

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

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# Introduction

## Terms of reference

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

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

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

## Nature of the committee's scrutiny

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

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

## 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.<sup>2</sup>

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1 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13<sup>th</sup> 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](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.<sup>3</sup>

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

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

## Senator John Williams (Chair)

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

4 Parliament of Australia, *Senate Disallowable Instruments List*, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/leginstruments/Senate\\_Disallowable\\_Instruments\\_List](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](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 6 November 2015 and 19 November 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.

<b>Instrument</b>	<b>ASIC Corporations (Division 4 Financial Products) Instrument 2015/1030 [F2015L01771]</b>
<b>Purpose</b>	Broadens the class of financial products to facilitate transfers through ASX Settlement Pty Ltd and extends the statutory warranties and indemnities in Part 7.11 of the <i>Corporations Act 2001</i>
<b>Last day to disallow</b>	25 February 2016
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Department</b>	Treasury
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### Incorporation of extrinsic material

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).

With reference to the above, the committee notes that the instrument refers to the 'operating rules of ASX' in its definition of *AQUA Quote Display Board*. However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which the operating rules of ASX 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 or Acts.

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

<b>Instrument</b>	<b>Bankruptcy Amendment (National Personal Insolvency Index) Regulation 2015 [F2015L01800]</b>
<b>Purpose</b>	Aligns the period of time that information relating to debt agreements is retained on the National Personal Insolvency Index with the period of time that the same information is recorded on credit reports under the <i>Privacy Act 1988</i>
<b>Last day to disallow</b>	29 February 2016
<b>Authorising legislation</b>	<i>Bankruptcy Act 1966</i>
<b>Department</b>	Attorney-General's
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### **No statement of compatibility**

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule-maker to prepare a statement of compatibility in relation to an instrument to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies. The statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights, and must be included in the ES for the legislative instrument.

With reference to these requirements, the committee notes that the ES for this instrument does not include a statement of compatibility.

**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 *Human Rights (Parliamentary Scrutiny) Act 2011*.**

<b>Instrument</b>	<b>Insurance (prudential standard) determination No. 1 of 2015 - Prudential Standard GPS 320 - Actuarial and Related Matters [F2015L01768]</b>
<b>Purpose</b>	Sets out the roles and responsibilities of an Actuary and determines actuarial review requirements
<b>Last day to disallow</b>	25 February 2016
<b>Authorising legislation</b>	<i>Insurance Act 1973</i>
<b>Department</b>	Treasury
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### **Incorporation of extrinsic material**

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).

With reference to the above, the committee notes that various items of this instrument refer to Prudential Standards GPS 001, GPS 110, GPS 112, GPS 114, GPS 115, GPS 116, GPS 230, GPS 310, GPS 320, and CPS 520. However, neither the text of the instrument nor the ES expressly state the manner in which the prudential standards referred to 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 or Acts.

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

<b>Instrument</b>	<b>Therapeutic Goods (Medical Devices) Amendment (In Vitro Diagnostic Medical Devices) Regulation 2015 [F2015L01791]</b>
<b>Purpose</b>	Amends the Therapeutic Goods (Medical Devices) Regulations 2002 to provide alternative conformity assessment procedures for Class 4 in-house in vitro diagnostic medical devices
<b>Last day to disallow</b>	29 February 2016
<b>Authorising legislation</b>	<i>Therapeutic Goods Act 1989</i>
<b>Department</b>	Health
<b>Scrutiny principle</b>	Standing Order 23(3)(a)

### **Unclear basis for determining fees**

The regulation amends the Therapeutic Goods (Medical Devices) Regulations 2002 to provide alternative conformity assessment procedures for Class 4 in-house in vitro diagnostic medical devices (IVD). The committee notes that item 10 of the regulation introduces two application audit fees for Class 4 in-house IVDs required to undergo an application audit. The application audit fee is \$59 900 for Class 4 in-house IVDs that are an immunohaematology reagent IVD and \$14 600 for other Class 4 in-house IVDs. However, the ES does not explicitly state the basis on which the fees have been calculated for this new category of circumstances.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of or 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.**

### **Access to extrinsic material**

Item 9 of the regulation inserts new section 6B.3 into the Therapeutic Goods (Medical Devices) Regulations 2002. The new section incorporates by reference *ISO 15189, Medical laboratories—Requirements for quality and competence*, published by the International Organization for Standardization, as amended from time to time.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents accord with the approach of the Senate Standing Committee on Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates extrinsic material that is not readily and freely available to the public. Generally, the committee will be concerned where relevant information,

including standards or industry databases, is not publically available or is available only if a fee is paid, such that those obliged to obey the law may have inadequate access to its terms.

In this respect, the committee notes that *ISO 15189, Medical laboratories—Requirements for quality and competence* is published by and available for sale from the International Organization for Standardization for a fee of CHF178.<sup>1</sup> However, neither the instrument nor the ES provide information about whether the standard is otherwise freely and readily available.

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

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<sup>1</sup> As at 1 December 2015, CHF 178 (178 Swiss Franc) converted to approximately AUD \$240.

## 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.

<b>Instrument</b>	<b>Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]</b> <b>Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464]</b>
<b>Purpose</b>	Implements UN Security Council Resolution 2199 relating to Syria in Australia; amends the Charter of the United Nations (Sanctions—Iraq) Regulations 2008 to implement UN Security Council Resolution 2199
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Charter of the United Nations Act 1945</i>
<b>Department</b>	Foreign Affairs and Trade
<b>Scrutiny principle</b>	Standing Order 23(3)(b)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

### Unclear meaning of the term 'illegally removed'

The committee commented as follows:

These regulations give effect in Australia to obligations arising from United Nations Security Council resolution 2199 (2015), which imposes sanctions on Syria and Iraq. The resolution was adopted under Chapter VII of the Charter of the United Nations on 12 February 2015, and is therefore binding on Australia. Paragraph 17 of the resolution requires United Nations member states to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990, and from Syria since 15 March 2011.

The regulations create offences which are triggered if a person does not comply with the written directions of the Secretary of the Department of Foreign Affairs and Trade regarding 'illegally removed cultural property'.

With reference to the above, the committee notes that the regulations define 'illegally removed cultural property' as an item of:

- 
- Syrian/Iraqi cultural property; or
  - archaeological, historical, cultural, rare scientific, or religious, importance;
  - that has been illegally removed from Syria on or after 15 March 2011, or from Iraq on or after 6 August 1990.

However, neither the regulations nor the ESs expressly define what the concept of 'illegally removed' means. In particular, it is unclear whether this is to be understood with reference to Syrian/Iraqi, international or Australian law, and whether the concept applies as at the time of the alleged removal of the cultural property or as at a later point in time (for example, when the secretary is considering the making of a written direction).

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

### **Minister's response**

The Minister for Foreign Affairs advised:

Australia is under an international legal obligation to implement United Nations Security Council Resolutions (UNSCR) as expeditiously as practicable. The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015) and Australia is under an international obligation to implement the terms of the UNSCR into Australian law. The term 'illegally removed' refers to property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Syrian, Iraqi, or international law. To clarify this issue, the Department of Foreign Affairs and Trade has prepared revised Explanatory Statements for both Regulations, which are attached for your information.

### **Committee's response**

**The committee thanks the minister for her response.**

The committee notes the minister's advice that 'illegally removed' refers to 'property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Syrian, Iraqi, or international law'.

However, the committee notes that, notwithstanding the minister's advice, the term 'illegally removed' (which is not further defined in UN Security Council Resolution 2199 (2015)) remains very broad and imprecise in its apparent application, covering a considerable period of time and different regimes, such as the Assad and Hussein regimes (which may have criminalised certain dealings with cultural property). Given this, the scope and operation of the term 'illegally removed cultural property' remains unclear to the committee in terms of what types of dealings with cultural property may have been criminalised over the period in question and, as noted in the committee's initial comments, whether 'illegally removed property' is to be

understood with reference to Syrian, Iraqi or international law at the time of the alleged removal of the cultural property or at a later point in time.

The committee also acknowledges the minister's efforts to include further information in the ES to assist with the interpretation of the offence provisions in the regulations. However, in addition to the preceding remarks, the committee notes that it would generally expect that the definition of a term relevant to the interpretation and application of an offence provision to be contained in the regulation itself rather than in the ES for the instrument.

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

**Retrospective effect**

The committee commented as follows:

Section 4 of the first regulation provides that 'illegally removed cultural property' is that which has 'been illegally removed from Syria on or after 15 March 2011'.

Item 1 of schedule 2 to the second regulation amends the definition of 'illegally removed cultural property' in the Charter of the United Nations (Sanctions—Iraq) Regulations 2008. The new definition defines this as that which has 'been illegally removed from Iraq on or after 6 August 1990', which effectively expands the type of property covered by the regulation.

The committee notes that, although the instruments are not strictly retrospective, the new definitions operate such that the regulations will apply to antecedent facts (that is, the previous removal of cultural property from Syria or Iraq). As a consequence, it appears that persons may have performed acts prior to the commencement of the regulations that are now caught by the offence provisions described above. The committee notes that, while the relevant offences relate to a failure to comply with a direction (this direction-making power operating prospectively), the definitions on which the offences rely refer to antecedent facts.

