

The Senate

Standing
Committee on
Regulations and
Ordinances

Delegated legislation monitor

Monitor No. 8 of 2015

12 August 2015

© Commonwealth of Australia 2015

ISSN 2201-8689 (print)

ISSN 1447-2147 (online)

This document was prepared by the Senate Standing Committee on Regulations and Ordinances and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Sam Dastyari	New South Wales, ALP
Senator Nova Peris OAM	Northern Territory, ALP
Senator Linda Reynolds	Western Australia, LP
Senator Zed Seselja	Australian Capital Territory, LP

Secretariat

Mr Ivan Powell, Secretary
Ms Jessica Strout, Acting Senior Research Officer

Committee legal adviser

Mr Stephen Argument

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3066
Email: regords.sen@aph.gov.au
Website: http://www.aph.gov.au/senate_regord_ctte

Contents

Membership of the committee	<i>iii</i>
Introduction	<i>ix</i>
Chapter 1 – New and continuing matters	
Response required	
Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015 [F2015L00870]	1
Aged Care (Subsidy, Fees and Payments) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015 [F2015L00996]	2
Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015 [F2015L01019]	2
Autonomous Sanctions Amendment (Sanctioned Commercial Activity—Russia) Regulation 2015 [F2015L00946]	3
Carbon Credits (Carbon Farming Initiative—Commercial and Public Lighting) Methodology Determination 2015 [F2015L00980]	4
Comptroller-General of Customs (Places of Detention) Directions 2015 [F2015L00891]	5
Corporations Amendment (Financial Advice) Regulation 2015 [F2015L00969]	6
Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 6) Regulation 2015 [F2015L00939]	8
Finance Minister’s Orders (Financial Statements for reporting periods ending on or after 1 July 2011) Repeal Instrument 2015 [F2015L00889]	10
Jervis Bay Territory Emergency Management Ordinance 2015 [F2015L00774]	11
Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015 [F2015L00972]	12
Parliamentary Entitlements Amendment (Office Budget) Regulation 2015 [F2015L00949]	13
Private Health Insurance (Registration) Amendment Rules 2015 (No. 1) [F2015L00765]	14
Social Security (Administration) (Income Management - Crediting of Accounts) Rules 2015 [F2015L00781]	15

Social Security (Satisfaction of the Activity Test – Classes of Persons) (DEEWR and FaHCSIA) Specifications 2009 (No. 1) – Instrument of Revocation 2015 [F2015L00865].....	16
Taxation Administration Act 1953 - Pay as you go withholding - PAYG Withholding Variation: Allowances – Legislative Instrument [F2015L01047].....	17
Work Health and Safety Amendment Regulation 2015 (No. 1) [F2015L00951].....	18

Further response required

Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572].....	19
---	----

Advice only

Comptroller-General of Customs (Warrants) Directions 2015 [F2015L00890].....	24
Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 5) Regulation 2015 [F2015L00767].....	25
Income Tax Amendment (Defence Force Income Tax Exemptions) Regulation 2015 [F2015L00771]	26
Intellectual Property Legislation Amendment (TRIPS Protocol and Other Measures) Regulation 2015 [F2015L00852]	27
National Health (Price and Special Patient Contribution) Amendment Determination 2015 (No. 4) (PB 48 of 2015) [F2015L00763].....	28
National Health (Remote Aboriginal Health Services Program) Special Arrangements Amendment Instrument 2015 (No. 1) (PB 65 of 2015) [F2015L00971].....	29
National Rental Affordability Scheme Amendment (Administrative Processes) Regulation 2015 [F2015L00772]	30
Taxation Administration Act Withholding Schedules 2015 [F2015L00750].....	31
Taxation Administration Act 1953 - Pay as you go withholding - Taxation Administration Act Withholding Schedules 2015 [F2015L00944]	31
Treasury Laws Amendment (First Home Saver Accounts) Regulation 2015 [F2015L00840].....	32
Multiple instruments that appear to rely on subsection 33(3) of the <i>Acts Interpretation Act 1901</i>	33

Chapter 2 – Concluded matters

A New Tax System (GST, Luxury Car Tax and Wine) Direction 2015 [F2015L00566].....	37
---	----

Marine Order 11 (Living and working conditions on vessels) 2015 [F2015L00609].....	38
Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542].....	40
Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551].....	41
Migration Regulations 1994 - Specification of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 - IMMI 15/028 [F2015L00563].....	43
National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1) [F2015L00598].....	44
Radiocommunications Advisory Guidelines (Protection of Apparatus-licenced and Class-licenced Receivers – 2 GHz Band) 2015 [F2015L00721]	45
Radiocommunications (Radio-controlled Models) Class Licence 2015 [F2015L00497].....	47
Safety, Rehabilitation and Compensation (Definition of Employee – Defence Families of Australia) Notice 2015 [F2015L00602].....	49
Appendix 1 – Correspondence	51
Appendix 2 – Guideline on consultation	89

Introduction

Terms of reference

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

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

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

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

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

Publications

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

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

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

Structure of the monitor

The monitor is comprised of the following parts:

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

Acknowledgement

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

General information

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

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

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

Senator John Williams (Chair)

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

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

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

Chapter 1

New and continuing matters

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

Response required

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

Instrument	Administrative Decisions (Judicial Review) Amendment (Enactments) Regulation 2015 [F2015L00870]
Purpose	Amends the <i>Administrative Decisions (Judicial Review) Act 1977</i> to include three Northern Territory Acts related to the regulation of electricity utilities
Last day to disallow	16 September 2015
Authorising legislation	<i>Administrative Decisions (Judicial Review) Act 1977</i>
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

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

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

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

Instrument	Aged Care (Subsidy, Fees and Payments) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015 [F2015L00996] Aged Care (Transitional Provisions) (Subsidy and Other Measures) Amendment (Indexation, Pre-Entry Leave and Other Measures) Determination 2015 [F2015L01019]
Purpose	These instruments amend the Aged Care (Subsidy, Fees and Payments) Determination 2014 and the Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014 to increase the amount of subsidies and supplements payable to approved providers of aged care services from 1 July 2015, remove reference to the pre-entry leave subsidy and make consequential changes as a result of the operation of the <i>Aged Care and Other Legislation Amendment Act 2014</i>
Last day to disallow	17 September 2015
Authorising legislation	<i>Aged Care Act 1997; Aged Care (Transitional Provisions) Act 1997</i>
Department	Social Services
Scrutiny principle	Standing Order 23(3)(d)

Relationship of instruments to Social Services Legislation Amendment (No. 2) Bill 2015

The instruments increase the amount of subsidies and supplements payable to approved providers of aged care services; and cease the payment of the residential care subsidy to residential aged care providers for pre-entry leave (which relates to the holding of a place for up to seven days prior to a care recipient entering care) from 1 July 2015.

The committee notes that key elements of the instruments may be described as 'mirroring' and anticipating amendments in the Social Services Legislation Amendment (No. 2) Bill 2015 (the bill). The bill passed the House of Representative on 15 June 2015 but has yet to pass the Senate, where the second reading was moved on 16 June 2015.

The committee notes that in each case the ESs for the instruments state:

The Amending Determination will give effect to the removal of pre-entry leave subsidy from 1 July 2015 in the event that Schedule 2 of the Social

Services Legislation Amendment (No. 2) Bill 2015 (the Amending Bill), which also contains provisions to remove pre-entry leave subsidy, does not receive Royal Assent by that time. Upon commencement, Schedule 2 of the Social Services Legislation Amendment (No. 2) Bill 2015 (the Amending Bill) will operate to cease the payment of subsidy and supplements during a period of pre-entry leave. If the Amending Bill commences then this Amending Determination will remove unnecessary provisions in the Determination (Schedule 3). If the Amending Bill does not commence by 1 July 2015 then the Amending Determination operates in the alternative to reduce the amount of subsidy paid during pre-entry leave to nil (Schedule 2).

...

The commencement of amendments in Schedule 2 and 3 are dependent on the commencement of Schedule 2 of the Amending Bill. Schedule 2 of this determination commences on 1 July 2015 if Schedule 2 of the Amending Bill has not commenced on 1 July 2015. Schedule 3 of this determination commences immediately after Schedule 2 of the Amending Bill has commenced. If Schedule 2 of the Amending Bill never commences then Schedule 3 of this Amending Determination will never commence.

However, it is unclear to the committee, on the basis of the information provided, what is the reason for introducing these changes via regulation while the bill is still before the Parliament.

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

Instrument	Autonomous Sanctions Amendment (Sanctioned Commercial Activity—Russia) Regulation 2015 [F2015L00946]
Purpose	Amends the Autonomous Sanctions Regulations 2011 to clarify the definition of 'sanctioned commercial activity'
Last day to disallow	17 September 2015
Authorising legislation	<i>Autonomous Sanctions Act 2011</i>
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. However, section 18 provides that in some circumstances such

consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for this instrument provides no information in relation to consultation.

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

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

Instrument	Carbon Credits (Carbon Farming Initiative—Commercial and Public Lighting) Methodology Determination 2015 [F2015L00980]
Purpose	Provides for crediting emissions reductions from projects that improve the energy performance of lighting systems in commercial and industrial buildings and public areas
Last day to disallow	17 September 2015
Authorising legislation	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

This instrument provides for crediting emissions reductions from projects that improve the energy performance of lighting systems in commercial and industrial buildings and public areas.

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

Subsection 106(8) of the authorising legislation for the instrument (the *Carbon Credits (Carbon Farming Initiative) Act 2011*) provides that instruments may apply, adopt or incorporate (with or without modifications) matter contained in any other instrument or writing 'as in force or existing at a particular time' or 'as in force or existing from time to time' (thereby altering the effect of section 14 of the *Legislative Instruments Act 2003*).

With reference to the above, the committee notes that subsection 5(2) of the instrument incorporates by reference various standards. However, neither the instrument nor the ES expressly state the manner in which the specified documents are incorporated.

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

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

Instrument	Comptroller-General of Customs (Places of Detention) Directions 2015 [F2015L00891]
Purpose	Identifies places which an officer is permitted to detain a person and specifies other matters relating to the detention of persons under paragraph 219ZJE(1)(a) of the <i>Customs Act 1901</i>
Last day to disallow	17 September 2015
Authorising legislation	<i>Customs Act 1901</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)

Undue trespass on personal rights and liberties

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

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

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

afforded to a person subject to a search. It is therefore unclear whether the instrument unduly trespasses on the personal rights and liberties of persons affected by the instrument.

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

Instrument	Corporations Amendment (Financial Advice) Regulation 2015 [F2015L00969]
Purpose	Amends the Corporations Regulations 2001 in relation to the Future of Financial Advice
Last day to disallow	17 September 2015
Authorising legislation	<i>Corporations Act 2001</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(d)

Matters more appropriate parliamentary enactment

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

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

The regulation makes amendments to:

- clarify that a provider who provides advice to an employer about default funds is providing a financial service to a retail client;
- provide that the wholesale and retail client distinction that currently applies in other Parts of the *Corporations Act 2001* also applies to the FOFA provisions;
- modify best interests duty to giving advice on a basic banking product and/or a general insurance product where the subject matter of the advice being sought also relates to consumer credit insurance;
- provide a facility for making non-cash payments that is not related to a basic deposit product is a basic deposit product for the purposes of the FOFA provisions;
- clarify the application of the existing client-pays provision; and
- broaden the basic banking exemption from the ban on conflicted remuneration to include benefits relating to consumer credit insurance products.

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

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

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

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

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

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

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

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

Previously unauthorised expenditure

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to authorising expenditure.

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

The instrument adds one new item to Part 3 of Schedule 1AB and 21 new items to Part 3 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997. However, four items appear to be expenditure not previously authorised by legislation:

- New table item 90 to Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Individual Placement and Support Trial to assist young people with mental illness to remain in education or employment, or transition to employment. While the expenditure for this program is unknown it is to be administered by the Department of Social Services.
- New table item 92 of Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Stronger Communities Programme which will deliver social benefits in Australia's regions. \$45 million over two years, commencing 2015-16 has been allocated to the program, and it is to be administered by the Department of Infrastructure and Regional Development.

