government expenditure.³²

3.67 In 2017, the committee raised concerns about four instruments in relation to the availability of independent review of decisions under programs authorised by the FF(SP) regulations. The committee generally sought further information from relevant ministers about the availability of independent merits review, before drawing the instruments, where appropriate, to the attention of the Senate.³³

3.68 The committee also observed in 2017 the making of instruments authorising expenditure under new section 33 of the *Industry Research and Development Act 1986*, which was inserted by the *Industry Research and Development Amendment (Innovation and Science Australia) Act 2016*. Section 33 provides for the authorisation of executive spending on industry research and development programs by specifying such programs in legislative instruments, and as such operates in a similar way to FF(SP) instruments. In *Delegated legislation monitor 2 of 2017*, the committee drew the effect of new section 33 to the attention of the minister and senators, noting concerns expressed by the Senate Standing Committee for the Scrutiny of Bills about the delegation of such legislative power to the executive, and the importance of ensuring sufficient parliamentary oversight of these arrangements.³⁴

3.69 During 2017, the committee commented on four such instruments made under the *Industry Research and Development Act 1986*, applying the same scrutiny principles as those applied to FF(SP) instruments. Three of the instruments

32 While the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government, it may directly amend an appropriation bill not for the ordinary annual services of the government (section 53 of the Constitution). In June 2010, the Senate reaffirmed its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. It stated that appropriations for expenditure on new policies not previously authorised by special legislation shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

33 See *Delegated legislation monitor 4 of 2017* (29 March 2017) and *6 of 2017* (14 June 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2017 [F2017L00217]; *Delegated legislation monitor 10 of 2017* (16 August 2017) and *12 of 2017* (13 September 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 3) Regulations 2017 [F2017L00790]; and *Delegated legislation monitor 14 of 2017* (6 December 2017) and *16 of 2017* (6 December 2017) in relation to the Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 5) Regulations 2017 [F2017L01211] and Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 4) Regulations 2017 [F2017L01208].

34 *Delegated legislation monitor 2 of 2017* (15 February 2017), pp. 19-21.

authorised expenditure on new policies that may have been inappropriately classified as ordinary annual services of government.³⁵ One instrument raised concerns about the availability of independent merits review for grants decisions.³⁶

3.70 In June 2017 the committee published a new guideline providing background information and options for legislative drafters with reference to the committee's scrutiny of regulations that amend Schedule 1AB to the FF(SP) regulations.³⁷

'Sunsetting' of legislative instruments

3.71 The Legislation Act provides the framework for the management of Commonwealth legislation, including the sunsetting or automatic repeal of legislative instruments.

3.72 Under section 50 of the Legislation Act all legislative instruments registered on the FRL after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration.³⁸ This process is called 'sunsetting'.

3.73 Sections 51 and 51A of the Legislation Act allow the Attorney-General to defer or align the sunsetting of instruments, subject to certain conditions. In addition, section 54 provides that sunsetting does not apply to certain classes of or specified legislative instruments, including those listed in sections 11 and 12 of the LEOM regulation.

3.74 During 2017 the committee drew the attention of the Senate to several instruments whose sunsetting was significantly deferred by the Attorney-General

35 See *Delegated legislation monitor 2 of 2017* (15 February 2017) in relation to the Industry Research and Development (Portland Aluminium Smelter Assistance Program) Instrument 2017 [F2017L00052]; and *Delegated legislation monitor 8 of 2017* (9 August 2017) in relation to the Industry Research and Development (Cyber Security Small Business Program) Instrument 2017 [F2017L00685] and Industry Research and Development (Onshore Gas Social and Economic Research Fund Program) Instrument 2017 [F2017L00752];

36 See *Delegated legislation monitor 14 of 2017* (15 November 2017) and *16 of 2017* (6 December 2017) in relation to the Industry Research and Development (Cooperative Research Centres Projects Program) Instrument 2017 [F2017L01202].

37 The guideline initially focused on the committee's concerns relating to constitutional authority for expenditure, but has been revised and updated since its first publication to cover all three relevant scrutiny principles. The current (May 2018) version of the guideline, *Regulations that amend Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997*, is available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/FFSP_Regulations_1997.