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 statements of compatibility address the question of any 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 no explanation is offered.

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

**Minister's response**

The Minister for Foreign Affairs advised:



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The Regulations reflect the international obligations imposed by UNSCR 2199 including the need to take steps to prevent the trade in cultural property illegally removed from Iraq or Syria since 6 August 1990 and 15 March 2011 respectively. As accepted by the Committee, the Regulations criminalise the present trade in illegally removed cultural property rather than their past removal and an offence does not arise unless a direction is issued. The Regulations do not change the status of legally removed property and only apply where no good title has been obtained by the fact that the goods were illegally removed.

### **Committee's response**

**The committee thanks the minister for her response and has concluded its examination of this issue.**

### **Insufficient information regarding strict liability offences**

The committee commented as follows:

The first regulation creates a strict liability offence for failing to comply with a direction from the Secretary of the Department of Foreign Affairs and Trade, the Secretary of the Arts Department or a member of the Australian Federal Police or the police force of a state or territory in relation to illegally removed cultural property of Syria.

The second instrument amends the Charter of the United Nations (Sanctions-Iraq) Regulations 2008 to create a similar strict liability offence in relation to illegally removed cultural property of Iraq.

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 ESs provide no explanation of or justification for the framing of the offences.

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

### **Minister's response**

The Minister for Foreign Affairs advised:

A strict liability offence was appropriate for these Regulations due to the fact that a person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put 'on notice' by the issuing of that direction to return the item. As a result they have received sufficient notice of their obligations under the Regulations and have the opportunity to avoid unintentional contravention.

It would be therefore unnecessary to impose a requirement to prove the individual's intention not to comply with the notice. Further, strict liability is appropriate for these offences as the offences are not punishable by

imprisonment, the offences are punishable only by a fine of below 60 penalty units and because a requirement to prove fault would reduce the effectiveness of the enforcement regime in deterring the trade in illegally removed Syrian and Iraqi cultural property. I also note that honest and reasonable mistake of fact is available as a defence to strict liability offences under s9.2 of the Criminal Code.

### **Committee's response**

#### **The committee thanks the minister for her response.**

The committee notes the minister's advice that 'strict liability is appropriate for these offences as the offences are not punishable by imprisonment, [and] the offences are punishable only by a fine of below 60 penalty units.'

However, the committee notes that, while the minister's advice appears correct in relation to property removed from Iraq [F2015L01464], failure to comply with the arrangements specified by the Secretary in relation to Syria [F2015L01463] is designated as a breach of UN sanction enforcement law, such that a person commits an offence under the *Charter of the United Nations Act 1945*. This is punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units (or \$450 000).<sup>2</sup> As such, it is unclear to the committee, in light of the minister's advice, whether it is intended that these penalties should apply for a failure to comply with the arrangements specified by the Secretary in relation to Syria; and, if so, whether it is appropriate that the offence be one of strict liability.

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

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<sup>2</sup> See the combined effect of the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 2) [F2015L01673], which designates regulation 5 of the Charter of the United Nations (Sanctions—Syria) Regulation 2015 as a UN Sanction Enforcement Law under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

<b>Instrument</b>	<b>Christmas Island Marine Traffic and Harbour Facilities Determination 2015 [F2015L01591]</b> <b>Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 [F2015L01593]</b>
<b>Purpose</b>	The instruments set the Port charges for Christmas Island and Cocos (Keeling) Island Ports and the Port conditions for cargo movement on the wharf area of Christmas Island Port
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	Utilities and Services Ordinance 1996
<b>Department</b>	Infrastructure and Regional Development
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

### **Unclear basis for determining fees**

The committee commented as follows:

Schedule 1 of these instruments sets the Port charges for the Christmas Island and Cocos (Keeling) Island Ports.

The committee's usual expectation in cases where instruments of delegated legislation carry financial implications via the imposition of 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. With reference to these requirements, the committee notes that the ESs for these instruments provide no indication as to the basis on which the fees have been calculated or set.

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

### **Minister's response**

The Minister for Territories, Local Government, and Major Projects advised:

The 2015 Determinations replaced, and were based on, arrangements for Christmas Island contained in the Marine Traffic and Harbour Facilities Determination No 1 of 2003 (the 2003 Determination). Advice from the contractor which manages both ports for the Australian Government, Patrick Ports, is that the charges in the 2003 Determination were comparable to those in place in similar remote ports in Western Australia and that these should be continued.

## **Committee's response**

### **The committee thanks the minister for his response.**

The committee notes the minister's advice that the port charges set by the instruments were comparable to those in similar remote ports in Western Australia. However, the minister's response does not address the question of the specific basis on which the charges have been calculated.

### **The committee reiterates its request for the advice of the minister in relation to this matter.**

### **No description of consultation**

The committee commented as follows:

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

## **Minister's response**

The Minister for Territories, Local Government, and Major Projects advised:

In developing the 2015 Determinations, the Department consulted with Patrick Ports and the Office of Best Practice Regulation. The Department also wrote to Mr Barry Haase, the Administrator of the Territories of Christmas Island and the Cocos (Keeling) Islands, advising that the 2015 Determinations were being made and briefing him on the outcomes of the consultations.

The 2015 Determinations did not amend the charges for Christmas Island set out in the 2003 Determination and only made a minor amendment to the conditions for managing the port. The 2015 Determinations provided legal authority for existing practices for Cocos (Keeling) Islands and port charges consistent with those for Christmas Island. As such, the Department did not consider further consultation was necessary.

**Committee's response**

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

**Drafting**

The committee commented as follows:

The committee notes that these instruments are identified as made under section 4 of the Utilities and Services Ordinance 1996. Section 4 enables the Administrator to impose on a person a fee in relation to the provision, by the Administrator, of a utility to the person; or the use, by the person, of a service provided by the Administrator; being the fee determined by the Administrator, from time to time, to be the fee applicable to the utility or service.

However, while the instruments appear to have been made by the Administrator, the ESs to the instruments state:

The Governor-General has made this Determination in accordance with the power granted to him under section 4 of the *Utilities and Services Ordinance 1996*.

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

**Minister's response**

The Minister for Territories, Local Government, and Major Projects advised:

The 2015 Determinations were made by the Administrator under section 4 of the *Utilities and Services Ordinance 1996*. I have instructed the Department to update the explanatory statements to reflect the correct information.

**Committee's response**

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

<b>Instrument</b>	<b>Removal of Prisoners (Territories) Regulation 2015 [F2015L01524]</b>
<b>Purpose</b>	Repeals and re-makes the Removal of Prisoners (Territories) Regulations in the same form; and continues an administrative process that allows prisoners to make an application to the secretary of the Commonwealth department with administrative responsibility for the territories to return to a territory after the expiration of their custodial sentence, at no cost to themselves
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Removal of Prisoners (Territories) Act 1923</i>
<b>Department</b>	Infrastructure and Regional Development
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

### **No description of consultation**

The committee commented as follows:

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

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

**The committee 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*.**

### **Minister's response**

The Minister for Territories, Local Government, and Major Projects advised:

The Department consulted the Attorney-General's Department and the Administrator on the 2015 Regulation. The Department did not consider that further consultation with the territory communities was necessary given the 2015 Regulation did not change the arrangements in place under the previous regulations.

I have asked the Department to ensure it provides this information for new instruments in the future. I thank the Committee for its assistance in relation to this matter.

### **Committee's response**

#### **The committee thanks the minister for his response.**

The committee notes the minister's advice that the Attorney-General's Department and the Administrator were consulted on this regulation and that further consultation was not considered necessary given the regulation did not change existing arrangements.

The committee also acknowledges the minister's efforts to ensure this information is included in future regulations. However, the committee's concern with respect to consultation is to ensure that an ES is technically compliant with the descriptive requirements of the *Legislative Instruments Act 2003* (LIA), and thus in accordance with statute (scrutiny principle (a)). This is because the absence of a description of consultation in an ES falls short of the committee's requirements in relation to the content of ESs. The committee regards the extent and nature of consultation in relation to the making of an instrument as a critical aspect of the exercise of the parliament's delegated powers and, accordingly, information regarding consultation as a critical inclusion for ESs.

**The committee therefore reiterates its request to the minister that the ES be updated with the information provided in relation to consultation, in accordance with the requirements of the *Legislative Instruments Act 2003*.**

<b>Instrument</b>	<b>Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 [F2015L01665]</b>
<b>Purpose</b>	Amends the Commonwealth Employees' Rehabilitation and Compensation Act 1988 – Notice of Declarations and Specifications (Notice No. 1 of 1990) to substitute reference to the 'Australian National Gallery' with the 'National Gallery of Australia' and corrects a typographical error in the the Safety, Rehabilitation and Compensation Act 1988 – Notice of Declaration under subsection 5(6) (Notice No. V1 of 1995)
<b>Last day to disallow</b>	22 February 2016
<b>Authorising legislation</b>	<i>Safety, Rehabilitation and Compensation Act 1988</i>
<b>Department</b>	Employment
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

## **No description of consultation**

The committee commented as follows:

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

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

**The committee 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*.**

## **Minister's response**

Mr Mark Roddam, Branch Manager of the Workers' Compensation Branch, advised:

The Act [*Legislative Instruments Act 2003*] requires consultation during the making of a legislative instrument unless it falls under an exemption, such as an instrument that is of a minor or machinery nature and one that does not substantially alter existing arrangements.