-
- New table item 93 to Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Drought Communities Programme that will fund local infrastructure in selected local government areas. \$35 million over four years from 2015-16 has been allocated to the program and it is to be administered by the Department of Infrastructure and Regional Development.
 - New table item 99 to Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund measures to improve the uptake of vaccines under the National Immunisation Programme in order to reduce the incidence of vaccine preventable diseases across the Australian community. \$26.4 million over four years has been allocated to the program and it is to be administered by the Department of Health.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, the programs outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committees.

The committee draws the attention of the Senate to the expenditure authorised by this instrument relating to the programs listed below:

- **Individual Placement and Support Trial;**
- **Stronger Communities Programme;**
- **Drought Communities Programme; and**
- **National Immunisation Programme.**

Merits review

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

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

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

In order to assess whether a program in schedule 1AB possesses the characteristics justifying the exclusion from merits review, the committee's usual expectation is that ESs specifically address this question in relation to each new and/or amended program added to Schedule 1AB, including a description of the policy considerations and

program characteristics that are relevant to the question of whether or not decisions should be subject to merits review.

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

Instrument	Finance Minister's Orders (Financial Statements for reporting periods ending on or after 1 July 2011) Repeal Instrument 2015 [F2015L00889]
Purpose	Repeals the Finance Minister's Orders (Financial Statements for reporting periods on or after 1 July 2011)
Last day to disallow	17 September 2015
Authorising legislation	<i>Aboriginal and Torres Strait Islander Act 2005; Defence Service Homes Act 1918; High Court of Australia Act 1979; Natural Heritage Trust of Australia Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(b)

Retrospectivity

This instrument repeals the Finance Minister's Orders (Financial Statements for reporting periods on or after 1 July 2011) and commences retrospectively on 1 July 2014.

Subsection 12(2) of the *Legislative Instruments Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

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

Instrument	Jervis Bay Territory Emergency Management Ordinance 2015 [F2015L00774]
Purpose	Establishes a legislative framework for emergency management in the Jervis Bay Territory
Last day to disallow	20 August 2015
Authorising legislation	<i>Jervis Bay Territory Acceptance Act 1915</i>
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Sub-delegation

Section 9 of this Ordinance provides that the minister may, in writing, delegate his or her powers under the Ordinance (other than sections 15 and 48, which respectively empower the minister to declare a state of emergency and to make statutory rules) to 'any person'.

With reference to section 9, the ES states:

The Minister's powers and functions under this Ordinance may be delegated to people, for example, to Departmental officers or emergency services officers. The Minister may delegate the majority of his or her powers or functions to any person; however, the Minister cannot delegate the powers to declare a state of emergency, or to make statutory rules under this Ordinance.

The Minister can delegate powers or functions, including the power to delegate, to a member of the Senior Executive Service (SES) within the Department responsible for Territories. The SES employee may then sub-delegate the power or function to an emergency services officer, or a member of an emergency services organisation.

The section also states that the *Acts Interpretation Act 1901* sections 34AA, 34AB, and 34A apply to the sub-delegation of powers and functions in the same way as they apply to the delegation of powers and functions. This means that powers which have been sub-delegated cannot be delegated further; that sub-delegations may be made to a position and exercised by whoever is in that position at a particular point in time; and that the person exercising the sub-delegated power or function can do so according to their opinion, belief or state of mind, if this is relevant to the exercise of the power, or the performance of the function or duty.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of

persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers (other than the excluded powers) to 'any person'.

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

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

Unclear basis for determining fees

Schedule 7 of this instrument increases various visa application charges.

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

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

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

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

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

Instrument	Parliamentary Entitlements Amendment (Office Budget) Regulation 2015 [F2015L00949]
Purpose	Amends the Parliamentary Entitlements Regulations 1997 to amend some entitlements for parliamentarians under Schedule 1 to the <i>Parliamentary Entitlements Act 1990</i> and the Parliamentary Entitlements Regulations 1997, to create an office budget to be used for certain existing entitlements
Last day to disallow	17 September 2015
Authorising legislation	<i>Parliamentary Entitlements Act 1990</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

In relation to section 17 of the *Legislative Instruments Act 2003*, consultation on the provisions in the Regulation has been undertaken and has bipartisan support.

The Office of Best Practice Regulation (OBPR) has been consulted and agrees that this proposal will have no regulatory impact on businesses, individuals or organisations and therefore the regulatory costs are nil. OBPR ID Number: 16832.

First, while the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee considers that in this case the information provided regarding bipartisan support does not describe whether formal consultation was undertaken and, if so, the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation).

Second, the committee does not consider that the process of ascertaining the necessity of a Regulatory Impact Statement for an instrument is strictly relevant to the question of consultation under *the Legislative Instruments Act 2003* (see subsection 17(2)).

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

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

Instrument	Private Health Insurance (Registration) Amendment Rules 2015 (No. 1) [F2015L00765]
Purpose	Amends the Private Health Insurance (Registration) Rules 2009 (No. 2) to remove details of two restricted access groups
Last day to disallow	20 August 2015
Authorising legislation	<i>Private Health Insurance Act 2007</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

The Office of Best Practice Regulation (OBPR) was consulted. OBPR advised that a Regulation Impact Statement was not required because the amendments are minor.

The committee's guideline on the requirement to address the question of consultation under the *Legislative Instruments Act 2003* states:

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act

regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

The committee therefore considers that the ES for the instrument provides no information regarding consultation for the purposes of the *Legislative Instruments Act 2003*.

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

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

Instrument	Social Security (Administration) (Income Management - Crediting of Accounts) Rules 2015 [F2015L00781]
Purpose	Provide particular circumstances in which the Income Management Record (established by section 123VA of the <i>Social Security (Administration) Act 1999</i>) and a person's income management account can be credited with an amount that is ascertained in accordance with the rules
Last day to disallow	20 August 2015
Authorising legislation	<i>Social Security (Administration) Act 1999</i>
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

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

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative*

Instruments Act 2003. The committee considers that in this case the information provided does not describe the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation with the Department of Human Services).

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

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

Instrument	Social Security (Satisfaction of the Activity Test – Classes of Persons) (DEEWR and FaHCSIA) Specifications 2009 (No. 1) – Instrument of Revocation 2015 [F2015L00865]
Purpose	Revokes the Social Security (Satisfaction of the Activity Test – Classes of Persons) (DEEWR) Specification (No. 1) 2009 and the Social Security (Satisfaction of the Activity Test – Classes of Persons) (FaHCSIA) Specification (No. 1) 2009
Last day to disallow	16 September 2015
Authorising legislation	<i>Social Security Act 1991</i>
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

The Department of Social Services has been consulted regarding this instrument.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. The committee considers that in this case the information

provided does not describe the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation with the Department of Social Security).

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

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

Instrument	Taxation Administration Act 1953 - Pay as you go withholding - PAYG Withholding Variation: Allowances – Legislative Instrument [F2015L01047]
Purpose	Repeals the Taxation Administration Act 1953 - PAYG Withholding - PAYG Withholding Variation: Allowances; and adjusts the cents per kilometre car expense payments
Last day to disallow	17 September 2015
Authorising legislation	<i>Taxation Administration Act 1953</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This instrument effects certain changes to tax arrangements, and appears to apply from 1 July 2015. The ES for the instruments states:

The variation for cents per kilometre car expense payments has been adjusted because of a proposed change to calculation rules announced in the federal budget on 12 May 2015. If passed, the change is to take effect from 1 July 2015.

The committee understands this statement to mean that the measure will subsequently be confirmed by primary legislation. If this is correct, it is unclear to the committee how the instrument operates in the period prior to the passage of the primary legislation, and in the event that measure is not ultimately confirmed by primary legislation.

The committee requests the advice of the Treasurer on this matter.

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

Insufficient information regarding strict liability offences

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

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

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

Further response required

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 [F2015L00572]
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Education and Training and the Department of Social Services
Last day to disallow	13 August 2015
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	Standing Order 23(3)(a) and (c)
Previously reported in	<i>Delegated legislation monitor No. 6 of 2015</i>

Authority for expenditure

The committee commented as follows: Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle is interpreted broadly as a requirement to ensure that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 1*,¹ the High Court confirmed that executive authority to spend appropriated monies is not unlimited and therefore generally requires legislative authority. As a result of the subsequent High Court decision in *Williams No. 2*,² the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

In this regard, the committee notes that the ES states that the objective of the Mathematics by Inquiry program is:

1 *Williams v Commonwealth* (2012) 248 CLR 156.

2 *Williams v Commonwealth* (2014) 252 CLR 416.

To create and improve mathematics curriculum resources for primary and secondary school students:

- (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
- (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The objective of the Coding Across the Curriculum program is:

To encourage the introduction of computer coding and programming across different year levels in Australian schools:

- (a) to meet Australia's international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
- (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.

The committee notes that the ES identifies the constitutional basis for expenditure in relation to both the Mathematics by Inquiry and the Coding Across the Curriculum programs as follows:

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the external affairs power (section 51(xxix))
- Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

Therefore, the instrument appears to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as the relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them).

However, in relation to the external affairs power, the committee understands that, in order to rely on the power in connection with obligations under international treaties, legislation must be appropriately adapted to implement relatively precise obligations arising under that treaty.

In relation to the executive nationhood power and the express incidental power, the committee understands that the nationhood power provides the Commonwealth executive with a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

The committee therefore sought the minister's advice as to:

- *how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and*
- *how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.*

Minister's response

The Minister for Finance advised that:

The Committee may be aware that successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so. The drafting of legislation, including subordinate legislation, is routinely undertaken having regard to a range of constitutional and other legal considerations. In some cases, basic constitutional underpinnings will be evident in provisions that describe the objective scope of legislation.

The items for Mathematics by Inquiry and Coding across the Curriculum in the Regulation are a case in point. As indicated in the explanatory statement accompanying the Regulation, the objective for each of these items references the external affairs power, the Commonwealth executive power and the express incidental power.

The Government will continue to draft amendments for legislative authority under the section 32B mechanism in the *Financial Framework (Supplementary Powers) Act 1997* having due regard to constitutional limits. Consistent with this approach to law-making more generally, the Government will continue to work on maximising clarity in its approach to drafting.

Committee's response

The committee thanks the minister for his response.

However, the minister's response has not addressed the specific questions asked by the committee, namely:

- how the obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights are

sufficiently specific to support the Mathematics by Inquiry and the Coding Across the Curriculum programs; and

- how the Mathematics by Inquiry and the Coding Across the Curriculum programs are supported by the executive nationhood power and the express incidental power to the extent that they are enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation.

First, the committee notes that these questions are asked of the minister in his capacity as the instrument-maker. In this respect, the committee seeks the minister's advice as to whether he regards the referenced constitutional powers as providing a basis for the making of the instrument.

The committee therefore seeks further advice from the minister in relation to this matter.

Second, the committee notes that the minister's response suggests that legal advice may have been obtained in relation to the constitutional support for the Mathematics by Inquiry and the Coding Across the Curriculum programs. The minister states:

...successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in circumstances where there are special reasons for doing so.

While the Senate has indicated some measure of acceptance of certain public interest immunity grounds for refusals to disclose information (in cases where a particular harm is identified), the committee does not understand the minister's response to be explicitly advancing a public interest immunity claim on a recognised ground in this case.

In relation to the stated position of governments not to disclose legal advice, the committee has noted previously that it is not aware of any general government policy or practice which prevents ministers or departments from providing information containing legal (or any other) advice to the Senate and its committees (absent a valid public interest immunity claim); and the Senate has consistently rejected refusals made simply on the basis that the requested information would disclose legal or other advice as to government or a department.³ To underline this point, the committee notes that it has been provided with legal advice on a number of occasions.⁴

3 A full account of the Senate's approach to such matters may be found in *Odgers' Australian Senate Practice* (13th ed.) pp 595–625.

4 See for example *Delegated legislation monitor* No. 2 of 2014, entries on Veterans' Entitlements (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2013 [F2013L00671] and Veterans' Entitlements (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2013 [F2013L00670], pp 6–9.