38 The sunsetting of legislative instruments registered on 1 January 2005 (that is, all instruments made before that date) is staggered, with the date of sunsetting determined by the table set out in subsection 50(2).

using the 'alignment' power under section 51A.³⁹ The committee also expressed concern about amendments to the LEOM regulation in 2017 exempting further significant legislative instruments from sunseting.⁴⁰

Exemption of the Migration Regulations from sunseting

3.75 Extensive correspondence was exchanged between the committee, the Attorney-General and the Minister for Immigration and Border Protection between February and November 2017, in relation to two instruments which effected the exemption of the Migration Regulations from sunseting. The following provides a brief summary of these communications.⁴¹

3.76 The Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (review regulation) amended the Migration Regulations to introduce a new statutory review process. The process required periodic reviews of the Migration Regulations to be conducted at a departmental level, with the initial review to commence within one year after 1 July 2017 and finish within two years; and subsequent reviews to commence every ten years after 1 October 2017 and finish within two years of their commencement.

3.77 The Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (exemption regulation), then amended the LEOM regulation to exempt the Migration Regulations from the sunseting scheme under the Legislation Act. Without this amendment, the Migration Regulations would have been required to be remade due to sunseting on or before 1 October 2018.

3.78 Neither the ES to the review regulation nor to the exemption regulation provided information on the broader justification for exempting the Migration Regulations from sunseting. The committee initially noted that the process to review and remake instruments can be lengthy, and that departments and agencies

39 See *Delegated legislation monitor 5 of 2017*, p. 24; *Delegated legislation monitor 11 of 2017*, pp. 22-23, and *Delegated legislation monitor 13 of 2017*, pp. 41-42. It is noted that numerous instruments were also made in 2017 deferring the sunseting of instruments under section 51 of the Legislation Act; however, these instruments are not disallowable by Parliament and therefore do not fall under the scrutiny of the committee.

40 In addition to the discussion in this chapter regarding the exemption of the Migration Regulations from sunseting, see *Delegated legislation monitor 14 of 2017*, pp. 67-73, regarding the committee's communication with the Attorney-General about the exemption of 19 other significant pieces of delegated legislation from sunseting, including the Corporations Regulations 2001.

41 See *Delegated legislation monitors 1, 3, 7, 8, 9, 13 and 15 of 2017*, and the included or associated ministerial correspondence, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Monitor.

should plan for sunseting well in advance of an instrument's sunset date. The committee was concerned that the effect of the introduction of the new process for review of the Migration Regulations was that the timeframes set in place by the sunseting regime under the Legislation Act would be avoided. In particular, the new process did not include a statutory requirement to remake the Migration Regulations after each review to ensure that Parliament maintained effective and regular oversight of the Migration Regulations.

3.79 In its dialogue with the ministers over several months, the committee emphasised that it considered it essential that Parliament retain direct oversight of the outcomes of the review process of significant pieces of delegated legislation, including the Migration Regulations. The committee therefore requested that, if the Migration Regulations were to be exempted from sunseting under the Legislation Act, a legislative requirement be inserted into the Migration Regulations requiring the minister to table in Parliament the review documentation (including the final report) prepared for each review conducted under the new process.

3.80 The Minister for Immigration and Border Protection ultimately advised that he did not consider it appropriate or necessary to insert a legislative requirement for either the documentation prepared in relation to the review of the Migration Regulations, or the final review report, to be tabled in Parliament. The committee noted that this meant that no other form of parliamentary oversight would replace the Legislation Act's sunseting process in relation to the Migration Regulations.

3.81 During this dialogue the committee acknowledged the point made by the ministers that amendments to the Migration Regulations, including any amendments arising from reviews of the regulations, would remain subject to parliamentary scrutiny and disallowance. The committee considered, however, that Parliament's opportunity to consider amendments to an instrument on an ad hoc basis, as they arise, is not the same as comprehensive periodic oversight of an instrument in its entirety, as envisaged by the sunseting regime.

3.82 In its final conclusion on the matter, the committee recognised that there was a difference of view between the committee and the relevant ministers in relation to these issues, which was unlikely to be resolved through further correspondence. The committee nonetheless reiterated its concern that these instruments had effectively removed from comprehensive parliamentary scrutiny a significant body of delegated legislation, in an area of law which engages a large number of Australia's national and international legal obligations, and has significant ramifications for individuals as well as the national interest. The committee reiterated its considered view that it is essential that Parliament retain direct oversight of the outcomes of the review of significant pieces of delegated legislation, including the Migration Regulations.