It also requires that the Explanatory Statement refer to any consultation undertaken, or if consultation was not undertaken, the reasons why it was not undertaken.

However, the Act explicitly provides that the failure to consult does not affect the enforceability or validity of the instrument (section 19). Neither does the failure to lodge an Explanatory Statement (and, by extension, the failure for the Explanatory Statement to contain a description of the consultation undertaken) affect the enforceability or validity of the instrument (subsection 26(1)).

The Department of Employment considers that the Notice is exempted from the requirement to consult as it is of a minor or machinery nature. The Notice deletes all references in the Commonwealth Employees' Rehabilitation and Compensation Act 1988 - Notice of Declarations and Specifications (Notice No. 1 of 1990) to the "Australian National Gallery", and replaces these with references to the "National Gallery of Australia" to reflect the name change of that entity.

The Notice also corrects a typographical error in the Safety, Rehabilitation and Compensation Act 1988 - Notice of Declaration under subsection 5(6) (Notice No. VI of 1995) in a reference to the "National Museum of Australia".



These are the only effects of the Notice and it does not in any way alter the operation of the two declarations.

The Notice was made at the request of the Minister for the Arts and in liaison with the Attorney-General's Department which covers the Arts portfolio.

The Act does not require the Explanatory Statement to be updated in this instance in order for the Notice to be enforceable or valid.

Notwithstanding this, the department will take measures to ensure all future instruments meet the relevant requirements of the Act, including that Explanatory Statements refer to any consultation undertaken or the reasons why consultation was not undertaken if that is the case.

### **Committee's response**

**The committee notes that Mr Mark Roddam, Branch Manager of the Workers' Compensation Branch, provided a response to the committee's request for the advice of the minister.**

The committee notes that Mr Roddam's advice appears to rely on the flawed assumption that the committee's scrutiny function is restricted by the provisions of the *Legislative Instruments Act 2003* (LIA). However, while the committee generally seeks to conduct its scrutiny of delegated legislation to accord with, or augment, the provisions of the LIA, the fundamental principle underpinning the committee's expectations is that of ensuring that it is able to effectively scrutinise instruments with reference to the four matters outlined in Senate Standing Order 23.

The committee's concern with respect to consultation is to ensure that an ES is technically compliant with the descriptive requirements of the LIA, and thus in accordance with statute (scrutiny principle (a)). This is because the absence of a description of consultation in an ES, notwithstanding LIA section 26(1), falls short of the committee's longstanding requirements in relation to the content of ESs. The expectation that ESs address the matter of consultation predates the enactment of the LIA, which placed a number of the committee's longstanding requirements in relation to the making of delegated legislation and ESs on a statutory basis. The committee regards the extent and nature of consultation in relation to the making of an instrument as a critical aspect of the exercise of the parliament's delegated powers and, accordingly, information regarding consultation as a critical inclusion for ESs.

On this basis, the committee notes also that reliance on section 19 of the LIA for any failure or neglect to comply with the requirements of section 26 is irrelevant to the committee's request that the ES be updated with the information requested.

**The committee therefore reiterates its request to the minister that the ES be updated with the information provided in relation to consultation, in accordance with the requirements of the *Legislative Instruments Act 2003*.**

## Advice only

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

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

<b>Instruments</b>	<p>ASIC Corporations (Repeal) Instrument 2015/1031 [F2015L01770]</p> <p>Bass Strait Central Zone Scallop Fishery Total Allowable Catch Determination (No. 2) 2015 [F2015L01788]</p> <p>Private Health Insurance (Complaints Levy) Amendment Rules 2015 [F2015L01789]</p> <p>Private Health Insurance (Prostheses) Amendment Rules 2015 (No. 3) [F2015L01764]</p> <p>Private Health Insurance (Prostheses) Amendment Rules 2015 No. 4 [F2015L01803]</p> <p>Safety, Rehabilitation and Compensation Act 1988 – Section 34S - Approval of Form of Application for Approval as a Workplace Rehabilitation Provider (05/11/2015) [F2015L01774]</p> <p>Safety, Rehabilitation and Compensation Act 1988 – Section 34S - Approval of Form of Renewal Application for Approval as a Workplace Rehabilitation Provider (05/11/2015) [F2015L01783]</p> <p>Safety, Rehabilitation and Compensation Act 1988 – Sections 34D and 34E - Criteria and Operational Standards for Workplace Rehabilitation Providers 2015 [F2015L01777]</p> <p>Woomera Prohibited Area Rule 2014 Determination of Exclusion Periods for Amber Zone 1 and Amber Zone 2 for Financial Year 2015 – 2016 Amendment No. 3 [F2015L01784]</p>
<b>Scrutiny principle</b>	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.<sup>3</sup>

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3 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.

<b>Instrument</b>	<b>Australian Passports (Application Fees) Amendment Determination 2015 (No. 1) [F2015L01629]</b>
<b>Purpose</b>	Provides for an application fee for the issue of a replacement passport in ‘exceptional circumstances’
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Australian Passports (Application Fees) Act 2005</i>
<b>Department</b>	Foreign Affairs and Trade
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

#### Unclear basis for determining fees

The committee commented as follows:

The instrument amends the Australian Passports (Application Fees) Determination 2015 to provide for an application fee for the issue of a replacement passport in ‘exceptional circumstances’. The committee notes that the fee will be \$151, in line with the current fee that applies to applications for replacement passports in a range of circumstances. However, the explanatory statement (ES) does not explicitly state the basis on which the fee has been calculated for this new category of circumstances.

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.**

## **Minister's response**

The Minister for Foreign Affairs advised:

This instrument, jointly with the Passports Legislation Amendment (2015 Measures No. 1) Determination 2015, provides for an additional circumstance in which a replacement passport may be issued—in 'exceptional circumstances'. The existing replacement passport application fee applies, unless the fee is waived.

A replacement passport is a reprint of an existing passport with a new passport number and in some cases a slight amendment. For example, the replacement passport may change the surname following marriage. In most circumstances the expiry date of the replacement passport is the same as that of the existing passport. Replacement passports are designed to provide a cheaper and simpler alternative to applying for a new full validity passport, depending on the remaining validity of the existing passport. The replacement passport application fee is \$151 and the standard passport application fee is \$250.

The Australian Passports (Application Fees) Act 2005 (the Act) provides that all passport fees are taxes (subsection 4(5)). Subsection 4(1) provides that a Minister's determination may specify passport fees. Subsection 5(3) states that 'An application fee need not bear any relationship to the cost of issuing an Australian travel document...'

The replacement passport application fee was determined on the basis of the following considerations:

- to streamline and simplify the passport fee schedule by aligning the replacement passport application fee with the application fees for emergency passports, convention travel documents and certificates of identity;
- to reflect the simpler requirements for processing a replacement passport application; and
- to reflect the reduced validity of a replacement passport in most circumstances.

## **Committee response**

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

<b>Instrument</b>	<b>Carbon Credits (Carbon Farming Initiative—Facilities) Methodology Determination 2015 [F2015L01346]</b>
<b>Purpose</b>	Supports Emissions Reduction Fund (ERF) projects through crediting verified emissions reductions achieved through a reduction in emissions per unit of output at facilities that report emissions under the National Greenhouse and Energy Reporting Scheme and produce a saleable product
<b>Last day to disallow</b>	12 November 2015
<b>Authorising legislation</b>	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i>
<b>Department</b>	Environment
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 11 of 2015

### **Incorporation of extrinsic material**

The committee commented as follows:

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

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

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

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

The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its

operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

### **Minister's response**

The Minister for the Environment advised:

The Facilities Method incorporates the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* as in force from time to time. This occurs through section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislative Instruments Act 2003*), which has the effect that references to external documents which are Commonwealth disallowable legislative instruments (such as the *National Greenhouse Emissions Reporting (Measurement) Determination 2008*) are taken to be references to versions of those instruments as in force from time to time.

It is also the standard drafting practice of the Office of Parliamentary Counsel, who drafted the Facilities Method, to not expressly state the manner of incorporation if the material being incorporated is a Commonwealth Act or a Commonwealth disallowable legislative instrument and the intention is that the material be incorporated as in force from time to time.

### **Committee's response**

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

However, while the committee is grateful for the minister's clarification that the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* is incorporated as in force from time, it reiterates its usual expectation that, where an instrument incorporates extrinsic material by reference, the manner of incorporation is clearly specified in the instrument and, ideally, in the explanatory statement (ES). This approach 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, including legislation not identified in the instrument.