The committee therefore requests from the minister a copy of any legal advice obtained in relation to this matter, and particularly the question of whether the referenced constitutional powers support the inclusion of the programs in question in the regulation.

Merits review

The committee commented as follows: The instrument adds new table item 74 to schedule 1AB establishing legislative authority for the Government to provide support under the Sector Development Fund for activities to assist the disability sector in transition to the National Disability Insurance Scheme. While the ES is generally helpful in providing information about the proposed administration of the Sector Development Fund, no information has been provided as to whether the program possesses the relevant characteristics that would justify the exclusion of decisions under this program from merits review.

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

The committee therefore requested further information from the minister in relation to this matter.

Minister's response

The Minister for Finance advised that:

In addition to the Department's [Department of Social Services] complaints services, applicants are able to seek review from the Commonwealth Ombudsman. No further merits review is considered appropriate given that funds are allocated on a competitive selection process involving a limited pool of funds for allocation.

Committee's response

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

Advice only

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

Instrument	Comptroller-General of Customs (Warrants) Directions 2015 [F2015L00890]
Purpose	Replaces former CEO Directions No. 1 of 2014 which expanded the class of officers of Customs who may apply for and execute seizure warrants
Last day to disallow	17 September 2015
Authorising legislation	<i>Customs Act 1901</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This instrument is made under section 183UC of the *Customs Act 1901*, and specifies the manner in which the powers relating to warrants in Division 1 of Part XII of that Act may be exercised; the officers of Customs who are entitled to exercise the powers in relation to warrants; and the manner and frequency of reporting required in relation to the exercise of those powers.

The committee notes that the ES for the instrument states that the directions ‘in effect replace former CEO Directions No. 1 of 2014 [F2014L00428] which expanded the class of officers of Customs who may apply for and execute seizure warrants’. However, the CEO Directions No. 1 of 2014 [F2014L00428] are not formally repealed by the new instrument, and appear on FRLI as currently in force. While the previous instrument is due to sunset on 1 October (and the common law provides for implied repeal of legislation), the committee considers it preferable that in such cases the repeal of an existing instrument is done expressly by the replacing instrument. Such an approach avoids potential confusion for anticipated users as to which instrument is currently applicable.

The committee draws this matter to the minister's attention.

Instrument	Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 5) Regulation 2015 [F2015L00767]
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Industry and Science
Last day to disallow	20 August 2015
Authorising legislation	<i>Financial Framework (Supplementary Powers) Act 1997</i>
Department	Finance
Scrutiny principle	SO 23(3)(d)

Previously unauthorised expenditure

The committee has previously determined to examine certain regulations made under the *Financial Framework (Supplementary Powers) Act 1997*, on the basis of concerns regarding the potential erosion of the Senate's constitutional rights with respect to authorising expenditure.

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

The instrument adds one new item to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for the Commonwealth government to fund the Home Insulation Program Industry Payment Scheme (the scheme). While the expenditure for the scheme is not for publication due to commercial-in-confidence considerations, it is to commence on 1 June 2015 and will be administered by the Department of Industry and Science.

In the committee's view, this item appears to be expenditure not previously authorised by legislation. The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, the program outlined above would properly have been contained within an appropriation bill not for the ordinary annual services of government, and subject to direct amendment by the Senate. The committee will draw this matter to the attention of the relevant portfolio committee.

The committee draws the attention of the Senate to the expenditure authorised by this instrument relating to the Home Insulation Program Industry Payment Scheme.

Instrument	Income Tax Amendment (Defence Force Income Tax Exemptions) Regulation 2015 [F2015L00771]
Purpose	Amends the Income Tax Regulations 1936 and Treasury Laws Amendment (2015 Measures No. 1) Regulation 2015 to exempt from income tax the remuneration of Australian Defence Force personnel engaged in service on Operations ACCORDION, AUGURY, HIGHROAD, MANITOU, OKRA and PALATE II
Last day to disallow	20 August 2015
Authorising legislation	<i>Income Tax Assessment Act 1936</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(b)

Retrospective effect

Schedule 1 to this instrument amends the Income Tax Regulations 1936 to exempt from income tax the remuneration of Australian Defence Force (ADF) personnel engaged in specific overseas military operations during specified times of duty. The instrument provides that times of duty include various dates in the past, as early as 26 June 2006.

The committee notes that, although the instrument is not strictly retrospective, the new exemptions will also apply to antecedent facts (that is, the existence of earlier eligible duty). As a consequence, it appears that ADF personnel who engaged in certain overseas military operations since 26 June 2006 may now be eligible for the exemption from income tax. The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The committee's usual expectation is therefore that the statement of compatibility would address the question of the instrument's retrospective effect and provide a justification for this approach (particularly where a person's rights or liberties may be adversely affected). However, in this case the committee notes that the amendments appear to be beneficial in their effect.

The committee draws this matter to the minister's attention.

Instrument	Intellectual Property Legislation Amendment (TRIPS Protocol and Other Measures) Regulation 2015 [F2015L00852]
Purpose	Amends the Designs Regulations 2004, the Patents Regulations 1991, and the Trade Marks Regulations 1995 to prescribe matters required under the provisions of the Acts as amended by Schedules 1, 2 and 5 to the <i>Intellectual Property Laws Amendment Act 2015</i> , and delete no-longer-required provisions and correct minor errors
Last day to disallow	15 September 2015
Authorising legislation	<i>Designs Act 2003; Patents Act 1990; Trade Marks Act 1995</i>
Department	Industry and Science
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Items 1 and 2 of Schedule 1 to this instrument insert into the Patents Regulations 1990 a definition of 'eligible importing country'. These provisions rely on new subsection 228(5) of the *Patents Act 1990* (dealing with incorporation by reference), which was inserted to the *Patents Act 1990* by Part 1 of Schedule 1 to the *Intellectual Property Laws Amendment Act 2015*. The ES for the instrument notes that Schedule 1 to the *Intellectual Property Laws Amendment Act 2015* does not commence until 25 August 2015.

The committee notes that, notwithstanding the fact that subsection 228(5) of the *Patents Act 1990* has not yet commenced, the instrument provides that certain sections and schedules commence on the day after registration (19 June 2015). The instrument has therefore been made in reliance on an empowering provision that has not yet commenced (that is, new subsection 228(5)). While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES does not identify the relevance of subsection 4(2) to the operation of the instrument.

The committee considers that, in the interests of promoting clarity and intelligibility of an instrument to anticipated users, any such reliance on subsection 4(2) of the *Acts Interpretation Act 1901* should be clearly identified in the accompanying ES.

The committee draws this matter to the minister's attention.

Instrument	National Health (Price and Special Patient Contribution) Amendment Determination 2015 (No. 4) (PB 48 of 2015) [F2015L00763]
Purpose	Amends the National Health (Price and Special Patient Contribution) Determination 2010 (PB 109 of 2010) to provide for price determinations under section 85B of the <i>National Health Act 1953</i> in relation to brands of pharmaceutical items for which the minister and the responsible person have not been able to make a price agreement. It also provides for the circumstances in which the Commonwealth will pay the special patient contribution resulting from these price determinations
Last day to disallow	20 August 2015
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

This determination affects certain responsible persons with medicines listed on the PBS. Before a pharmaceutical benefit is listed on the PBS, and from time to time thereafter, price negotiations occur between the responsible person and the Minister for the purpose of reaching a price agreement for section 85AD of the Act. If the Minister and the responsible person cannot agree on a price, further consultation occurs with the responsible person, and thereafter the Minister determines the price that will be the approved ex-manufacturer price for the brand. The Minister also determines the corresponding price claimed by the responsible person which is used to calculate the special patient contribution that will apply to the brand.

In the committee's view, the statement above describes the process of negotiation between the minister and the responsible person in relation to their commercial interest, as opposed to a process of consultation with persons likely to be affected by the instrument or to draw on relevant expertise. In effect, it appears that consultation

(within the general meaning of public consultation or consultation with experts or stakeholders) was unnecessary in this instance because the price determination essentially reflects the outcome of a negotiation over price.

While the information regarding the negotiation process is usefully included in the ES, in terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

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

The committee draws this matter to the minister's attention.

Instrument	National Health (Remote Aboriginal Health Services Program) Special Arrangements Amendment Instrument 2015 (No. 1) (PB 65 of 2015) [F2015L00971]
Purpose	Amends the National Health (Remote Aboriginal Health Services Program) Special Arrangements Instrument 2010 (No. PB 65 of 2010) to reflect a change to the handling fee paid for supply of medicines
Last day to disallow	17 September 2015
Authorising legislation	<i>National Health Act 1953</i>
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

The Amendment Instrument is minor and machinery in nature.

The committee understands from this explanation that consultation was not undertaken in this case. However, no explicit statement is provided that consultation was not undertaken as it was considered either unnecessary or inappropriate (as the

case may be). In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have explicitly stated, with a supporting explanation, that consultation was not undertaken as it was considered unnecessary or inappropriate in this case.

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

The committee draws this matter to the minister's attention.

Instrument	National Rental Affordability Scheme Amendment (Administrative Processes) Regulation 2015 [F2015L00772]
Purpose	Amends the National Rental Affordability Scheme Regulations 2008 to remove conditions of allocation about the frequency with which the rent charged for an approved rental dwelling can be reviewed and increased
Last day to disallow	20 August 2015
Authorising legislation	<i>National Rental Affordability Scheme Act 2008</i>
Department	Social Services
Scrutiny principle	Standing Order 23(3)(b)

Retrospective effect

Schedule 1 to this instrument amends the National Rent Affordability Regulations 2008 to allow an approved participant in the National Rental Affordability Scheme (NRAS) to receive an incentive for an approved rental dwelling for the year beginning on 1 May 2014 or later.

The committee notes that, although the instrument is not strictly retrospective, the change to conditions of allocation will also apply to antecedent facts (that is, the existence of an approved rental dwelling). As a consequence, it appears that an approved participant in the NRAS may now be eligible for an incentive for an approved rental dwelling that was within the scheme on 1 May 2014. The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)). The committee's usual expectation is therefore that the statement of compatibility would address the question of the instrument's retrospective effect and provide a justification for this approach (particularly where a person's rights or liberties may be adversely affected). However, in this case the committee notes that the amendments appear to be beneficial in their effect.

The committee draws this matter to the minister's attention.

Instrument	Taxation Administration Act Withholding Schedules 2015 [F2015L00750]
	Taxation Administration Act 1953 - Pay as you go withholding - Taxation Administration Act Withholding Schedules 2015 [F2015L00944]
Purpose	These instruments specify the formulas and procedures to be used for working out the amount to be withheld by an entity under the pay as you go (PAYG) system
Last day to disallow	20 August 2015
Authorising legislation	<i>Taxation Administration Act 1953</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

The making and publication of withholding schedules is a routine part of tax administration.

The ATO [Australian Taxation Office] will provide the necessary information to payroll and software providers, and those employers who code their own in-house payroll systems, to ensure that they have sufficient time to update their software packages.

The committee understands from the description provided that consultation was not undertaken in these cases. However, no explicit statement is provided that consultation was not undertaken as it was considered either unnecessary or inappropriate. In terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ESs to have explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

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

The committee draws this matter to the minister's attention.

Instrument	Treasury Laws Amendment (First Home Saver Accounts) Regulation 2015 [F2015L00840]
Purpose	Amends various regulations to remove references to First Home Saver Accounts Scheme
Last day to disallow	14 September 2015
Authorising legislation	<i>Australian Prudential Regulation Authority Act 1998; Banking Act 1959; Corporations Act 2001; Electronic Transactions Act 1999; Retirement Savings Act 1997; Superannuation Industry (Supervision) Act 1993</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Schedule 2 of the instrument provides that Schedule 1 of the instrument commences at the same time as Part 1 of Schedule 1 of the *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015*. However, the ES to the instrument states:

To ensure that these changes do not remove these references before the primary legislation ceases to be operative, the amendments made by the proposed regulation commence from **the later of 1 July 2015 or** the day Schedule 1 to the Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015 commences [emphasis added].