3.83 During its commentary on these instruments in 2017, the committee also repeatedly expressed its general view that the circumstances in which an exemption from sunseting will be appropriate are limited, and indicated that it would continue

to analyse any proposals for exemption carefully. Where exemptions from sunseting are proposed in delegated legislation, the committee will expect detailed justification of the need for such an exemption, and of how Parliament will retain appropriate oversight of such instruments.

Sunsetting review

3.84 Section 60 of the Legislation Act required that during 2017 a review of the operation of the Act's sunseting provisions be conducted by a body appointed by the Attorney-General, that the body report to the Attorney-General before 1 October 2017, and that the report be tabled in Parliament.

3.85 A committee of three senior officials was convened in early 2017 to conduct the Review of the Operation of the Sunseting Provisions of the Legislation Act (sunseting review). The sunseting review was required to consider the extent to which the objectives of the sunseting framework had been met, any factors which had limited the achievement of those objectives, whether those objectives were still appropriate, and how the performance of the sunseting framework might be improved.⁴²

Initial submission by the committee

3.86 On 31 May 2017, the committee was invited to provide a submission to the sunseting review. On 4 August 2017 the committee made its first submission, jointly with the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights.⁴³

3.87 In their submission, the three committees (scrutiny committees) commented that the current 10 year sunseting framework provides an essential opportunity for Parliament to ensure that the content of legislative instruments is current and that Parliament maintains effective and regular oversight of the legislative power it has delegated (including the opportunity to consider disallowance of instruments that have been remade due to sunseting).

3.88 The scrutiny committees accepted that in some circumstances it may be appropriate for an instrument to be exempt from sunseting. However, they noted that the scrutiny committees were concerned about the potential implications of such exemptions for parliamentary oversight. The committees recommended that the Legislation Act be amended to specify the criteria for granting exemptions from

42 See <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Review-of-the-sunseting-framework-under-the-legislation-act-2003.aspx> for terms of reference, submissions received, and final report.

43 [https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunseting-review-submissions/Standing-Committee-for-the-Scrutiny-of-Ordinances,-Parliamentary-Joint-Committee-on-Human-Rights-\(combined-submission\).PDF](https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunseting-review-submissions/Standing-Committee-for-the-Scrutiny-of-Ordinances,-Parliamentary-Joint-Committee-on-Human-Rights-(combined-submission).PDF).

sunsetting. The committees also expressed their preference that any exemptions prescribe specific instruments rather than classes of instruments, and that where a class of instruments is proposed to be exempted from sunsetting (and disallowance), the exemption be contained in primary rather than in delegated legislation. The committees further expressed concern that insufficient guidance was available about the scope of the class exemptions currently provided in section 11 of the LEOM regulation.

3.89 The scrutiny committees noted their concerns about the processes for managing sunsetting of delegated legislation, including indications of a lack of planning for sunsetting in advance of an instrument's sunsetting date. The committees noted that in many cases they observed insufficient explanation in the ESs to remade instruments about their purpose and operation, as required by section 15J of the Legislation Act, in favour of a statement in the ES that an instrument has been made with 'minimal changes' or 'no changes'. The committees recommended that relevant guidance materials be clarified to specify that the requirements of section 15J apply equally to instruments being remade due to sunsetting.

3.90 The scrutiny committees commented on the appropriateness of the present provisions for the deferral and alignment of sunsetting of instruments, expressing a general preference that these mechanisms be used sparingly. The committees did not support a suggestion that the Attorney-General's power to defer sunsetting for up to 12 months, under section 51 of the Legislation Act, be extended to a longer period. The committees considered that instruments aligning sunsetting under section 51A of the Legislation Act should remain subject to disallowance, and should require inclusion of a statement of reasons.

3.91 The scrutiny committees' submission commented on other matters raised in the sunsetting review's consultation paper, including the inclusion of sunsetting information on the FRL, the automatic repeal of instruments under the Legislation Act (discussed further below), and the desirability of legislatively defining a parliamentary 'sitting day'.