<b>Instrument</b>	<p><b>Comptroller-General of Customs Instrument of Approval No. 2 of 2015 [F2015L01501]</b></p> <p><b>Comptroller-General of Customs Instrument of Approval No. 12 of 2015 [F2015L01541]</b></p> <p><b>Comptroller-General of Customs Instrument of Approval No. 14 of 2015 [F2015L01529]</b></p> <p><b>Comptroller-General of Customs Instrument of Approval No. 15 of 2015 [F2015L01532]</b></p>
<b>Purpose</b>	The instruments address the effect of sunseting under section 50 of the <i>Legislative Instruments Act 2003</i> and maintain the collection of information in accordance with a requirement under subsections 71AAAF(1) and 71L(1) of the <i>Customs Act 1901</i>
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Customs Act 1901</i>
<b>Department</b>	Immigration and Border Protection
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

### **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).

With reference to the above, the committee notes that various items of these Instruments of Approval refer to '*UN/LOCODE*' which is defined at the conclusion of each instrument as 'the code that applies to the place as published by the United Nations Economic Commission for Europe'. Items in these instruments also refer to the '*ISO Country Code*' which is defined, in relation to a country, as 'the code for that country as set out in ISO 3166-1: 1997 *Codes for the representation of names of countries and their subdivisions - Part 1: Country codes* (as published by the International Organization for Standardization)'.

Instrument of Approval No. 14 also refers to '*ISO Currency Code*' which is defined, in relation to a currency, as 'the code for that currency as set out in ISO 4217: 2001 *Codes for the representation of currencies and funds* (as published by

the International Organization for Standardization)'). In two of the instruments (Approval Nos. 2 and 12) the '*ISO Country Code*' is incorporated 'as in force when this instrument commences'; however, in relation to the '*UN/LOCODE*' and the '*ISO Country Code*' in the remaining two instruments, neither the text of the instruments nor the ESs expressly state the manner in which the codes in question 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.**

**Minister's response**

The Minister for Immigration and Border Protection advised:

The Committee's comments relate to the UN/LOCODE, the ISO Country Code and the ISO Currency Code that are referred to in the Instruments of Approval which provide for information that must be communicated to the Department electronically through the Integrated Cargo System (the ICS). The ICS is a software application that is used for all import and export reporting and processing procedures and is the only method of electronically reporting the legitimate movement of goods across Australia's borders.

I agree with the Committee's view that the relevant codes are incorporated as extrinsic material in the relevant instruments.

The materials are not legislative instruments and are incorporated to provide for those codes relevantly published by the United Nations Economic Commission for Europe, set out in ISO 3166-1: 1997 Codes for the representation of names of countries and their subdivisions - Part 1: Country codes (as published by the International Organization for Standardization), or set out in ISO 4217: 2001 Codes for the representation of currencies and funds (also as published by the International Organization for Standardization), at the time the instruments commence.

For companies or individuals to become users of the ICS, certain requirements (such as holding a digital certificate) and particular technical specifications must be met. As such, one time or infrequent importers or exporters would generally engage the services of a Customs broker to conduct business on their behalf. Use of the ICS is predominantly by cargo industry professionals who are familiar with the international standard identified UN/LOCODE, ISO Country Code and ISO Currency Code. For this reason, the manner of incorporation of the codes as extrinsic material was not specified in the instruments themselves.

I accept the Committee's expectations, however, that the manner of incorporation of extrinsic material is clearly specified in the instrument and

the Explanatory Statement, and undertake to ensure that future instruments and Explanatory Statements are consistent with those expectations.

### Committee's response

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

The committee thanks the Minister Immigration and Border Protection for his undertaking that where future instruments incorporate extrinsic material, the manner of incorporation will be specified to assist readers and users of the instruments.

<b>Instrument</b>	<b>AASB 132 - Financial Instruments: Presentation - August 2015 [F2015L01605]</b>
<b>Purpose</b>	Reissues accounting standards for financial instruments and replaces previous versions of the standard
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Department</b>	Treasury
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

### Incorporation by reference

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).

With reference to the above, the committee notes that various items of this instrument refer to other accounting standards. For example, the instrument states:

Australian Accounting Standard AASB 132 *Financial Instruments: Presentation* is set out in paragraphs 1 – Aus100.2 and the Appendix. All the paragraphs have equal authority. Paragraphs in bold type state the main principles. AASB 132 is to be read in the context of other Australian Accounting Standards, including AASB 1048 *Interpretation of Standards*, which identifies the Australian Accounting Interpretations, and AASB 1057 *Application of Australian Accounting Standards*. In the absence of explicit guidance, AASB 108 *Accounting Policies, Changes in Accounting Estimates and Errors* provides a basis for selecting and applying accounting policies.

However, neither the text of the instrument nor the ES expressly state the manner in which the accounting standards referred to 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.<sup>1</sup>**

### **Minister's response**

The Assistant Minister to the Treasurer advised:

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1 The committee notes that the issue raised also applies to a number of recent standards including: AASB 12 - Disclosure of Interests in Other Entities - August 2015 [F2015L01536]; AASB 107 - Statement of Cash Flows - August 2015 [F2015L01538]; AASB 108 - Accounting Policies, Changes in Accounting Estimates and Errors - August 2015 [F2015L01565]; AASB 117 - Leases - August 2015 [F2015L01562]; AASB 128 - Investments in Associates and Joint Ventures - August 2015 [F2015L01543]; AASB 127 - Separate Financial Statements - August 2015 [F2015L01544]; AASB 129 - Financial Reporting in Hyperinflationary Economies - August 2015 [F2015L01550]; AASB 110 - Events after the Reporting Period - August 2015 [F2015L01553]; AASB 134 - Interim Financial Reporting - August 2015 [F2015L01557]; AASB 138 - Intangible Assets - August 2015 [F2015L01558]; AASB 116 - Property, Plant and Equipment - August 2015 [F2015L01572]; AASB 120 - Accounting for Government Grants and Disclosure of Government Assistance - August 2015 [F2015L01576]; AASB 121 - The Effects of Changes in Foreign Exchange Rates - August 2015 [F2015L01580]; AASB 123 - Borrowing Costs - August 2015 [F2015L01586]; AASB 3 - Business Combinations - August 2015 [F2015L01592]; AASB 112 - Income Taxes - August 2015 [F2015L01601]; AASB 2 - Share-based Payment - July 2015 [F2015L01603]; AASB 132 - Financial Instruments: Presentation - August 2015 [F2015L01605]; AASB 8 - Operating Segments - August 2015 [F2015L01606]; AASB 137 - Provisions, Contingent Liabilities and Contingent Assets - August 2015 [F2015L01607]; AASB 6 - Exploration for and Evaluation of Mineral Resources - August 2015 [F2015L01608]; AASB 139 - Financial Instruments: Recognition and Measurement - August 2015 [F2015L01609]; AASB 7 - Financial Instruments: Disclosures - August 2015 [F2015L01610]; AASB 140 - Investment Property - August 2015 [F2015L01611]; AASB 119 - Employee Benefits - August 2015 [F2015L01612]; AASB 13 - Fair Value Measurement - August 2015 [F2015L01613]; AASB 5 - Non-current Assets Held for Sale and Discontinued Operations - August 2015 [F2015L01614]; AASB 141 - Agriculture - August 2015 [F2015L01615]; AASB 133 - Earnings per Share - August 2015 [F2015L01616]; AASB 10 - Consolidated Financial Statements - July 2015 [F2015L01617]; AASB 124 - Related Party Disclosures - July 2015 [F2015L01621]; AASB 136 - Impairment of Assets - August 2015 [F2015L01622]; AASB 4 - Insurance Contracts - August 2015 [F2015L01623]; AASB 102 - Inventories - July 2015 [F2015L01624]; AASB 101 - Presentation of Financial Statements - July 2015 [F2015L01626]; AASB 11 - Joint Arrangements - July 2015 [F2015L01627]; AASB 1 - First-time Adoption of Australian Accounting Standards - July 2015 [F2015L01628]; AASB 1048 - Interpretation of Standards - August 2015 [F2015L01618]; and AASB 1057 - Application of Australian Accounting Standards - July 2015 [F2015L01620].

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In my opinion AASB 132 is consistent with the current practice adopted for the full suite of legislative instruments:

- The Accounting Standards referred to in AASB 132 are all disallowable legislative instruments, made under section 334 of the *Corporations Act 2001*;
- Under section 14(1)(a) of the *Legislative Instruments Act 2003* (LIA), a legislative instrument may make provision in relation to a matter by "applying, adopting or incorporating, with or without modification, the provisions of any Act, or of any disallowable legislative instrument, as in force at a particular time or as in force from time to time".
- Under section 10(a) of the *Acts Interpretation Act 1901* (AIA), where an Act contains a reference to a short title for the citation of another Act as originally enacted, or of another Act as amended, then the reference is to be construed as a reference to that other Act as originally enacted and as amended from time to time;
- Under section 13(1)(a) of the LIA, the AIA applies to a legislative instrument (such as AASB 132 and the incorporated Accounting Standards) as if it were an Act;
- Therefore, the references in AASB 132 to the titles of Standards that are legislative instruments:
  - are to be construed as references to those other Standards as originally made and as amended from time to time; and
  - are effective in incorporating provisions of those Standards as in force from time to time, without further specification in AASB 132, for the purposes of section 14(1)(a) of the LIA.
- The Australian Accounting Standards Board (AASB) staff have consulted with the Office of Parliamentary Counsel, which confirms that in not expressly stating that the "incorporated" Standards are incorporated as in force from time to time, AASB 132 is drafted consistently with the long-standing practice adopted by the Office of Parliamentary Counsel in drafting regulations and other legislative instruments that refer to other disallowable legislative instruments (including regulations).