While it appears clear that Schedule 2 of the instrument is to commence on the day that Schedule 1 to the *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015* commences, the committee notes that ESs should be drafted with sufficient care to avoid potential confusion for the anticipated users of instruments.

The committee draws this matter to the minister's attention.

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

Instruments	
	ASIC Corporations (Repeal) Instrument 2015/275 [F2015L00736]
	Clean Energy Legislation (Carbon Tax Repeal) (Jobs and Competitiveness Program) Amendment Rule 2015 [F2015L00740]
	CASA EX75/15 - Authorisation — to carry out maintenance on WHR aircraft, Exemption — to allow supervision of maintenance on WHR aircraft [F2015L00744]
	Taxation Administration Act Withholding Schedules 2015 [F2015L00750]
	Private Health Insurance (Registration) Amendment Rules 2015 (No. 1) [F2015L00765]
	Civil Aviation Order 104.0 Amendment Instrument 2015 (No. 2) [F2015L00775]
	Human Services (Medicare) (Medicare Programs) Specification 2015 [F2015L00789]
	Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No. 1) [F2015L00800]
	PCEHR (Assisted Registration) Amendment (support of parental responsibility claim) Rule 2015 [F2015L00804]
	National Health (Weighted average disclosed price – October 2015 reduction day) Determination 2015 (No. PB 53 of 2015) [F2015L00843]
	Quarantine (Christmas Island) Proclamation 2015 [F2015L00847]
	Quarantine (Cocos Islands) Proclamation 2015 [F2015L00849]
	Seafarers Rehabilitation and Compensation (Prescribed Ship — Intra-State Trade) Declaration 2015 (No. 2) [F2015L00857]
	Occupational Health and Safety (Maritime Industry) (Prescribed Ship or Unit — Intra-State Trade) Declaration 2015 (No. 2) [F2015L00863]
	Marriage (Recognised Denominations) Amendment (Name Changes) Proclamation 2015 [F2015L00875]
	Health Insurance (Diagnostic Imaging Accreditation) Amendment Instrument (No. 2) 2015 [F2015L00894]

Instruments

Telecommunications (Interception and Access) (Emergency Services Facilities — Western Australia) Instrument 2015 [F2015L00866]

Telecommunications (Interception and Access) (Emergency Services Facilities — New South Wales) Instrument 2015 [F2015L00867]

Telecommunications (Interception and Access) (Emergency Services Facilities – Queensland) Instrument 2015 [F2015L00868]

Telecommunications (Interception and Access) (Emergency Service Facilities – Australian Capital Territory) Instrument 2015 [F2015L00869]

Health Insurance (HbA1c Test for Diagnosis of Diabetes) Revocation Determination 2015 [F2015L00931]

Health Insurance (RET Gene Testing) Revocation Determination 2015 [F2015L00932]

Remuneration Tribunal Determination 2015/10 - Judicial and Related offices - Remuneration and Allowances [F2015L00936]

Remuneration Tribunal Determination 2015/09 - Remuneration and Allowances for Holders of Public Office [F2015L00937]

Lodgment of Private Health Insurance Information in Accordance with the Private Health Insurance Act 2007 Revocation 2015 [F2015L00941]

Taxation Administration Act 1953 - Pay as you go withholding - Taxation Administration Act Withholding Schedules 2015 [F2015L00944]

Part 66 Manual of Standards Amendment Instrument 2015 (No. 1) [F2015L00945]

Aviation Transport Security (Prohibited Items) Amendment (Handcuffs) Instrument 2015 [F2015L00950]

Private Health Insurance (Complying Product) Amendment Rules 2015 (No. 2) [F2015L00955]

Vehicle Standard (Australian Design Rule 8/01 - Safety Glazing Material) 2005 Amendment 3 [F2015L00981]

Private Health Insurance (Benefit Requirements) Amendment Rules 2015 (No. 2) [F2015L00926]

Instruments	<p>National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans - New South Wales) Amendment Rules 2015 [F2015L01002]</p> <p>CASA EX114/15 - Amendment of Exemptions — compliance with SIDs in the maintenance of Cessna aircraft [F2015L01010]</p> <p>National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 2) [F2015L01017]</p> <p>Private Health Insurance (Complying Product) Rules 2015 [F2015L01021]</p> <p>Private Health Insurance (Risk Equalisation Policy) Rules 2015 [F2015L01051]</p> <p>Private Health Insurance (Health Benefits Fund Policy) Rules 2015 [F2015L01054]</p> <p>Private Health Insurance (Levy Administration) Rules 2015 [F2015L01056]</p> <p>Legal Services Amendment (Public Governance, Performance and Accountability, AGS) Directions 2015 [F2015L01052]</p> <p>Migration Regulations 1994 - Specification of Occupations, a Person or Body, a Country or Countries 2015 - IMMI 15/092 [F2015L01059]</p> <p>Migration Regulations 1994 - Specification of Access to Movement Records 2015 - IMMI 15/098 [F2015L01061]</p> <p>Vehicle Standard (Australian Design Rule 13/00 – Installation of Lighting and Light Signalling Devices on other than L-Group Vehicles) 2005 Amendment 5 [F2015L00983]</p> <p>National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2015 [F2015L01001]</p>
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the

relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.⁵

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

Chapter 2

Concluded matters

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	A New Tax System (GST, Luxury Car Tax and Wine) Direction 2015 [F2015L00566]
Purpose	Replaces the sunseting Finance Minister's (A New Tax System) Directions 2005
Last day to disallow	13 August 2015
Authorising legislation	<i>A New Tax System (Goods and Services Tax) Act 1999; A New Tax System (Luxury Car Tax) Act 1999; A New Tax System (Wine Equalisation Tax) Act 1999</i>
Department	Treasury
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor No. 6</i>

Retrospectivity

The committee commented as follows: This instrument replaces the previous directions and was made on 10 April 2015. Section 2 of the instrument provides that it is taken to have commenced on 1 April 2015. The ES for the instrument states:

This is intended to ensure continuity of GST arrangements for the Commonwealth and relevant Commonwealth entities following the sunseting of the Finance Minister's (A New Tax System) Directions 2005 on 1 April 2015. The Direction is not intended to affect the rights of any person, or impose liabilities on any person, other than the Commonwealth or an authority of the Commonwealth (see section 12(2) of the *Legislative Instruments Act 2003*).

The committee notes that subsection 12(2) of the *Legislative Instruments Act 2003* does not operate on the 'intention' of an instrument with retrospective effect but on the fact of whether such an instrument 'would' affect rights (to the disadvantage of a person) or impose liabilities retrospectively.

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

Minister's response

The Minister for Finance advised:

The Direction replaced the *Finance Minister's (A New Tax System) Directions 2005* (2005 Directions), which ceased due to sunseting on 1 April 2015. The Direction was made on 10 April 2015, but taken to have commenced on 1 April 2015. This ensured continuity of arrangements in place to support the notional application of certain taxes to the Commonwealth and untaxable Commonwealth entities, such as Department of State.

The retrospective commencement of the Direction does not detrimentally affect the rights of any person, nor does it impose additional obligations on any person, other than the Commonwealth, in accordance with subsection 12(2) of the *Legislative Instruments Act 2003*.

The minister further explained:

In practice, the retrospective commencement of the Direction provided continued support for Commonwealth entities to continue to rely on arrangements to support the management of certain taxes.

Committee's response

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

Instrument	Marine Order 11 (Living and working conditions on vessels) 2015 [F2015L00609]
Purpose	Gives effect to the International Labour Organization's Maritime Labour Convention 2006 and the International Marine Organization's Code on noise levels on board ships; and also prescribes additional requirements for living and working conditions on regulated Australian vessels
Last day to disallow	13 August 2015
Authorising legislation	<i>Navigation Act 1958</i>
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor No. 7</i>

Incorporation of extrinsic material

The committee commented as follows: This order repeals and replaces Marine Order 11 (living and working conditions) on vessels 2013, which was due to 'sunset' (that is, be automatically repealed) on 1 May 2015. The instrument incorporates a number of documents, which, in line with the committee's expectation that an

explanatory statement (ES) explain the purpose and operation of the instrument, are listed in the ES as documents incorporated by reference.

First, the committee notes that the document, Marine Order 15 (construction – fire protection, fire detection and fire extinction) 2014 is included in the list of incorporated documents in the ES. However, this differs to the date of Marine Order 15 referenced in the instrument at schedule 4, item 5(a), which refers to Marine Order 15 (construction – fire protection, fire detection and fire extinction) 2009. While it appears likely that the latter document is intended to be incorporated, it is unclear to the committee on a reading of the instrument and the ES what the intention of the rule-maker was in this regard.

Second, section 14 of the *Legislative Instruments Act 2003* allows for the incorporation of both legislative and non-legislative extrinsic material into instruments either as, respectively, in force from time to time or as in force at a particular date (subject to any provisions in the authorising legislation which may alter the operation of section 14). In this regard, the committee notes that neither the instrument nor the ES expressly states the manner of incorporation of Marine Order 15. The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice or to necessarily consult extrinsic material.

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

Minister's response

The Deputy Prime Minister, and Minister for Infrastructure and Regional Development, advised that the reference in the instrument at schedule 4, item 5(a), which refers to Marine Order 15 (construction – fire protection, fire detection and fire extinction) 2009, was an oversight, and that it will be corrected in an amendment of the order proposed for later this year.

Further the Deputy Prime Minister stated:

It was the Australian Maritime Safety Authority's intention to refer to the current (2014) version of Marine Order 15, and therefore to rely on paragraph 10(a) of the *Acts Interpretation Act 1901* so that the cross-reference would be a reference to Marine Order 15 as amended from time to time.

Committee's response

The committee thanks the Deputy Prime Minister for his response and has concluded its examination of the instrument.

The committee notes that the Deputy Prime Minister's advice clarifies that the instrument is intended to incorporate current Marine Order 15 as amended from time to time; and that this is provided for under section 14 of the *Legislative Instruments Act 2003*.

The committee also notes that any uncertainty in this regard will be removed by the minister's proposed amendment to the order.

Instrument	Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542]
Purpose	Amends the Migration Regulations 1994 in relation to bogus documents and protection visas, visa application bars, oral statements and Safe Haven Enterprise visas
Last day to disallow	13 August 2015
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor</i> No. 6

Retrospective effect

The committee commented as follows: This instrument amends the Migration Regulations 1994 and is consequential to the *Migration Amendment (Protection and Other Measures) Act 2015*.

Item 2 of schedule 1 to the instrument enables the Refugee Review Tribunal or Administrative Appeals Tribunal to make a direction based on sections 91W or 91WA of the *Migration Act 1958* (Migration Act), which provide the power to refuse a visa application for failure to establish, identity, nationality or citizenship; and section 91WB of the Migration Act, which provides that a protection visa may be granted only on the basis of the applicant being a member of the same family unit as a protection visa holder, if the applicant applied for the protection visa before the primary protection visa holder was granted their protection visa.

Schedule 5 to the instrument (specifically, new clause 4201) provides that the amendments made by item 2 of schedule 1 apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (17 April 2015), as well as applications made on or after that day.

The committee noted that, although the instrument is not strictly retrospective, the amendments made by item 2 of schedule 1 prescribe rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appeared that an otherwise valid application not determined at 17 April 2015 may now be subject to new rules that did not apply at the time of the visa application.

The committee's usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of

delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore requested further information from the minister (as to the justification for this approach).

Minister's response

The Minister for Immigration and Border Protection advised:

The amendment, while potentially retroactive in effect (as it allows the AAT [Administrative Appeals Tribunal] to make direction on applications lodged prior to 18 April 2015), has a positive effect on a person's rights, as it's entire effect is to allow the AAT to make a direction that an applicant has met certain requirements. Therefore, it was considered appropriate to ensure that this benefit was afforded to applications already made, but not finally determined, before 18 April as well as new applications made on or after 18 April.

The amendment does not require a person to meet any criteria they would otherwise not have been required to meet.

Committee's response

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

Instrument	Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]
Purpose	Amends the Migration Regulations 1994 in relation to the fast track assessment process, the refugee framework and Safe Haven Enterprise visas
Last day to disallow	13 August 2015
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor</i> No. 6

Retrospective effect

The committee commented as follows: This instrument amends the Migration Regulations 1994 and is consequential to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act).