The committee's second submission

3.92 After making its first submission to the sunsetting review, the committee published further significant commentary regarding exemptions from sunsetting in *Delegated legislation monitor 9 of 2017*, in relation to the instruments exempting the Migration Regulations from sunsetting (as discussed above). The committee drew its comments on this matter to the attention of the sunsetting review in a supplementary submission made on 16 August 2017.⁴⁴

44 [https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunsetting-review-submissions/Standing-Committee-for-the-Scrutiny-of-Ordinances,-Parliamentary-Joint-Committee-on-Human-Rights-\(supplementary-submission\).PDF](https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/sunsetting-review-submissions/Standing-Committee-for-the-Scrutiny-of-Ordinances,-Parliamentary-Joint-Committee-on-Human-Rights-(supplementary-submission).PDF).

3.93 In its supplementary submission, the committee emphasised that it is essential for Parliament to retain effective and regular oversight of the power it has delegated, and expressed concern about the use of delegated legislative power by the executive to exempt a significant piece of delegated legislation from the sunseting framework of the Legislation Act. The committee expressed its view that the circumstances in which an exemption will be appropriate are limited, and noted that it would continue to analyse any such proposal carefully and require detailed justification of it.

Report of the sunseting review

3.94 The Attorney-General tabled the *Report on the Operation of the Sunseting Provisions in the Legislation Act 2003* in the House of Representatives on 23 October 2017 and in the Senate on 13 November 2017.⁴⁵

3.95 The report concluded that overall, the sunseting regime in the Legislation Act was fulfilling its stated purpose, and required only minor refinements to improve its operation. The report recommended another review after ten years.

3.96 Notably, the report stated that while sunseting provided an 'opportunity for further parliamentary scrutiny of legislative instruments', this was 'a product of the sunseting mechanism rather than its purpose'.⁴⁶ The review acknowledged the committee's concerns about the reduction of parliamentary oversight of instruments exempted from sunseting, such as the Migration Regulations, but regarded appropriate parliamentary oversight in such a case as 'a matter for the responsible minister to determine'.⁴⁷

3.97 The report included 45 recommendations, many of relevance to the committee's work and the comments made in its submissions. These included:

- retaining the criteria for exemptions from sunseting in policy, rather than legislation, and expanding those criteria to include large and complex instruments subject to regular review and amendment, but requiring review of the criteria by the Attorney-General's Department every five years;
- including all exemptions from sunseting, other than those in the Legislation Act itself, in the LEOM regulation rather than in other laws;

45 Sunsetting Review Committee, *Report on the Operation of the Sunseting Provisions in the Legislation Act 2003*, September 2017, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Report-on-the-operation-of-the-Sunseting-Provisions-in-the-Legislation-Act-2003.pdf>.

46 Sunsetting Review Committee, *Report on the Operation of the Sunseting Provisions in the Legislation Act 2003*, September 2017, p. 7.

47 Sunsetting Review Committee, *Report on the Operation of the Sunseting Provisions in the Legislation Act 2003*, September 2017, p. 20.

- allowing the Attorney-General to defer the sunseting of legislative instruments for up to 24 months (rather than the existing 12 months), but requiring that instruments deferring sunseting for more than 12 months be disallowable;
- requiring that ESs to instruments deferring and aligning sunseting include a statement of reasons;
- amending provision for the automatic repeal of instruments so that it does not occur before the end of their disallowance period; and
- amending the *Legislation Act* and/or *Acts Interpretation Act 1901* to define the term 'sitting day'.

3.98 The committee notes that, in its recommendation 28, the report specifically drew the attention of all responsible agencies to the committee's expectation that all proposed exemptions from sunseting should be accompanied by robust and thorough justification.

3.99 Many of the review's recommendations would require amendment of the *Legislation Act*.⁴⁸ The committee will monitor the government's response to, and any implementation of, the recommendations.

Access to Australian Standards incorporated in delegated legislation

3.100 As mentioned above, the committee has consistently expressed concern about the accessibility of documents incorporated in delegated legislation, particularly industry standards.

3.101 According to research conducted by the Department of Industry, Innovation and Science, more than one-third of some 5600 Australian Standards are currently referenced in legislation at all levels of Australian government. Access to standards is hindered by distribution arrangements: under present contractual agreements, Australian and many international standards are not generally available for free but must be purchased at a cost from a commercial distributor.