Further, the Assistant Minister to the Treasurer provided:

...the AASB has also indicated that in future, an explanation could be included in Explanatory Statements for Standards that other Standards were incorporated as in force from time to time to assist readers.

### **Committee's response**

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

Noting that various items of this instrument refer to other accounting standards as in force from time to time, the committee thanks the Assistant Minister to the Treasurer

for his undertaking that where future Standards incorporate other Standards, the manner of incorporation will be specified to assist readers and users of the instrument.

<b>Instrument</b>	<b>Legislation (Exemptions and Other Matters) Regulation 2015 [F2015L01475]</b>
<b>Purpose</b>	Repeals and replaces the Legislative Instruments Regulations 2004 to implement part of the reforms made by the <i>Acts and Instruments (Framework Reform) Act 2015</i>
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Legislative Instruments Act 2003</i>
<b>Department</b>	Attorney-General's
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

### **Exemption of instruments from disallowance**

The committee commented as follows:

The regulation repeals and replaces the Legislative Instruments Regulations 2004, which currently set out exemptions from legislative instrument status, disallowance by the Parliament and sunseting for particular instruments and classes of instrument. The ES explains that the remaking of the regulation is required to implement some of the changes introduced by the *Acts and Instruments (Framework Reform) Act 2015* (to commence in 2016).

Sections 9 and 10 of the regulation prescribe particular instruments and classes of instrument that are not subject to disallowance. In relation to section 10, the ES states:

These particular instruments were prescribed as exempt from disallowance in section 44 of the Legislative Instruments Act and Schedule 2 of the Legislative Instruments Regulations. They have been consolidated into the Legislation (Exemption and Other Matters) Regulation in order to improve the accessibility of the law by providing a consolidated list of exemptions. The amendments which have been made clarify the exemptions, modify or consolidate exemptions where there was overlap between the exemptions in the Legislative Instruments Act and the Legislative Instruments Regulations, and update exemptions to ensure they reflect existing in practice.

The item-by-item description of section 10 in the ES provides justifications for the exemption of particular instruments from disallowance, explaining why the particular nature of the instruments justifies the exemption from disallowance. The exception is item 20 of the table in section 10, which remakes item 26 of the table in

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subsection 44(2) of the *Legislative Instruments Act 2003*. This item exempts the following from disallowance:

- an instrument (other than a regulation) made under Part 1, 2 or 9 of the *Migration Act 1958*, and
- an instrument made under Part 1, 2 or 5 of, or Schedule 1, 2, 4, 5A or 8 to, the *Migration Regulations 1994*.

The committee notes that this exemption extends to a large number of instruments relating to a broad range of matters, including the conditions pertaining to the arrival, presence and departure of persons in Australia; labour market testing; and the designation of a country as a 'regional processing country'. However, the ES simply states that the 'instruments made under the Migration Act and Migration Regulations are appropriate for executive control', and does not provide information on:

- the nature of the instruments covered by the exemption;
- the broader justification for the exemption of instruments made under the Migration Act and Migration Regulations; and
- whether, taking into account the nature of the instruments to which the exemption applies, it is appropriate to include this broad exemption from disallowance (thereby removing them from the effective oversight of the Parliament).

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

### **Minister's response**

The Attorney-General advised that item 20 under section 10:

...provides exemptions from disallowance under the *Legislation Act 2003* (as the *Legislative Instruments Act 2003* is soon to be renamed) for certain instruments made under the *Migration Act 1958* and the *Migration Regulations 1994*. The Regulation would replicate the exemption currently found in item 26 of the table in subsection 44(2) of the *Legislative Instruments Act*. The current exemption will cease to have effect when the Acts and Instruments (Framework Reform) Act 2015 comes into force on 5 March 2016.

The Attorney-General also advised:

It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty for the rights and obligations of individuals with regard to visa and migration status.

Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and

appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the Legislative Instruments Act.

I am also concerned that if these instruments were subject to disallowance, the Government would be less agile in addressing issues relating to trends in global population movements.

The following examples of the nature of instruments made under the *Migration Act 1958* and *Migration Regulations 1994* was also provided:

<b>Legislative Reference</b>	<b>Examples of the nature of instruments</b>
<i>Migration Act 1958, Part 1</i>	<ul style="list-style-type: none"> <li>• Authorisation of officers for certain purposes</li> <li>• Approved places of immigration detention</li> <li>• Appointment of ports</li> </ul>
<i>Migration Act 1958, Part 2</i>	<ul style="list-style-type: none"> <li>• Provisions here deal with arrival and departures of persons and border control. These matters require certainty for effective implementation</li> <li>• Setting out the number of visas granted for a particular class of visa in a particular year</li> <li>• Particular occupations and applicable sponsorship obligations</li> <li>• Approved reporting systems</li> <li>• Types of evidence required</li> </ul>
<i>Migration Act 1958, Part 9</i>	<ul style="list-style-type: none"> <li>• Use of computer programs to make decisions</li> </ul>
<i>Migration Regulations 1994, Part 1</i>	<ul style="list-style-type: none"> <li>• Eligible passports for internet application lodgement</li> <li>• Specified occupations for certain visa eligibility</li> <li>• Appropriate English language test results</li> <li>• Course qualifications for certain visas</li> </ul>
<i>Migration Regulations 1994, Part 2</i>	<ul style="list-style-type: none"> <li>• Prescribed qualifications and number of points for certain visas</li> </ul>
<i>Migration Regulations 1994, Part 5</i>	<ul style="list-style-type: none"> <li>• Specification of evidence</li> <li>• Specify particular level of English language proficiency</li> <li>• Detailed requirements for nominations of sponsors</li> <li>• Paying fees in foreign currencies</li> </ul>
<i>Migration Regulations 1994, Schedule 1</i>	<ul style="list-style-type: none"> <li>• Form required to make a valid visa application</li> <li>• The manner and place for lodging applications</li> </ul>
<i>Migration Regulations 1994, Schedule 2</i>	<ul style="list-style-type: none"> <li>• Specify members of industry associations in relation to certain streams</li> </ul>
<i>Migration Regulations 1994, Schedule 4</i>	<ul style="list-style-type: none"> <li>• Specify certain applicants required to undertake medical assessments</li> <li>• Persons who make the medical assessment</li> </ul>
<i>Migration Regulations 1994, Schedule 5A</i>	<ul style="list-style-type: none"> <li>• Specify agencies that can assess levels of education</li> <li>• Specify calculation of living costs</li> <li>• Specify courses and tests for students assessment requirements</li> </ul>
<i>Migration Regulations 1994, Schedule 8</i>	<ul style="list-style-type: none"> <li>• Circumstances in which certain conditions apply</li> <li>• Specify a list of chemicals for 'chemicals of concern'</li> </ul>



## Committee's response

**The committee thanks the Attorney-General for his response and has concluded its examination of this instrument.**

In concluding this matter the committee notes the Attorney-General's advice that continuing to exempt the relevant instruments from disallowance ensures certainty in operational matters and provides for administrative matters to support the machinery of the migration program.

<b>Instrument</b>	<b>Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015 [F2015L01461]</b>
<b>Purpose</b>	Amends the Migration Regulations 1994 to confirm that the effect of section 2.08F is to provide that any application made by certain visa applicants for a Permanent Protection Visa will be converted into an application for a Temporary Protection Visa
<b>Last day to disallow</b>	3 December 2015
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Department</b>	Immigration and Border Protection
<b>Scrutiny principle</b>	Standing Order 23(3)(b)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 14 of 2015

## Retrospective effect

The committee commented as follows:

The regulation amends section 2.08F of the Migration Regulations 1994, and is intended to confirm that the effect of that section is to provide that an application for a Permanent Protection Visa (PPV) will be converted into an application for a Temporary Protection Visa (TPV) if the application:

- has been the subject of a court order requiring the minister to reconsider the application;
- has been remitted to the minister for reconsideration by the Administrative Appeals Tribunal; or
- had not been decided by the minister before 16 December 2014.

The committee notes that, although the instrument is not strictly retrospective, it prescribes rules for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that a person whose application

for a PPV was made on or before 16 December 2014 may now be subject to criteria for the grant of a TPV that did not apply at the time of their application.

The ES for the instrument states:

It is noted that the Regulation does not have any retrospective effect beyond the retrospectivity expressly authorised by the Migration Act (subsection 45AA(3) and subsection 45AA(8)) and reflected in subregulation 2.08F(1) (which has not been amended). The effect of the conversion from a PPV application to a TPV application is that the visa application is taken not to be, and never to have been, a valid application for a PPV, and is taken to be, and to always have been, a valid application for a TPV.