Schedule 2 to the instrument removes references to the Refugee Convention in the Migration Regulations to reflect the new language inserted into the *Migration Act 1958* (Migration Act) by part 2 of schedule 5 to the RALC Act.

Schedule 4 of the instrument (specifically new part 40) provides that the amendments made by schedule 2 apply in relation to the review of a Refugee Review Tribunal-reviewable decision made on or after the commencement of the instrument (16 April 2015) in relation to an application for a protection visa made on or after 16 December 2014.

The committee notes that, although the instrument is not strictly retrospective, the amendments made by schedule 2 prescribe rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 16 December 2014 may now be subject to new rules that did not apply at the time of the visa application.

The committee's usual approach in such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore requested further information from the minister (as to the justification for this approach).

Minister's response

The Minister for Immigration and Border Protection advised that the amendments are to apply to applications made on or after 16 December 2014 rather than applications that are not finally determined at 16 December 2014.

Further, the minister explained:

...if the application and commencement of the regulation amendment did not reflect the application and commencement of Part 2 of Schedule 5 of the RALC Act, some persons who are covered by those Act amendments, who the Government, intends to receive a fee waiver or refund, would not be entitled to the waiver of refund.

These amendments which enable the AAT [Administrative Appeals Tribunal] to review protection visa decisions under the same criteria that were applied by the primary decision maker and which enable persons who are covered by the amendments in Part 2 of Schedule 5 to the RALC Act to receive a fee waiver or refund in respect of the review of the protection visa decision at the AAT do not trespass on personal rights and liberties of persons affected by the regulation amendment.

Committee's response

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

Instrument	Migration Regulations 1994 - Specification of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 - IMMI 15/028 [F2015L00563]
Purpose	Specifies the tests, scores, period, level of salary and other exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) (Subclass 457) visa applicants
Last day to disallow	13 August 2015
Authorising legislation	<i>Migration Act 1958</i>
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	<i>Delegated legislation monitor No. 6</i>

Retrospective effect

The committee commented as follows: This instrument revokes and replaces an existing instrument, and prescribes the tests, scores, period, level of salary and other exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) (Subclass 457) visa applicants.

Various provisions of the instrument indicate that they apply to applicants who lodged their most recent applications before, on or after dates in the past (specifically, 1 January 2015, 1 July 2013, 1 July 2010 and 14 April 2009). Additionally, while it is unclear how this is given effect by the text of the instrument, the explanatory statement (ES) for the instrument also states:

...the Instrument applies to applicants of Subclass 457 visas who lodged applications on or after the commencement of this Instrument, or lodged prior to the commencement of this Instrument but not finally determined by the date of commencement [18 April 2015].

The committee notes that, although the instrument is not strictly retrospective, it prescribes various rules for the future based on antecedent facts (that is, the existence of an earlier visa application or nomination). As a consequence, it appears that an otherwise valid application or nomination not determined at 18 April 2015 may now be subject to new rules that did not apply at the time of the application or nomination.

The committee's usual approach in such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

The committee therefore requested further information from the minister (as to the justification for this approach).

Minister's response

The Minister for Immigration and Border Protection advised:

...the practical effect of the Instrument for applicants who are required to satisfy the English language requirements [is that]:

applicants will have the added benefit of an expanded list of accepted English language tests; and

for applicants who have undertaken a IELTS [International English Language Testing System] test, a lower test score to meet the Subclass 457 visa English language requirement.

All other applicants whose most recent application was made on or after 18 April 2015, may undertake one of the expanded list of acceptable English language tests and minimum scores specified in this Instrument.

Further, the minister noted:

As the Instrument is beneficial to applicants and significantly maintains the exemptions specified in the previous Instrument, it does not trespass unduly on personal rights and liberties of applicants.

Committee's response

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

Instrument	National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1) [F2015L00598]
Purpose	Amends the National Greenhouse and Energy Reporting (Measurement) Determination 2008 to update emissions factors for the combustion of fuel
Last day to disallow	13 August 2015
Authorising legislation	<i>National Greenhouse and Energy Reporting Act 2007</i>
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor No. 6</i>

Drafting

The committee commented as follows: This instrument purports to rely on sections 7B and 10 of the *National Greenhouse and Energy Reporting Act 2007* (the Act). However, as far as the committee can ascertain, there is no section 7B of this Act.

In addition, schedule 1, item 26 does not appear to be included in the explanation of the amendments provided for in the ES.

In the interests of promoting the clarity and intelligibility of the instrument to anticipated users, the committee therefore seeks clarification of the provision of the enabling legislation on which the instrument relies, as well as an explanation of the amendment provided for by schedule 1, item 26.

The committee therefore requested further information from the minister.

Minister's response

The Minister for the Environment advised with regard to the enabling legislation:

Reference to section 7B was customarily included in the Explanatory Statements to support amendments to Determinations made under the *NGER* [National Greenhouse and Energy Reporting] *Act 2007*. The reference is no longer required since the repeal of the section on 1 July 2014 in support of the repeal of the *Clean Energy Act 2011*. The section previously provided for the Minister to determine "potential emissions" which related to the National Greenhouse and Energy Reporting Scheme's requirements under the *Clean Energy Act 2011*.

Section 10 of the *NGER Act 2007* remains in force as the Minister's authorisation to make the *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No.1)*.

The minister also advised that the omission of reference to schedule 1, item 26 in the ES was a drafting oversight. However, the minister explained that the explanation of item 26 is the same as for items 19–25, 28 and 29 and provided a corrected ES.

Committee's response

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

Instrument	Radiocommunications Advisory Guidelines (Protection of Apparatus-licenced and Class-licenced Receivers – 2 GHz Band) 2015 [F2015L00721]
Purpose	Sets guidelines to manage interference by providing for the protection of receivers of apparatus-licensed and class-licensed services operating in or adjacent to the 2 GHz band
Last day to disallow	20 August 2015
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> No. 7

Incorporation of extrinsic material

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

This instrument revokes and replaces the Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers – 2 GHz Band) 2000 which was due to 'sunset' (that is, be automatically repealed) on 1 October 2015 by operation of part 6 of the *Legislative Instruments Act 2003*. The instrument incorporates or otherwise refers to a number of documents, which, in line with the committee's expectations, are described in the instrument and the ES.

However, the following four documents, while listed in the ES, do not appear to be incorporated or otherwise referenced:

- Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers – 2 GHz Band) 2000;
- ECC Report 096 – Compatibility between UMTS 900/1800 and systems operating in adjacent bands (available at www.cept.org/ecc);
- ECC Report 146 - Compatibility between GSM MCBTS and other services (TRR, RSBN/PRMG, HC-SDMA, GSM-R, DME, MIDS, DECT) operating in the 900 and 1800 MHz frequency bands (available at www.cept.org/ecc); and
- CEPT Report 041 - Report from CEPT to European Commission in response to Task 2 of the Mandate to CEPT on the 900/1800 MHz bands - Compatibility between LTE and WiMAX operating within the bands 880-915 MHz / 925-960 MHz and 1710-1785 MHz / 1805-1880 MHz (900/1800 MHz bands) and systems operating in adjacent bands (available at www.cept.org/cept).

As such, on the face of the instrument and the accompanying ES, it is unclear to the committee whether it was the rule-maker's intention that the documents listed above be incorporated by reference in the instrument or whether they have been unintentionally listed in the ES.

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

Minister's response

The Minister for Communications advised that the four documents the committee asked about were intentionally listed in the ES and are contained in the instrument at the following:

- Advisory Guidelines 2000 – reference at part 1, section 1.3 (Revocation);
- EEC Report 096 – referenced at part 4, section 4.1(2) by the name 'Electronic Communications Committee Report 96';

- EEC Report 146 – referenced at part 4, section 4.1(2) by the name 'Electronic Communications Report 146'; and
- CEPT Report 41 – referenced at part 4, section 4.1(2) by the name 'European Conference of Postal and Telecommunications Administrations (CEPT) Report 41'.

Committee's response

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

The committee notes that the references to the documents contained in the instrument, as identified by the minister, were overlooked in the committee's initial examination of the instrument.

Instrument	Radiocommunications (Radio-controlled Models) Class Licence 2015 [F2015L00497]
Purpose	Revokes and replaces the Radiocommunications (Radio-controlled Models) Class Licence 2002
Last day to disallow	13 August 2015
Authorising legislation	<i>Radiocommunications Act 1992</i>
Department	Communications
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> No. 6

Drafting

The committee commented as follows: The instrument is identified as made under subsection 132(1) and section 133 of the *Radiocommunications Act 1992*, which enable the Australian Communications and Media Authority (ACMA) to issue Class Licences by notice published in the Gazette. Section 2 of the instrument provides that the Class Licence commences on the later of the day after it is registered on the Federal Register of Legislative instruments (FRLI) or the day on which it is published in the Gazette. Note 2 to the instrument states that the Class Licence commences only when both events have occurred.

However, the committee notes that section 56 of the *Legislative Instruments Act 2003* directs that, where the enabling legislation requires the text of a legislative instrument to be published in the Gazette, the requirement for publication in the Gazette is taken to be satisfied if the instrument is registered.

It is therefore unclear to the committee how the commencement provision in section 2 of the instrument interacts with section 56 of the *Legislative Instruments Act 2003*,

and whether, for example, the registration of the instrument alone could be taken as satisfying the commencement requirements set out in section 2 of the instrument.

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

Minister's response

The Minister for Communications advised:

The Class Licence was published in the Gazette on 31 March 2015, and later registered on the Federal Register of Legislative Instruments on 2 April 2015.

Accordingly, the Class Licence commenced on 3 April 2015, being the day after its registration as per paragraph 2 (a) of the Class Licence. Therefore, in this instance, section 2 of the Class Licence and the resulting date of commencement of the Class Licence were not affected by section 56 of the *Legislative Instruments Act 2003*.

The minister also advised that subsection 132(1) of the *Radiocommunications Act 1992* will be amended on the commencement of item 315 of Schedule 3 of the *Acts and Instruments (Framework Reform) Act 2015* to omit the reference to a 'Notice in the Gazette', which will be replaced with a reference to 'legislative instrument'.

Committee's response

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

However, while the minister's advice clearly confirms the commencement date of the instrument (3 April 2015), it remains unclear to the committee whether section 56 of the *Legislative Instruments Act 2003* would affect the commencement of an instrument if its gazettal were to post-date registration. Any uncertainty in this regard will be removed by the minister's proposed amendment to replace the words 'Notice in the *Gazette*' with 'legislative instrument'.

Instrument	Safety, Rehabilitation and Compensation (Definition of Employee – Defence Families of Australia) Notice 2015 [F2015L00602]
Purpose	Declares that certain representatives of the Defence Families of Australia are employees for the purposes of the <i>Safety, Rehabilitation and Compensation Act 1988</i>
Last day to disallow	13 August 2015
Authorising legislation	<i>Safety, Rehabilitation and Compensation Act 1988</i>
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	<i>Delegated legislation monitor</i> No. 6

Description of consultation

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

This declaration was made in consultation with the Department of Defence.

The Office of Best Practice Regulation was consulted regarding this declaration and indicated that a Regulation Impact Statement was not required for this declaration (OBPR ID 18835).

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*.

Further, the committee does not consider the process of ascertaining the necessity of a Regulatory Impact Statement for an instrument as strictly relevant to the question of consultation under the *Legislative Instruments Act 2003*.

The committee therefore requested further information from the minister; and requested that the ES be updated in accordance with the requirements of the Legislative Instruments Act 2003.

Minister's response

The Department of Employment advised:

The declaration was made at the request of the Minister of Defence. The Department of Defence advises that consultation was undertaken with the Department of Veteran's Affairs and Defence Families of Australia prior to the request being made.

The Department of Employment also advised that they will arrange for the ES to be updated to include the information provided.

Committee's response

The committee thanks the Department of Employment for the response and has concluded its examination of the instrument.