3.102 Throughout 2017, the committee routinely commented on the accessibility of documents incorporated in delegated legislation. A fundamental principle of the rule of law is that every person subject to the law should be able to access its terms readily and freely. The committee therefore expects the ES to an instrument that incorporates one or more documents to provide a description of each incorporated document and to indicate where it can be accessed without cost. The committee expects, at a minimum, that consideration be given to any means by which an incorporated document may be made freely available to interested or affected

48 It is noted that any proposed amendment to the *Legislation Act* would be scrutinised by the Senate Standing Committee for the Scrutiny of Bills.

persons. The committee's expectations in this regard are set out in its *Guideline on incorporation of documents*.⁴⁹

3.103 The issue of access to material incorporated into law by reference to external documents, such as Australian and international standards, has been one of ongoing concern to the committee and other Australian parliamentary scrutiny committees. In this regard the committee has noted a 2016 report by the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament, which comprehensively outlined the significant scrutiny concerns associated with the incorporation of standards by reference, particularly where the incorporated material is not freely available.⁵⁰

3.104 In 2017, the committee corresponded with the Minister for Industry, Innovation and Science about the issue of access to standards referenced in legislation. Following this correspondence, members of the committee's secretariat and its legal adviser met with representatives of the Department of Industry, Innovation and Science and Standards Australia to discuss options for improving the accessibility of regulated standards. The committee continues to engage with the minister and the department on this issue.

3.105 The committee was pleased to learn during 2017 that access to standards through the National Library and state and territory libraries, which had been cut off in 2016, had been temporarily restored for non-commercial research and study purposes, with some documents now accessible online. The new arrangement for library access runs until February 2019.⁵¹

3.106 The committee continues to monitor this issue, and to report in the monitor on specific examples of access to standards and other documents in delegated legislation, as noted below.

49 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

50 Parliament of Western Australia, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016), 39th Parliament, Report 84, <http://www.parliament.wa.gov.au/Parliament/commit.nsf/%28EvidenceOnly%29/DFF600B884DEC6B648257D570013D717?opendocument>.

51 See National and State Libraries Australasia, *Access to Standards restored at NSLA libraries*, at <https://www.nsla.org.au/news/access-standards-restored-nsla-libraries> (accessed 14 March 2018).

Routine matters

3.107 This section lists some of the routine matters that the committee reported on during the relevant period.

Incorporation of documents by reference

3.108 Scrutiny principle (a) of the committee's terms of reference requires the committee to ensure that instruments are made in accordance with statute, their authorising Acts, as well as any other applicable laws or legal requirements.

3.109 Paragraph 14(1)(b) of the Legislation Act allows a legislative instrument to incorporate any document in writing which exists at the time the legislative instrument is made. Examples of these may include Commonwealth legislative instruments that are exempt from disallowance, state and territory legislative instruments, treaties, guidelines, or Australian and international standards.

3.110 However, subsection 14(2) provides that such documents may only be incorporated as in force or existence at a date before or at the same time as the legislative instrument commences, and not as in force from time to time (unless a specific provision in the legislative instrument's authorising Act (or another Act of Parliament) overrides this).

3.111 In addition, paragraph 15J(2)(c) of the Legislation Act requires the ES to a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained. The committee's expectation is that incorporated documents can be readily and freely accessed by anyone affected by or interested in the law, without charge.

3.112 In 2017 the committee amended its *Guideline on incorporation of documents*, available on the committee's website.⁵²

3.113 In 2017, the committee commented on 36 instruments which did not specify the manner of incorporation of documents, and on 62 instruments which didn't indicate either whether incorporated documents were available free of charge, or where they could be obtained free of charge. The committee wrote to ministers requesting information on these matters, and/or requesting that replacement ESs to the instruments be registered containing the required information.

Instruments that appear to rely on section 10 of the Acts Interpretation Act 1901 (as applied by paragraph 13(1)(a) of the Legislation Act)

3.114 Section 10 of the *Acts Interpretation Act 1901* (Interpretation Act), as applied by paragraph 13(1)(a) of the Legislation Act, has the effect that incorporation by

52 Regulations and Ordinances Committee, *Guideline on incorporation of documents*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/Guideline_on_incorporation_of_documents.

reference in instruments of (other) Commonwealth disallowable legislative instruments can be taken to be references to versions of the incorporated instruments as in force from time to time. The committee nevertheless considers that, in the interests of promoting clarity and intelligibility of an instrument to persons interested in or affected by an instrument, instruments (and ideally their accompanying ESs) should clearly state the manner in which any documents are incorporated, including where section 10 of the Interpretation Act is relied upon to incorporate other Acts or instruments as in force from time to time.