The committee notes that subsection 45AA(3) of the *Migration Act 1958* (the Act) specifically provides that a regulation may provide that, where a visa class is changed or effectively superseded (as in this case), an earlier application for the visa is taken not to be, and never to have been, a valid application for the visa; and is taken to be, and always to have been, a valid application for the amended or new visa. The Act also provides that, to avoid doubt, subsection 12(2) of the *Legislative Instruments Act 2003* and subsection 7(2) of the *Acts Interpretation Act 1901* do not apply to any such regulation (subsection 45AA(8)).<sup>2</sup>

However, the committee's usual approach in cases such as this, is to regard the instruments 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 requests the advice of the minister in relation to this matter.**

#### **Minister's response**

The Minister for Immigration and Border Protection advised:

I accept the committee's view that the instrument is retrospective in its effect. However, this conclusion needs to be appreciated within the context of the legislative scheme for dealing with the asylum claims of unauthorised arrivals which was approved by the Parliament in December 2014. By passing the *Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2014* (the Legacy Act) the Parliament agreed to a number of measures to strengthen Australia's policy in relation to the deterrence of people-smuggling activities. Included in these measures was the reintroduction [sic] of temporary protection visas (TPVs) for unauthorised arrivals, and the removal of access by unauthorised arrivals to permanent protection visas (PPVs). A further measure in the Legacy Act was the amendment of the *Migration Regulations 1994* (the Regulations) to

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2 In general terms, these provisions respectively provide that an instrument may not commence retrospectively where a person other than the Commonwealth would be disadvantaged; and that the amendment of an Act or part of an Act does not affect the previous operation of those provisions (including any right, privilege, obligation or liability acquired, accrued or incurred under the affected provisions).

introduce a conversion regulation (regulation 2.08F) which has the effect of converting existing PPV applications by unauthorised arrivals into TPV applications. This measure is retrospective. It covers persons meeting the definition of prescribed applicants including unauthorised arrivals, who applied for PPVs prior to the enactment of the Legacy Act, with the result that they only have access to TPVs.

The instrument queried by the committee is intended to ensure that the conversion process operates as envisaged by the Legacy Act. As the committee notes in the Delegated legislation monitor No. 14, the legal framework inserted by the Legacy Act contemplates and specifically authorises conversion regulations which have retrospective effect.

The instrument does not involve any change to the policy which underpins the Legacy Act and regulation 2.08F. The instrument merely removes gaps and potential gaps in the operation of regulation 2.08F. It ensures that unauthorised arrivals who might potentially benefit from these gaps are placed in the position which was always intended, and which is the same position as the majority of unauthorised arrivals. It would be anomalous if a minority of unauthorised arrivals were to be placed in a more beneficial [sic] position than the majority as a result of inadvertent inadequacies or potential inadequacies in the drafting of regulation 2.08F. For that reason, I do not consider that the instrument unduly trespasses on personal rights and liberties.

### Committee's response

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

<b>Instrument</b>	<b>Radiocommunications Licence Conditions (Outpost Licence) Determination 2015 [F2015L01433]</b>
<b>Purpose</b>	Revokes and replaces the Radiocommunications Licence Conditions (Outpost Licence) Determination 1997
<b>Last day to disallow</b>	2 December 2015
<b>Authorising legislation</b>	<i>Radiocommunications Act 1992</i>
<b>Department</b>	Communications
<b>Scrutiny principle</b>	Standing Order 23(3)(a)
<b>Previously reported in</b>	<i>Delegated legislation monitor</i> No. 12 of 2015

### Incorporation of extrinsic material

The committee commented as follows:

This instrument determines the conditions applicable to outpost licences.

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 314A(2) of the authorising legislation for this instrument (the *Radiocommunications Act 1992*) 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 of the instrument refers to the *Radiocommunications (Interpretation) Determination 2015*. However, neither the instrument nor the ES expressly state the manner in which the specified document is incorporated.

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

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

### **Minister's response**

The Minister for Communications advised:

By way of clarification, the Interpretation Determination has not been incorporated into the Outpost Licence Conditions Determination by reference, in reliance on either section 14 of the *Legislative Instruments Act 2003* or section 314A of the *Radiocommunications Act 1992* (Radiocommunications Act).

As stated in Note 2 to section 5 of the Outpost Licence Conditions Determination, the expressions listed under that note and which are used in that Determination are instead defined by the Interpretation Determination. This is in reliance on section 64 of the *Australian Communications and Media Authority Act 2005* (ACMA Act). Subsection 64(1) of the ACMA Act provides that:

The ACMA may make a written determination defining 1 or more expressions used in specified instruments, being instruments that are made by the ACMA under 1 or more specified laws of the Commonwealth.

The ACMA has confirmed that the Outpost Licence Conditions Determination, made under paragraph 107(1)(f) of the Radiocommunications Act, is an instrument to which the Interpretation Determination applies (refer sections 3, 4, 5 and 7 of the Interpretation Determination).

The explanatory memorandum for the Australian Communications and Media Authority Bill 2004 stated (at page 33):

Clause 64 ... will facilitate the standardisation of terms in such instruments, and the ready amendment of terms without the need for amendment to each affected instrument.

The ACMA has advised that the Interpretation Determination applies to the relevant specified instruments, including the Outpost Licence Conditions Determination, as in force from time to time (and not as in force at a particular time). That being the effect of the ACMA Act, and given the overall purpose and intent of subsection 64(1), which is to foster the efficient administration of a large number of legislative instruments, the ACMA does not customarily repeat that effect of the ACMA Act in each of those affected instruments.

### **Committee's response**

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



# **Appendix 1**

## **Correspondence**







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**THE HON JULIE BISHOP MP**

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Minister for Foreign Affairs

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

Dear  Senator

I write in response to the 11 November report of the Senate Standing Committee on Regulations and Ordinances (the Committee) which seeks my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions-Syria) Regulations 2015*, the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015* and the *Australian Passports (Application Fees) Amendment Determination 2015 (No.1)*.

***Charter of the United Nations (Sanctions-Syria) Regulations 2015 and the Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015***

As noted in the Committee's report, Australia is under an international legal obligation to implement United Nations Security Council Resolutions (UNSCR) as expeditiously as practicable. The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015) and Australia is under an international obligation to implement the terms of the UNSCR into Australian law. The term 'illegally removed' refers to property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Syrian, Iraqi, or international law. To clarify this issue, the Department of Foreign Affairs and Trade has prepared revised Explanatory Statements for both Regulations, which are attached for your information.

The Committee has sought my views on the possible retrospectivity of certain provisions in the Regulations. I do not agree with the Committee's assessment that the provisions relating to the giving of a direction in relation to illegally removed cultural property are retrospective in effect. The Regulations reflect the international obligations imposed by UNSCR 2199 including the need to take steps to prevent the trade in cultural property illegally removed from Iraq or Syria since 6 August 1990 and 15 March 2011 respectively. As accepted by the Committee, the Regulations criminalise the present trade in illegally removed cultural property rather than their past removal and an offence does not arise unless a direction is issued. The Regulations do not change the status of legally removed property and only apply where no good title has been obtained by the fact that the goods were illegally removed.

The Committee also sought my views on the justification for the imposition of a strict liability offence in the Regulations for the failure to comply with a direction in relation to illegally removed cultural property of Syria or Iraq. A strict liability offence was appropriate for these Regulations due to the fact that a person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put 'on notice' by the issuing of that direction to return the item. As a result they have received sufficient notice of their obligations under the Regulations and have the opportunity to avoid unintentional contravention.

It would be therefore unnecessary to impose a requirement to prove the individual's intention not to comply with the notice. Further, strict liability is appropriate for these offences as the offences are not punishable by imprisonment, the offences are punishable only by a fine of below 60 penalty units and because a requirement to prove fault would reduce the effectiveness of the enforcement regime in deterring the trade in illegally removed Syrian and Iraqi cultural property. I also note that honest and reasonable mistake of fact is available as a defence to strict liability offences under s9.2 of the Criminal Code.

***Australian Passports (Application Fees) Amendment Determination 2015 (No. 1).***

In response to the Committee's question in relation to the Australian Passports (Application Fees) Amendment Determination 2015 (No. 1), I provide the following advice:

This instrument, jointly with the Passports Legislation Amendment (2015 Measures No. 1) Determination 2015, provides for an additional circumstance in which a replacement passport may be issued—in 'exceptional circumstances'. The existing replacement passport application fee applies, unless the fee is waived.

A replacement passport is a reprint of an existing passport with a new passport number and in some cases a slight amendment. For example, the replacement passport may change the surname following marriage. In most circumstances the expiry date of the replacement passport is the same as that of the existing passport. Replacement passports are designed to provide a cheaper and simpler alternative to applying for a new full validity passport, depending on the remaining validity of the existing passport. The replacement passport application fee is \$151 and the standard passport application fee is \$250.

The Australian Passports (Application Fees) Act 2005 (the Act) provides that all passport fees are taxes (subsection 4(5)). Subsection 4(1) provides that a Minister's determination may specify passport fees. Subsection 5(3) states that 'An application fee need not bear any relationship to the cost of issuing an Australian travel document...'

The replacement passport application fee was determined on the basis of the following considerations:

- . to streamline and simplify the passport fee schedule by aligning the replacement passport application fee with the application fees for emergency passports, convention travel documents and certificates of identity;
- . to reflect the simpler requirements for processing a replacement passport application; and
- . to reflect the reduced validity of a replacement passport in most circumstances.

I trust this information is of assistance.