However, the committee draws the minister's attention to the requirement that ESs describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken. The committee considers that merely identifying parties consulted, without describing the nature of the consultation (such as the manner, purpose and outcome of the consultation), does not meet the requirements of sections 17 and 18 of the *Legislative Instruments Act 2003*, as outlined above.

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

Appendix 1

Correspondence



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MC15-001864

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

Dear Senator Williams

I refer to the Committee Secretary's letter dated 18 June 2015 sent to my office seeking further information about items in the *Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015* (the Regulation).

In the *Delegated legislation monitor* No. 6 of 2015, 17 June 2015, the Senate Committee on Regulations and Ordinances (the Committee) requested information about the items for the Mathematics by Inquiry and the Coding across the Curriculum programmes. The Committee requested information on how the obligations under the international conventions referenced in the objectives of the items are sufficiently specific to support these programmes and how these programmes are supported by the executive nationhood power and the express incidental power of the Constitution. The Committee also requested information about the application of merits review to the Sector Development Fund.

The Committee may be aware that successive governments have been careful to avoid action that might effectively waive legal privilege in advice and thereby potentially prejudice the Commonwealth's legal position. Accordingly, governments have maintained a position of not disclosing the legal advice they rely on except in exceptional circumstances where there are special reasons for doing so. The drafting of legislation, including subordinate legislation, is routinely undertaken having regard to a range of constitutional and other legal considerations. In some cases, basic constitutional underpinnings will be evident in provisions that describe the objective or scope of legislation.

The items for Mathematics by Inquiry and Coding across the Curriculum in the Regulation are a case in point. As indicated in the explanatory statement accompanying the Regulation, the objective for each of these items references the external affairs power, the Commonwealth executive power and the express incidental power.

The Government will continue to draft amendments for legislative authority under the section 32B mechanism of the *Financial Framework (Supplementary Powers) Act 1997* having due regard to constitutional limits. Consistent with its approach to law-making more generally, the Government will continue to work on maximising clarity in its approach to drafting.

In relation to the Committee's request for information about the Sector Development Fund, the Department of Social Services, which administers the Fund, has provided the following advice:

Grants under the Sector Development Fund will be made in accordance with the *Commonwealth Grants Rules and Guidelines*. Grant selection processes will utilise the standard grant model of the Department of Social Services including the use of selection processes such as restricted competitive, direct and expression of interest selection processes. Information on grant availability and processes, including eligibility criteria and the application process, will be published on both the website of the Department of Social Services at www.dss.gov.au/grants and the National Disability Insurance Scheme (NDIS) website at www.ndis.gov.au. The decision-maker for grants made under the Sector Development Fund is the Assistant Minister for Social Services (or his delegate).

A complaints service is available for applicants and grant recipients. They can contact the complaints service listed on the website with complaints about the Department's service(s), the selection process or the service of another of the Department's grant recipients. Details of what constitutes an eligible complaint can be provided upon request by the Department of Social Services. Information on the Sector Development Fund will be published on the NDIS website at www.ndis.gov.au.

In addition to the Department's complaints service, applicants are able to seek review from the Commonwealth Ombudsman. No further merits review is considered appropriate given that funds are allocated on a competitive selection process involving a limited pool of funds for allocation.

I trust this information addresses the Committee's concerns.

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

Kind regards

/ Mathias Cormann
Minister for Finance

4 July 2015



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

REF: MS15-001324

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House, Canberra

Dear Chair

I write in response to your letter dated 18 June 2015, regarding the retrospective commencement of the *A New Tax System (GST, Luxury Car Tax and Wine Tax) Direction 2015* (the Direction) identified in the *Delegated legislation monitor* No. 6 of 2015.

The purpose of the Direction is to ensure that the Commonwealth and untaxable Commonwealth entities (Commonwealth entities), such as Departments of State, will be notionally liable for taxation. For example, GST, luxury car tax and wine equalisation tax. This reflects the Parliament's long standing intention that Commonwealth entities should be notionally liable to pay certain taxes, in the same manner as other people.

The Direction replaced the *Finance Minister's (A New Tax System) Directions 2005* (2005 Directions), which ceased due to sunset on 1 April 2015. The Direction was made on 10 April 2015, but taken to have commenced on 1 April 2015. This ensured continuity of arrangements in place to support the notional application of certain taxes to the Commonwealth and untaxable Commonwealth entities, such as Departments of State.

The retrospective commencement of the Direction does not detrimentally affect the rights of any person, nor does it impose additional obligations or liabilities on any person, other than the Commonwealth, in accordance with subsection 12(2) of the *Legislative Instruments Act 2003*.

No substantive changes were made to the content or application of the 2005 Directions. Minor administrative updates were made to align references with the *Public Governance, Performance and Accountability Act 2013*. The policy intention and practical effect did not change in any way. In practice, the retrospective commencement of the Direction provided continued support for Commonwealth entities to continue to rely on arrangements to support the management of certain taxes.



SENATOR THE HON MATHIAS CORMANN
Minister for Finance

I wish to thank the Committee Secretariat for their assistance in this matter. The contact in my Department is Suzanne Hinchcliffe, Acting Assistant Secretary, Governance and Public Management Taskforce, phone 6215 3657.

Kind regards

Mathias Cormann
Minister for Finance

28 July 2015



The Hon Warren Truss MP

Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

11 AUG 2015

PDR ID: MC15-003693

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

Dear Senator Williams *John*

I refer to a letter dated 25 June 2015 on behalf of the Senate Standing Committee on Regulations and Ordinances seeking further information regarding the incorporation of *Marine Order 15 (Construction — fire protection, fire detection and fire extinction) 2009* in *Marine Order 11 (living and working conditions on vessels) 2015* (the Order).

Firstly, the Committee noted that subclause 5(a) of Schedule 4 of the Order contained a reference to *Marine Order 15 (Construction — fire protection, fire detection and fire extinction) 2009* although only *Marine Order 15 (Construction — fire protection, fire detection and fire extinction) 2014* was included in the list of incorporated documents in the explanatory statement accompanying the Order.

This was an oversight. The Order was being drafted at the same time as *Marine Order 15* and one cross-reference to *Marine Order 15* that refers to the 2009 Order was overlooked. This will be corrected in an amendment of the Order proposed for later this year, which will also make other changes that are required as a result of the proposed issue of *Marine Order 28 (Operations standards and procedures) 2015*.

Secondly, the Committee noted that neither the Order nor the explanatory statement expressly stated whether *Marine Order 15* is incorporated as in force from time to time or as in force at a particular date.

It was the Australian Maritime Safety Authority's intention to refer to the current (2014) version of Marine Order 15, and therefore to rely on paragraph 10(a) of the *Acts Interpretation Act 1901* so that the cross-reference would be a reference to Marine Order 15 as amended from time to time.

Thank you again for taking the time to write to me on this matter.

Yours sincerely



WARREN TRUSS



**THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION**

Ref No: MS15-017528

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

Dear Senator *John,*

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 18 June 2015 concerning delegated legislation monitor No. 6 of 2015 in which the Committee requested a response regarding three legislative instruments.

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

- *Attachment A - Migration Amendment (Protection and Other Measures) Regulation 2015 [F2015L00542];*
- *Attachment B - Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 [F2015L00551]; and*
- *Attachment C - Specification of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 - IMMI 15/028 [F2015L00563].*

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

Yours sincerely

PETER DUTTON

***Migration Amendment (Protection and Other Measures)
Regulation 2015 - [F2015L00542]***

The Committee notes that Schedule 5 of the *Migration Amendment (Protection and Other Measures) Regulation 2015* (the POM Regulation) provides that the amendments made by item 2 of Schedule 1 to the POM Regulation apply to the relevant visa applications made, but not finally determined, before the commencement of the instrument, as well as applications made on or after the commencement of the instrument. The Committee notes that a valid application not finally determined at 18 April 2015 may now be subject to new rules that did not apply at the time of the visa application. The Committee requests further information as to the justification for this approach.

The effect of the amendment made by item 2 of Schedule 1 was to ensure that, should the Refugee Review Tribunal (the RRT) exercise their power in paragraph 415(2)(c) of the *Migration Act 1958* (the Migration Act) to remit a matter for reconsideration, it is permissible for the RRT to make the reconsideration subject to the direction that the grant of the visa is not prevented by sections 91W, 91WA or 91WB of the Act.

Sections 91W and 91WA relate to the provision of identity documents and section 91WB relates to the eligibility of family members. This amendment ensures that the relevant Tribunal can remit a decision to refuse a protection visa back to the Department with a direction that the grant of the visa is not prevented by those sections.

Please note that, as a result of the amendments made by the *Tribunals Amalgamation Act 2015* and the *Migration Legislation Amendment (2015 Measures No. 2) Regulation 2015* on 1 July 2015, the RRT has ceased to exist and its powers have been transferred to the Migration and Refugee Division of the Administrative Appeals Tribunal (the AAT).

Without this amendment, if a decision to refuse a protection visa was reviewed by the AAT, the AAT could not make a direction that the grant of the visa was not prevented by section 91W, 91WA or 91WB. As a result, it would be open to the delegate to simply find again that the grant of the visa was prevented by section 91W, 91WA or 91WB of the Act.

This amendment, while potentially retroactive in effect (as it allows the AAT to make directions on applications lodged prior to 18 April 2015), has a positive effect on a person's rights, as its entire effect is to allow the AAT to make a direction that an applicant has met certain requirements. Therefore, it was considered appropriate to ensure that this benefit was afforded to applications already made, but not finally determined, before 18 April as well as new applications made on or after 18 April.

The amendment does not require a person to meet any criteria they would otherwise not have been required to meet.

Subsection 504(1) of the Migration Act authorises the making of regulations, not inconsistent with the Migration Act, that are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act, which include

regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, where regulations are made that are for the purpose of regulating the entry and stay of non-citizens in Australia in the national interest, including to ensure that non-citizens who have applied for the grant of a visa provide evidence of their nationality and identity as a pre-condition to the grant of the visa, it is and consistent with the objective of the Migration Act for the regulations to be applied to all relevant applications decided on or after the commencement of the instrument.

We also note that, whilst this does not form part of the Committee's question, when sections 91W, 91WA and 91WB were introduced into the Migration Act they were made to apply to applications for protection visas made prior to 18 April as well as applications made on or after 18 April. This amendment was made by the *Migration Amendment (Protection and Other Measures) Act 2015*, in particular subitem 15(3) of Schedule 2 of that Act.

The retroactive effect of those amendments was enacted by the parliament as amendments to the Migration Act rather than made in delegated legislation. As noted above, it is considered appropriate that matters relating to identity and nationality be fully considered in relation to undecided visa applications.

Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015 - [F2015L00551]

The Committee notes that Schedule 4 to the *Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015* (the RALC Regulation) provides that amendments made by Schedule 2 to the RALC Regulation apply in relation to the review of a Refugee Review Tribunal (RRT) reviewable decision made on or after the commencement of the instrument (18 April 2015) in relation to an application for a protection visa made on or after 16 December 2014.

The Committee notes that it appears that a valid application not finally determined at 16 December 2014 may now be subject to new rules that did not apply at the time of the visa application. The Committee requests further information as to the justification for this approach.

To clarify, the effect of Schedule 4 is to apply to the amendments to applications made *on or after* 16 December 2014, not applications that are not finally determined at 16 December 2014.

The amendments made by Schedule 2 to the RALC Regulation are consequential to Part 2 of Schedule 5 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the RALC Act). Schedule 2 to the RALC Regulation was therefore drafted to commence and apply in accordance with the commencement and application of Part 2 of Schedule 5 to the RALC Act. The intent is that Schedule 2 to the RALC Regulation applies to persons in respect of whom the equivalent amendments to the Migration Act, included in Part 2 of Schedule 5 to the RALC Act, apply.

Part 2 of Schedule 5 to the RALC Act commenced by proclamation on 18 April 2015 and, from that date, applied to new applications for protection visas made on or after the day after Royal Assent of the RALC Act. The application of these provisions is provided by item 28 of Schedule 5 to the RALC Act and item 22 of the commencement table of the RALC Act. The RALC Act received the Royal Assent on 15 December 2014. Therefore, from 18 April 2015 onwards, the amendments in Part 2 of Schedule 5 to the RALC Act apply to new applications for protection visas made on or after 16 December 2014. For this reason, Schedule 2 to the RALC Regulation was drafted to apply, from 18 April 2015, to new applications made on or after 16 December 2014.