3.115 In 2017, the committee identified more than 80 instruments that appeared to rely on section 10 of the Interpretation Act as applied by section 13 of the Legislation Act. In many cases, the relevance of these provisions was not noted in the instrument or its ES, and until monitor 13 of 2017, the committee commented on an advice only basis on all such instruments.

3.116 In October 2017 the committee agreed that, with updated guidance in place, it would no longer (from monitor 14 of 2017 onwards) comment in the monitor on instruments relying on section 10 of the Interpretation Act as applied by section 13 of the Legislation Act. However, the committee continues to encourage the inclusion of appropriate information regarding the manner of incorporation in instruments that incorporate other documents, including legislation, by reference.

Description of consultation

3.117 Section 17 of the Legislation 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. Section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, explain why none was undertaken.

3.118 In 2017, the committee identified 34 instruments in relation to which these requirements were not fully adhered to, and wrote to relevant ministers in relation to each matter. In each case ministers were requested, and agreed, to amend the ESs to the instruments to comply with the Legislation Act.

Automatic repeal of spent and redundant instruments and provisions

3.119 From November 2013 to the end of 2017, the secretariat monitored the number of instruments automatically repealed (in accordance with Division 1 of Part 3 of Chapter 3 of the Legislation Act) because they (only) amend another instrument and those amendments have taken effect. In 2017, 633 of 1725 instruments registered on the FRL were repealed under this provision.

3.120 The committee has acknowledged that the power to effect mass repeal of redundant instruments of delegated legislation improves the utility of the FRL by making clear which instruments have no continuing effect.

3.121 However, the committee has expressed concern about this process giving rise to confusion as to whether instruments listed on the FRL as 'Repealed/Ceased' before the end of the disallowance period remained subject to disallowance. The committee would be concerned if parliamentarians or citizens were deterred from making objections to a legislative instrument because of a mistaken belief that it was no longer subject to disallowance.

3.122 In 2017 the committee secretariat continued to receive enquiries from parliamentarians' staff, officials and the public concerning whether instruments subject to the automatic repeal provisions were still subject to disallowance.

3.123 In its submission to the sunseting review, the committee recommended that information provided on the FRL be amended to explain that, notwithstanding the automatic repeal of an instrument, it may still be subject to disallowance. The committee notes the recommendation of the sunseting review committee that Division 1 of Part 3 of Chapter 3 of the Legislation Act be amended to provide that a disallowable legislative instrument is automatically repealed either at the end of the disallowance period for the instrument, when the instrument has fully taken effect, or when the capacity for any further provisions to commence has been exhausted, whichever occurs later.⁵³

Instruments made under anticipated legislative authority

3.124 In 2017, the committee identified 19 instruments that were made in reliance on empowering provisions that had not yet commenced. While this approach may be authorised by section 4 of the Interpretation Act, the ESs to the instruments did not identify this. The committee considers that, in the interests of promoting clarity and intelligibility of instruments to anticipated users, ESs to instruments that rely on section 4 of the Interpretation Act should clearly identify that the making of the instrument relies on that section.

Instruments that amend or repeal other instruments

3.125 Subsection 33(3) of the Interpretation Act provides that the power to make an instrument includes the power to vary or revoke the instrument. If instruments rely on this power, the committee considers it preferable that the ES identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users.

3.126 In 2017, the committee identified 230 instruments that that appeared to rely on subsection 33(3) of the Interpretation Act. In many cases, the relevance of

53 Sunsetting Review Committee, *Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003*, Attorney-General's Department, September 2017, <https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/Report-on-the-Operation-of-the-Sunsetting-Provisions-in-the-Legislation-Act-2003.pdf>, Recommendation 44.

subsection 33(3) was not noted in the instrument or its ES, and until monitor 13 of 2017, the committee commented on an advice only basis on all such instruments.

3.127 In October 2017 the committee published a new guideline on instruments that amend or repeal other instruments, and agreed that with such guidance in place, it would no longer (from monitor 14 of 2017 onwards) comment on these instruments in the monitor. However, the committee continues to encourage the inclusion of reference to subsection 33(3) in ESs to instruments that amend or repeal other instruments.

Senator John Williams

Chair