Yours sincerely

 Julie Bishop

30 NOV 2015

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Foreign Affairs

*Charter of the United Nations Act 1945*

*Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015*

*Charter of the United Nations (Sanctions-Iraq) Regulations 2008*

The purpose of the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015* (the **Amendment Regulation**) is to amend the *Charter of the United Nations (Sanctions-Iraq) Regulations 2008* in order to implement Resolution 2199 (2015) of the United Nations Security Council (UNSC).

Section 6 of the *Charter of the United Nations Act 1945* (the **Act**) provides that the Governor-General may make regulations for, in relation to, giving effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the **Charter**) which Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The Amendment Regulation gives effect in Australia to sanctions obligations arising from UNSC resolution 2199 (2015). Resolution 2199 (2015) concerning Syria and Iraq was adopted under Chapter VII of the Charter on 12 February 2015 and the measures are binding on Australia pursuant to Article 25 of the Charter. Paragraph 17 requires United Nations member states to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011.

The term 'illegally removed' is drawn directly from the terms of UNSCR 2199 (2015) and as such, Australia is under an international obligation to implement the terms of the UNSCR into Australian law. We consider that the term 'illegally removed' refers to property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Iraqi, or international law.

The Regulations criminalise the present trade in illegally removed cultural property rather than their past removal and an offence does not arise unless a direction is issued. The Regulations do not change the status of legally removed property and only apply where no good title has been obtained by the fact that the goods were illegally removed.

The Amendment Regulation creates a strict liability offence, which is appropriate as the offence is only triggered if a person does not comply with the written directions regarding illegally removed cultural property issued by the Secretary of the Department of Foreign Affairs and Trade. There is no offence if no directions are issued. A person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put 'on notice' by the issuing of that direction to return the item. As a result they have received sufficient notice of their obligations

under the Regulations and have the opportunity to avoid unintentional contravention. It would be therefore unnecessary to impose a requirement to prove the individual's intention not to comply with the notice.

Further, strict liability is appropriate for these offences as the offences are not punishable by imprisonment, the offences are punishable only by a fine of below 60 penalty units and because a requirement to prove fault would reduce the effectiveness of the enforcement regime in deterring the trade in illegally removed Syrian and Iraqi cultural property. Honest and reasonable mistake of fact is available as a defence to strict liability offences under s9.2 of the Criminal Code.

The Amendment Regulation gives effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the Charter) that Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

No public consultation was undertaken in relation to the Amendment Regulation, as it implements Australia's international legal obligations arising from decisions of the UNSC.

Resolution 2199 (2015) was adopted under Article 41 of Chapter VII of the Charter and the measures are binding on Australia pursuant to Article 25 of that Charter. The relevant UNSC resolution can be found on the UN website ([www.un.org](http://www.un.org)).

Details of the Amendment Regulation are set out in the [Attachment](#).

## **Statement of Compatibility with Human Rights**

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

*Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015*

*Charter of the United Nations (Sanctions-Iraq) Regulations 2008*

The *Charter of the United Nations (Sanctions-Iraq) Regulations 2015* (the Amendment Regulation) 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*.

The Amendment Regulation gives effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the Charter) that Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The Amendment Regulation gives effect to paragraph 17 of resolution 2199 (2015) in relation to Iraq, by broadening the definition of ‘illegally removed cultural property’ in the *Charter of the United Nations (Iraq) Regulations 2008* to align with resolution 2199.

The Amendment Regulation engages human rights by assisting with international efforts to deprive terrorist organisations such as Da’esh/Islamic State/ISIL/ISIS from funding human rights violations in Syria and Iraq by trading in illegally removed cultural property.

This Legislative Instrument is compatible with human rights because it advances the protection of human rights in Iraq.

## ATTACHMENT

### Details of *Charter of the United Nations Legislation (Sanctions—Iraq) Amendment Regulation 2015*

#### Section 1 – Name of Regulation

Section 1 would provide that the name of the regulation is the *Charter of the United Nations Legislation Amendment (Sanctions—Iraq) Regulation 2015*.

#### Section 2 – Commencement

Section 2 would provide that the regulation commences the day after the end of the period of 28 days beginning on the day the instrument is registered.

#### Section 3 – Authority

Section 3 would provide that the regulation is made under the *Charter of the United Nations Act 1945*.

#### Section 4 – Schedule(s)

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

#### Schedule 1 – Amendments

##### *Charter of the United Nations (Sanctions – Iraq) Regulations 2008*

#### **Item [1] – Regulation 4, insert new definition**

Item [1] would insert the text ‘*Arts Department* means the Department administered by the Minister administering the *Protection of Moveable Cultural Heritage Act 1986*.’

#### **Item [2] – Regulation 4 (definition of *illegally removed cultural property*)**

Item [2] would repeal the definition and substitute ‘*illegally removed cultural property* means an item of: (a) Iraqi cultural property; or (b) archaeological, historical, cultural, rare scientific, or religious, importance; that has been illegally removed from Iraq on or after 6 August 1990.’

#### **Item [3] – After paragraph 9(1)(a), insert new subparagraph**

Item [3] would insert a new subparagraph (aa) ‘the Secretary of the Arts Department; or’.

#### **Item [4] – Subregulation 9(2) repeal the note and substitute new note**

Item [4] would repeal the note and substitute ‘Note: If notified about an item under subregulation (1) the Departments and police will work together to determine whether

the item is illegally removed cultural property. If satisfied it is, the Department will arrange for its eventual safe return to an appropriate institution in Iraq.’

**Item [5] – At the end of regulation 9, add a new section**

Item [5] would add a new section ‘(3) A person commits an offence of strict liability if: (a) arrangements referred to in subregulation (2) applies to the person; and (b) the person fails to comply with the arrangements. Penalty: 50 penalty units’.

**Item [6] – Paragraph 10(3)(b), repeals the paragraph and substitutes a new paragraph**

Item [6] would repeal Paragraph 10(3)(b) and would substitute it with a new paragraph ‘(b) the other body corporate or entity contravenes subregulation (1)’.

**Item [7] – At the end of Part 2, add a new section**

Item [7] would add a new section ‘12A Compensation for acquisition of property’ which would stipulate that (1) if the operation of that Part would result in the acquisition of property otherwise than on just terms, the Commonwealth would be liable to pay a reasonable amount of compensation and (2) if no agreement is reached, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.



## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Foreign Affairs

*Charter of the United Nations Act 1945*

*Charter of the United Nations (Sanctions-Syria) Regulation 2015*

The purpose of the *Charter of the United Nations (Sanctions-Syria) Regulation 2015* (the **Syria Regulation**) is to implement Resolution 2199 (2015) of the United Nations Security Council (UNSC).

Section 6 of the *Charter of the United Nations Act 1945* (the **Act**) provides that the Governor-General may make regulations for, in relation to, giving effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the **Charter**) which Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The Syria Regulation gives effect in Australia to sanctions obligations arising from UNSC resolution 2199 (2015). Resolution 2199 (2015) concerning Syria and Iraq was adopted under Chapter VII of the Charter on 12 February 2015 and the measures are binding on Australia pursuant to Article 25 of the Charter. Paragraph 17 requires United Nations member states to take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011.

The term ‘illegally removed’ is drawn directly from the terms of UNSCR 2199 (2015) and as such, Australia is under an international obligation to implement the terms of the UNSCR into Australian law. We consider that the term ‘illegally removed’ refers to property that has been removed from Syria or Iraq without the consent of the legitimate owner, or in breach of Syrian, or international law.

The Regulations criminalise the present trade in illegally removed cultural property rather than their past removal and an offence does not arise unless a direction is issued. The Regulations do not change the status of legally removed property and only apply where no good title has been obtained by the fact that the goods were illegally removed.

The Syria Regulation creates a strict liability offence, which is appropriate as the offence is only triggered if a person does not comply with the written directions regarding illegally removed cultural property issued by the Secretary of the Department of Foreign Affairs and Trade. There is no offence if no directions are issued. A person who has been correctly issued with a direction to return the illegally removed cultural property is effectively put ‘on notice’ by the issuing of that direction to return the item. As a result they have received sufficient notice of their obligations under the Regulations and have the opportunity to avoid unintentional contravention. It would be therefore unnecessary to impose a requirement to prove the individual’s intention not to comply with the notice.

Further, strict liability is appropriate for these offences as the offences are not punishable by imprisonment, the offences are punishable only by a fine of below 60 penalty units and because a requirement to prove fault would reduce the effectiveness of the enforcement regime in deterring the trade in illegally removed Syrian and Iraqi cultural property. Honest and reasonable mistake of fact is available as a defence to strict liability offences under s9.2 of the Criminal Code.

No public consultation was undertaken in relation to the Syria Regulation, as it implements Australia's international legal obligations arising from decisions of the UNSC.

Resolution 2199 (2015) was adopted under Article 41 of Chapter VII of the Charter and the measures are binding on Australia pursuant to Article 25 of that Charter. The relevant UNSC resolution can be found on the UN website ([www.un.org](http://www.un.org)).

Details of the Syria Regulation are set out in the Attachment.

## **Statement of Compatibility with Human Rights**

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

*Charter of the United Nations (Sanctions-Syria) Regulation 2015*

The *Charter of the United Nations (Sanctions-Syria) Regulation 2015* (the Syria Regulation) 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*.