I note that the purpose of this regulation amendment, and particularly the amendments to subregulation 4.33(3), are to ensure that a person who is affected by the amendments to Part 2 of Schedule 5 to the RALC Act at the primary decision stage is able to seek merits review of their decision under the same criteria that applied at the primary decision stage.

The amendments to regulations 4.31B and 4.31C enable applicants who are assessed under the new criteria inserted by Part 2 of Schedule 5 to the RALC Act to gain a fee waiver or refund in respect of the review of the protection visa decision at the RRT (now the Migration and Refugee Division of the AAT). Without these amendments which replace references to the Refugees Convention with the new terms inserted by Part 2 of Schedule 5 to the RALC Act, a person who is assessed under the new refugee framework would not be able to receive a fee waiver or refund in

respect of the review of the protection visa decision at the AAT. Further, if the application and commencement of the regulation amendment did not reflect the application and commencement of Part 2 of Schedule 5 to the RALC Act, some persons who are covered by those Act amendments, who the Government intends to receive a fee waiver or refund, would not be entitled to the waiver or refund.

These amendments which enable the AAT to review protection visa decisions under the same criteria that were applied by the primary decision maker and which enable persons who are covered by the amendments in Part 2 of Schedule 5 to the RALC Act to receive a fee waiver or refund in respect of the review of the protection visa decision at the AAT do not trespass on personal rights and liberties of persons affected by the regulation amendment.

Subsection 504(1) of the Migration Act authorises the making of regulations, not inconsistent with the Migration Act, that are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act, which include regulating the entry and stay and non-citizens in Australia in the national interest. Accordingly, these regulations, which apply to all relevant applications decided on or after the commencement of the instrument are consistent with and authorised by the Migration Act.

I note that the amendments are also authorised by the following provisions in the Migration Act. Paragraph 412(1)(c) of the Migration Act, relevantly provides that an application for review of a (former) RRT(Migration and Refugee Division of the AAT) reviewable decision must be accompanied by the prescribed fee (if any) and paragraph 415(2)(c) of the Migration Act, provides that the AAT may, if the decision relates to a prescribed matter – remit the matter for reconsideration in accordance with such directions or recommendations of the AAT as are permitted by the regulations.

Specification of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 - IMMI 15/028 - [F2015L00563]

This Instrument operates by specifying the test, scores, period, level of salary and other exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa) applicants.

The new components of the post 18 April 2015 instrument are:

- three additional English tests that are available to applicants to undertake in order to satisfy the English language requirements of the Subclass 457 visa; and
- the minimum score (for individual components) required to satisfy the International English Language Testing System (IELTS test) has been lowered from 5.0 to 4.5.

The tests listed in the Instrument revoked Instrument IMMI 14/009 have not altered, however additional tests and lowering of the score for the IELTS tests has occurred in response to industry requests for greater flexibility and added benefits to applicants.

I note that the Instrument prescribes certain matters (such as specification of alternative language tests for the purpose of satisfying the English language requirement) which now apply to applications, or nominations, lodged prior to the commencement of this Instrument but not finally determined by the date of commencement.

The committee notes that, although the Instrument is not strictly retrospective, it prescribes various rules for the future based on antecedent facts (that is, the existence of an earlier visa application or nomination). As a consequence, an otherwise valid application or nomination not determined at 18 April 2015 is now subject to new rules that did not apply at the time of the application or nomination. However, I draw the Committee's attention to the practical effect of the Instrument for applicants who are required to satisfy the English language requirements:

- applicants will have the added benefit of an expanded list of accepted English language tests; and
- for applicants who have undertaken a IELTS test, a lower required test score to meet the Subclass 457 visa English language requirement.

All other applicants whose most recent application was made on and after 18 April 2015, may undertake one of the expanded list of acceptable English language tests and minimum scores specified in the Instrument.

I would like to clarify that the date of 1 January 2015 is not linked to an application or nomination, but rather the Cambridge English: Advanced test (CAE) that was undertaken on or after 1 January 2015. This means that an applicant who is not exempt under Item 7 of this Instrument, may use their results from the CAE test, if the test was completed on or after 1 January 2015, to satisfy the English language requirement in subparagraph 457.223(4)(eb)(iv) of the *Migration Regulations 1994*

(the Regulations). Prior to 1 January 2015, the applicant is required to complete one of the other specified tests in subitems 2(a) to 2(d).

As the Instrument is beneficial to applicants and significantly maintains the exemptions specified in the previous Instrument, it does not trespass unduly on personal rights or liberties of applicants.

Regulation 2.72(10)(g)(iv) of Part 2A to the Regulations and clause 457.223 of Schedule 2 to the Regulations authorises the making of instruments that specify the minimum English language proficiency requirements for applicants of the Subclass 457 visa. Subsection 504(1) of the *Migration Act 1958* (the Act) authorises the making of regulations, not inconsistent with the Act, that are necessary or convenient to be prescribed for carrying out or giving effect to the Act, which include regulating the entry and stay and non-citizens in Australia in the national interest. Accordingly, these regulations, which provide greater flexibility for the satisfaction of English language requirements for the purpose of a grant of a Subclass 457 visa, and which apply to all relevant applications decided on or after the commencement of the instrument are consistent with and authorised by the Act.



The Hon Greg Hunt MP

Minister for the Environment

MC15-024946

Mr Ivan Powell
Committee Secretary
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

14 JUL 2015

Dear Mr Powell

I refer to your letter of 18 June 2015 concerning the report of the Senate Regulations and Ordinances Committee *Delegated legislation monitor* No 6 of 2015 - National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1) [F2015L00598].

Thank you for writing on this matter. The Department of the Environment has investigated the two issues identified by the Committee, and has advised that they relate to drafting errors in the Explanatory Statement of the *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1)*.

Reference to section 7B was customarily included in Explanatory Statements to support amendments to Determinations made under the *NGER Act 2007*. The reference is no longer required since the repeal of the section on 1 July 2014 in support of the repeal of the *Clean Energy Act 2011*. The section previously provided for the Minister to determine "potential emissions", which related to the National Greenhouse and Energy Reporting Scheme's requirements under the *Clean Energy Act 2011*.

Section 10 of the *NGER Act 2007* remains in force as the Minister's authorisation to make the *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1)*. That authorisation provides for the Minister to determine by legislative instrument methods, or criteria for methods, scope 1 emissions, scope 2 emissions, reduction, removal, offsets, production or consumption emissions.

The omission of reference to item 26 in the Explanatory Statement is a drafting oversight. The explanation of item 26 is the same as for items 19, 20, 21, 22, 24, 25, 28, and 29.

Thank you for bringing these matters to my attention. A corrected Explanatory Statement is attached.

Yours sincerely

Greg Hunt

Enc

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for the Environment, the Honourable Greg Hunt MP

National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1).

The *National Greenhouse and Energy Reporting Act 2007 (Cwlth)* established the National Greenhouse and Energy Reporting (NGER) scheme, which is a national system for reporting greenhouse gas emissions, energy consumption and energy production by Australian corporations.

The *National Greenhouse and Energy Reporting (Measurement) Determination 2008* was made under section 10 of the Act, which provides for the Minister to determine methods, or criteria for methods, for the measurement of (a) greenhouse gas emissions; (b) the production of energy; and (c) the consumption of energy.

The *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1)* (the Instrument) will amend the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* to update emissions factors for the combustion of fuel, including the incorporation of updated Global Warming Potentials (GWPs) adopted by the Parties to the UN Framework Convention on Climate Change and its Kyoto Protocol.

Schedule 1 of the instrument will commence on 1 July 2015 and apply to the 2015-16 financial year. It will affect NGER reports submitted by corporations in October 2016.

Details of the amendments to the *NGER (Measurement) Determination 2008* and a Statement of Compatibility with Human Rights are included in the Attachments.

This Instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Overview of the National Greenhouse and Energy Reporting (Measurement) Determination 2008

The *NGER (Measurement) Determination 2008* provides the methods for the estimation of greenhouse gas emissions and the production and consumption of energy.

The scope of the Determination follows international classification systems and includes emissions from:

- the combustion of fuel for energy;
- the extraction, production, flaring, processing and distribution of fossil fuels and carbon capture and storage;
- industrial processes where a mineral, chemical or metal product is formed using a chemical reaction that generates greenhouse gases as a by-product as well as emissions of hydrofluorocarbons and sulphur hexafluoride resulting from their use by certain industries; and
- waste disposal – either in landfill, as management of wastewater or from waste incineration .

The most significant source of emissions in Australia is from fuel combustion, which accounts for over 60 per cent of the emissions reported in the national greenhouse gas inventory.

The scope of the Determination does not include land based emissions covered by the IPCC categories ‘Agriculture’ and ‘Land Use, Land Use Change and Forestry’. Emissions from fuel combustion by land based industries are, nonetheless, covered by this Determination.

Methods of measurement

The framework supporting the emissions estimation methods specified in the Determination reflects the approaches of the Intergovernmental Panel on Climate Change (IPCC) guidelines governing the estimation of national greenhouse gas inventories, as adopted by the Parties to the UN Framework Convention on Climate Change and its Kyoto Protocol.

The Determination provides four different classes of methods for the estimation of emissions for most emissions sources.

NGER Method 1: is the *National Greenhouse Accounts* default method and specifies the use of default emission factors in the estimation of emissions. This is the simplest method available and, in general, emissions may be estimated by reference to activity data such as fossil fuel consumption, evidenced by invoices, and the use of specified emission factors provided in the Determination.

NGER Method 2: is a facility-specific method using industry sampling and Australian or international standards to provide more accurate estimates of emissions at facility level. Method 2 enables corporations to undertake additional measurements – for example, the qualities of fuels

consumed at a particular facility – in order to gain more accurate estimates for emissions for that particular facility.

NGER Method 3: is a facility-specific method using Australian or international standards for both sampling and analysis of fuels and raw materials. Method 3 is very similar to Method 2, except that reporters must use Australian or equivalent documentary standards for sampling (of fuels or raw materials) as well as for the analysis of fuels.

NGER Method 4: direct monitoring of emission systems, either on a continuous or periodic basis. Rather than providing for the analysis of the chemical properties of inputs (or in some case, products), Method 4 aims to directly monitor greenhouse emissions arising from an activity. This approach can provide a higher level of accuracy in certain circumstances, depending on the type of emissions process; however, it is more likely to be more data intensive than other approaches.

As for Methods 2 and 3, there is a substantial body of documented procedures on monitoring practices and state and territory government regulatory experience that provide the principal sources of guidance for the establishment of such systems.

More generally, the *NGER (Measurement) Determination* draws on existing estimation practices wherever possible, including the use of data collected for commercial, taxation or other regulatory purposes, with the aim of maximising the use of readily validated data and minimising administrative burdens on reporters.

Consultation

A consultation draft of this Instrument was released for public comment on 17 December 2014. The Department received four submissions from stakeholders, which have not resulted in additional changes to the Instrument.

ATTACHMENT A

Details of the *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No.1)*

Item 1 – Name of Determination

This item provides that the title of the Instrument is the *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1)*.

Item 2 – Commencement

This item provides that the *National Greenhouse and Energy Reporting (Measurement) Amendment Determination 2015 (No. 1)* Schedule 1 commences on 1 July 2015.

Item 3 – Authority

This item outlines that the National Greenhouse and Energy Reporting (Measurement) Determination 2008 (the Determination) is made under sections 7B and 10 of the *National Greenhouse and Energy Reporting Act 2007*.

Item 4 – Schedules

Schedule 1—Amendments commencing 1 July 2015

The explanations of amendments provided below are grouped by part and division within the Instrument. Individual amendment items are referenced to the amendment number as stated in the Instrument.

Chapter 1: General

Part 1.1A Potential greenhouse gas emission embodied in an amount of natural gas

Part 1.1B Potential greenhouse gas emission embodied in an amount of gaseous designated fuel

Part 1.1A Potential greenhouse gas emission embodied in an amount of liquid designated fuel

Item	NGER (Measurement) Determination Reference	Commentary
1	1.4(3) 1.4(4) 1.4(5)	Removes guidance for determining the method of measurement for estimating potential emissions, complementing the repeal of the <i>Clean Energy Act 2011</i> .
2	Part 1.1A Part 1.1B Part 1.1C	Provisions for the derivation of potential emissions under the <i>Clean Energy Act 2011</i> are repealed.

Part 2.2 Emissions released from the combustion of solid fuels

Part 2.2 updates Oxidation Factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
3	2.5 (3)	References to Oxidation Factor changed to 100% oxidation, in accordance with IPCC 2006 inventory guidelines incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Part 2.3 Emissions released from the combustion of gaseous fuels

Part 2.3 updates Global Warming Potential (GWP) values and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
4	2.22 (1)	References to Oxidation Factor changed to 100% oxidation, in accordance with IPCC 2006 inventory guidelines incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Part 2.4 Emissions released from the combustion of liquid fuels

Part 2.4 updates Oxidation Factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
5	2.43 (1)	References to Oxidation Factor changed to 100% oxidation, in accordance with IPCC 2006 inventory guidelines incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Chapter 3: Fugitive Emissions

Part 3.2 Coal mining – fugitive emissions

Part 3.2 updates GWP values and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
6, 7, 8	3.5	Methane emission factors for gassy and non-gassy mines updated for IPCC Fourth Assessment Report (AR4) GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.
9	3.6 (1)	GWP for methane provided for equation updated from 21 to 25 for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.
10, 11	3.14 3.15 3.15A	Definition of OF changed from <i>correction factor</i> to a <i>destruction efficiency</i> . This reflects the change to 100% oxidation factors under IPCC 2006 inventory guidelines incorporated into methods used to estimate Australia's National Greenhouse Accounts, and clarifies the use of the 0.98 destruction efficiency factor.
12	3.17(2)	Methane emission factors for run-of-mine coal extracted from the mine updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.
13	3.20	State based methane emission factors for run-of-mine coal extracted from the mine updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Item	NGER (Measurement) Determination Reference	Commentary
14	3.21(1)	GWP for methane provided for equation updated from 21 to 25 for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Part 3.3 Oil and natural gas – fugitive emissions

Part 3.3 updates GWPs and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
15, 16	3.44 (2)	Methane emission factors for emission factor for gas type updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.
17, 23, 27, 31	3.45 (1) 3.53 (1) 3.68 3.86	Definition of OF changed from <i>correction factor</i> to a <i>destruction efficiency</i> . This reflects the change to 100% oxidation factors under IPCC 2006 inventory guidelines incorporated into methods used to estimate Australia's National Greenhouse Accounts, and clarifies the use of the 0.98 destruction efficiency factor.
18	3.46B (1) 3.46B (4)	GWP for methane provided for equation updated from 21 to 25 for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.
19, 20, 21, 22, 24, 25, 26, 28, 29	3.49 (1) 3.49 (2) 3.52 (2) 3.59 3.63 3.72 (2) 3.76	Methane emission factors for emission factors updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.
30	3.80 (3)	State based unaccounted for gas factors and natural gas composition factor updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Chapter 4: Industrial Processes emissions

Part 4.3 Industrial processes – chemical industry

Part 4.3 updates GWPs and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
32, 33, 34	4.47 (2)	Nitrous oxide emission factor nitric acid production updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Part 4.4 Industrial processes – metal industry

Part 4.3 updates GWPs and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
35	4.85	Tetrafluoromethane emission factor updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.
36	4.89	Hexafluoroethane emission factor updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Chapter 5: Waste

Part 5.2 Solid waste disposal in land

Part 5.2 updates GWPs and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
37, 38, 39, 40, 41, 42, 43, 44, 45, 46	5.4(1) 5.4(3) 5.4B(3) 5.4D 5.13(2)(c) 5.15(1) 5.15(4) 5.15A(3)	GWP for methane provided for equation updated from 21 to 25 for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.
47	5.15A (3) note (c)	Collection efficiency calculation reference updated.
50	5.22(2)	Methane and nitrous oxide emission factors for biological treatment updated for IPCC AR4 GWPs incorporated into methods used to estimate Australia's National Greenhouse Accounts.
48, 49, 51	5.17AA (note 3) 5.17L (note 5.22A – 5.22L	Provisions supporting the estimation of legacy waste for supporting emissions estimation under the <i>Clean Energy Act 2011</i> repealed.

Part 5.3 Wastewater handling (domestic and commercial)

Part 5.3 updates GWPs and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
------	---	------------

Item	NGER (Measurement) Determination Reference	Commentary
52, 54	5.25 (1) 5.25 (3) 5.26 (1)	GWP for methane provided for equation updated from 21 to 25 for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.
53, 55	5.25 (5) 5.26 (2)	Default methane emission factors for wastewater and sludge provided for equation updated for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.
56	5.31(7)	Default nitrous oxide emission factors for wastewater discharged into aquatic environments provided for equation updated for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Part 5.4 Wastewater handling (Industrial)

Part 5.4 updates GWPs and adjusts non-CO₂ emission factors provided as part of methodologies.

Item	NGER (Measurement) Determination Reference	Commentary
57	5.42 (1) 5.42 (3)	GWP for methane provided for equation updated from 21 to 25 for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.
58	5.42 (6) 5.42 (7)	Default methane emission factors for the treatment of sludge by the plant provided for equation updated for IPCC AR4 GWP incorporated into methods used to estimate Australia's National Greenhouse Accounts.

Schedule 2 Energy content factors and emission factors

Schedule 2 provides energy content factors and emission factors for the combustion of fuels.

Item	NGER (Measurement) Determination Reference	Commentary
59 – 64	Part 1, 2, 3, and 4	Updates emissions factors for the combustion of fuel. Updates incorporate updated IPCC AR4 GWPs, and updates based on most recent emissions estimates contained in the National Greenhouse Accounts.

Schedule 3 Carbon content factors

Schedule 3 provides the carbon content factors of fuels.

Item	NGER (Measurement) Determination Reference	Commentary
65 - 68	Part 2 and 3	Updates are based on most recent emissions estimates contained in the National Greenhouse Accounts.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Statement of Compatibility with Human Rights

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

**National Greenhouse and Energy Reporting (Measurement) Amendment
Determination 2015 (No. 1)**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Instrument amends the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (the Determination). The Determination is made under section 7B and subsection 10 of the *National Greenhouse and Energy Reporting Act 2007*, which provides for the Minister to determine methods, or criteria for methods, for the measurement of (a) greenhouse gas emissions, (b) the production of energy, (c) the consumption of energy and (d) potential greenhouse gas emissions embodied in an amount of natural gas.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Greg Hunt

Minister for the Environment



The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

09 JUL 2015

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

**Radiocommunications Advisory Guidelines
(Protection of Apparatus-licenced and Class-licenced Receivers –
2 GHz Band) 2015 [F2015L00721]**

Dear Senator 

Thank you for your recent letter concerning comments contained in the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 7 of 2015.

The Committee has raised concerns that four documents that are listed in the explanatory statement (ES) of the instrument Radiocommunications Advisory Guidelines (Protection of Apparatus-licenced and Class-licenced Receivers – 2GHz Band) 2015 [F2015L00721], do not appear to be incorporated or otherwise referenced in the instrument.

The documents in question are:

1. Radiocommunications Advisory Guidelines (Protection of Apparatus-licensed and Class-licensed Receivers – 2 GHz Band) 2000 (Advisory Guidelines 2000);
2. ECC Report 096 – Compatibility between UMTS 900/1800 and systems operating in adjacent bands (available at www.cept.org/ecc) (EEC Report 96);
3. ECC Report 146 – Compatibility between GSM MCBTS and other services (TRR, RSBN/PRMG, HC-SDMA, GSM-R, DME, MIDS, DECT) operating in the 900 and 1800 MHz frequency bands (available at www.cept.org/ecc) (EEC Report 146); and
4. CEPT Report 041 – Report from CEPT to European Commission in response to Task 2 of the Mandate to CEPT on the 900/1800 MHz bands - Compatibility between LTE and WiMAX operating within the bands 880-915 MHz / 925-960 MHz and 1710-1785 MHz / 1805-1880 MHz (900/1800 MHz bands) and systems operating in adjacent bands (available at www.cept.org/cept) (CEPT Report 41).

The list of documents in the ES is stated to include both documents that are incorporated into the instrument by reference, as well as other documents referred to by the instrument. The four documents the Committee has asked about are intentionally listed in the ES and are referred to by the instrument at the following sections:

1. Advisory Guidelines 2000 – referenced at part 1, section 1.3 (Revocation)
2. ECC Report 096 – referenced at part 4, section 4.1(2) by the name ‘Electronic Communications Committee Report 96’
3. ECC Report 146 – referenced at part 4, section 4.1(2) by the name ‘Electronic Communications Committee Report 146’
4. CEPT Report 41 – referenced at part 4, section 4.1(2) by the name ‘European Conference of Postal and Telecommunications Administrations (CEPT) Report 41’.

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

Yours sincerely

 Malcolm Turnbull



The Hon Malcolm Turnbull MP

MINISTER FOR COMMUNICATIONS

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

02 JUL 2015

Radiocommunications (Radio-controlled Models) Class Licence 2015

Dear Senator

Thank you for your recent letter concerning comments contained within the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 6 of 2015.

The Committee has questioned whether the operation of section 56 of the *Legislative Instruments Act 2003* has an effect on section 2 of the *Radiocommunications (Radio-controlled Models) Class Licence 2015* (Class Licence), in particular its date of commencement.

The Class Licence was specified in section 2 to commence on the later of the day after registration and the day on which it is published in the Gazette. The Class Licence was published in the Gazette on 31 March 2015, and later registered on the Federal Register of Legislative Instruments on 2 April 2015.

Accordingly, the Class Licence commenced on 3 April 2015, being the day after its registration as per paragraph 2(a) of the Class Licence. Therefore, in this instance, section 2 of the Class Licence and the resulting date of commencement of the Class Licence were not affected by section 56 of the *Legislative Instruments Act 2003*.

I note that subsection 132(1) of the *Radiocommunications Act 1992* will be amended on the commencement of item 315 of Schedule 3 to the *Acts and Instruments (Framework Reform) Act 2015* to omit the reference to a 'notice published in the *Gazette*', which will be substituted with a reference to 'legislative instrument'.

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

Yours sincerely

Malcolm Turnbull



Australian Government
Department of Employment

Your Ref
Our Ref MC15-002251

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

Dear Senator

Thank you for the letter from Mr Ivan Powell, Committee Secretary, of 18 June 2015 to the Senior Adviser of the Minister for Employment, requesting further information on the consultation undertaken in making the Safety, Rehabilitation and Compensation (Definition of Employee – Defence Families of Australia) Notice 2015 ('Notice'). I have been asked to reply on behalf of the Senior Adviser.

As noted in the explanatory statement for the Notice, the Notice was made in consultation with the Department of Defence. The declaration was made at the request of the Minister of Defence. The Department of Defence advises that consultation was undertaken with the Department of Veterans' Affairs and Defence Families of Australia prior to the request being made.

The Department of Employment will arrange for the explanatory statement for the Notice to be updated to include the information provided above.

Yours sincerely

Sarah Hawke
Senior Executive Lawyer a/g
Safety, Compensation and Institutions Branch
Workplace Relations Legal Group

2 July 2015

cc: regords.sen@aph.gov.au

Appendix 2

Guideline on consultation

Purpose

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

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

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

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

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

Requirements of the *Legislative Instruments Act 2003*

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

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

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

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

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

Describing the nature of consultation

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

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

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

Explaining why consultation has not been undertaken

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

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

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

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

Seeking further advice or information

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

Committee Secretary
Senate Regulations and Ordinances Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: +61 2 6277 3066
Fax: +61 2 6277 5881
Email: RegOrds.Sen@aph.gov.au