The Syria Regulation gives effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the Charter) that Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The Syria Regulation gives effect to paragraph 17 of resolution 2199 (2015) in relation to Syria, by prohibiting the trade in illegally removed Syrian cultural property.

The Syria Regulation engages human rights by assisting with international efforts to deprive terrorist organisations such as Da'esh/Islamic State/ISIL/ISIS from funding human rights violations in Syria and Iraq by trading in illegally removed cultural property.

This Legislative Instrument is compatible with human rights because it advances the protection of human rights in Syria.

## ATTACHMENT

### Details of *Charter of the United Nations (Sanctions—Syria) Regulation 2015*

#### Section 1 – Name of Regulation

Section 1 would provide that the name of the regulation is the *Charter of the United Nations Legislation Amendment (Sanctions—Syria) Regulation 2015*.

#### Section 2 – Commencement

Section 2 would provide that the regulation commences on the day after it is registered.

#### Section 3 – Authority

Section 3 would provide that the regulation is made under the *Charter of the United Nations Act 1945*.

#### Section 4 – Definitions

Section 4 would insert definitions for ‘Act’, ‘Arts Department’ and ‘illegally removed cultural property’.

#### Section 5 – Return of illegally removed cultural property of Syria

Section 5 would provide that a person who suspects that an item in the possession or control of a person is illegally removed cultural property must notify the Secretary of the Department of Foreign Affairs and Trade, the Secretary of the Arts Department or a member of the Australian Federal Police or a state or territory police force. The section would also provide that the Secretary of the Department of Foreign Affairs and Trade may direct the person to comply with arrangements for the delivery of the item to the Department of Foreign Affairs and Trade.

#### Section 6 – Dealing with illegally removed cultural property of Syria

Section 6 would provide that it is an offence if a person gives, trades or transfers illegally removed Syrian cultural property to another person.

#### Section 7 – Compensation for acquisition of property

Section 7 would provide (1) if the operation of that instrument would result in the acquisition of property otherwise than on just terms, the Commonwealth would be liable to pay a reasonable amount of compensation and (2) if no agreement is reached, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.



# PAUL FLETCHER MP

Federal Member for Bradfield  
Minister for Territories, Local  
Government, and Major Projects

PDR ID: MC15-00682

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

Dear Senator <sup>John</sup>~~Williams~~

## Advice for the Senate Standing Committee on Regulations and Ordinances

I write in response to the letter dated 12 November 2015 from the Secretary of the Senate Standing Committee on Regulations and Ordinance (the Committee) concerning delegated legislation for Christmas Islands and Cocos (Keeling) Islands.

I have been advised by the Department of Infrastructure and Regional Development (the Department) that two legislative instruments referred by the Committee replaced equivalent instruments that were repealed on 1 October 2015 under the sunset provisions in the *Legislative Instruments Act 2003* (Cth). These two instruments largely reflect the provisions in the instruments they replaced. The third instrument extends the same port charges for private vessels to the Cocos (Keeling) Islands as apply on Christmas Island. In this context, I can provide the following advice on each of the new instruments.

*Christmas Island Marine Traffic and Harbour Facilities Determination 2015 and Cocos (Keeling) Islands Marine Traffic and Harbour Facilities Determination 2015 (the 2015 Determinations)*

The Committee refers to Schedule 1 of each of the 2015 Determinations that sets the charges for the ports of Christmas Island and the Cocos (Keeling) Islands and asks that the explanatory statements provide the basis for the imposition of fees and charges.

The 2015 Determinations replaced, and were based on, arrangements for Christmas Island contained in the Marine Traffic and Harbour Facilities Determination No 1 of 2003 (the 2003 Determination). Advice from the contractor which manages both ports for the Australian Government, Patrick Ports, is that the charges in the 2003 Determination were comparable to those in place in similar remote ports in Western Australia and that these should be continued.

In developing the 2015 Determinations, the Department consulted with Patrick Ports and the Office of Best Practice Regulation. The Department also wrote to Mr Barry Haase, the Administrator of the Territories of Christmas Island and the Cocos (Keeling) Islands, advising that the 2015 Determinations were being made and briefing him on the outcomes of the consultations.

The 2015 Determinations did not amend the charges for Christmas Island set out in the 2003 Determination and only made a minor amendment to the conditions for managing the port. The 2015 Determinations provided legal authority for existing practices for Cocos (Keeling) Islands and port charges consistent with those for Christmas Island. As such, the Department did not consider further consultation was necessary.

The 2015 Determinations were made by the Administrator under section 4 of the *Utilities and Services Ordinance 1996*. I have instructed the Department to update the explanatory statements to reflect the correct information.

*Removal of Prisoners (Territories) Regulation 2015 (the 2015 Regulation)*

The Department consulted the Attorney-General's Department and the Administrator on the 2015 Regulation. The Department did not consider that further consultation with the territory communities was necessary given the 2015 Regulation did not change the arrangements in place under the previous regulations.

I have asked the Department to ensure it provides this information for new instruments in the future. I thank the Committee for its assistance in relation to this matter.

Yours sincerely ~

Paul Fletcher

| / 12 /2015



**Australian Government**  
**Department of Employment**

Your Ref xxxxxx  
Our Ref MC15-004026

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

Dear Senator Williams

**Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015**

This letter is in response to the letter of 12 November 2015 from Mr Ivan Powell, Committee Secretary of the Senate Standing Committee on Regulations and Ordinances, requesting advice on the consultation undertaken in making the Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 (the Notice) and that the Explanatory Statement be updated in accordance with the requirements of the *Legislative Instruments Act 2003* (the Act).

The Act requires consultation during the making of a legislative instrument unless it falls under an exemption, such as an instrument that is of a minor or machinery nature and one that does not substantially alter existing arrangements.

It also requires that the Explanatory Statement refer to any consultation undertaken, or if consultation was not undertaken, the reasons why it was not undertaken.

However, the Act explicitly provides that the failure to consult does not affect the enforceability or validity of the instrument (section 19). Neither does the failure to lodge an Explanatory Statement (and, by extension, the failure for the Explanatory Statement to contain a description of the consultation undertaken) affect the enforceability or validity of the instrument (subsection 26(1)).

The Department of Employment considers that the Notice is exempted from the requirement to consult as it is of a minor or machinery nature. The Notice deletes all references in the Commonwealth Employees' Rehabilitation and Compensation Act 1988 – Notice of Declarations and Specifications (Notice No. 1 of 1990) to the “Australian National Gallery”, and replaces these with references to the “National Gallery of Australia” to reflect the name change of that entity.

The Notice also corrects a typographical error in the Safety, Rehabilitation and Compensation Act 1988 – Notice of Declaration under subsection 5(6) (Notice No. VI of 1995) in a reference to the “National Museum of Australia”.

These are the only effects of the Notice and it does not in any way alter the operation of the two declarations.

The Notice was made at the request of the Minister for the Arts and in liaison with the Attorney-General's Department which covers the Arts portfolio.

The Act does not require the Explanatory Statement to be updated in this instance in order for the Notice to be enforceable or valid.

Notwithstanding this, the department will take measures to ensure all future instruments meet the relevant requirements of the Act, including that Explanatory Statements refer to any consultation undertaken or the reasons why consultation was not undertaken if that is the case.

Yours sincerely

Mark Roddam  
Branch Manager  
Workers' Compensation Policy Branch

19 November 2015





**The Hon Greg Hunt MP**

**Minister for the Environment**

MC15-036172

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

11 OCT 2015

Dear Senator

A handwritten signature in blue ink, appearing to read 'John', written over the name 'Senator'.

I refer to a request from the Secretary of the Senate Standing Committee on Regulations and Ordinances conveyed to my Office on 17 September 2015 seeking advice in relation to the incorporation of extrinsic material by reference under the *Carbon Credits (Carbon Farming Initiative—Facilities) Methodology Determination 2015* (the Facilities Method).

In its *Delegated Legislation Monitor No. 11 of 2015*, the Committee notes that various provisions of the Facilities Method refer to the '*NGER (Measurement) Determination*' which is defined in section 5 of the Facilities Method as the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (a legislative instrument made under subsection 10(3) of the *National Greenhouse and Energy Reporting Act 2007*). However, neither the Facilities Method nor its explanatory statement expressly states the manner in which the determination in question is incorporated.

The Facilities Method incorporates the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* as in force from time to time. This occurs through section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislative Instruments Act 2003*), which has the effect that references to external documents which are Commonwealth disallowable legislative instruments (such as the *National Greenhouse Emissions Reporting (Measurement) Determination 2008*) are taken to be references to versions of those instruments as in force from time to time.

It is also the standard drafting practice of the Office of Parliamentary Counsel, who drafted the Facilities Method, to not expressly state the manner of incorporation if the material being incorporated is a Commonwealth Act or a Commonwealth disallowable legislative instrument and the intention is that the material be incorporated as in force from time to time. I have copied this letter to the Committee Secretary, Mr Ivan Powell.

Yours sincerely

Greg Hunt





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

Ref No: MS15-023509

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

Dear Senator <sup>John,</sup>

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 12 November 2015 concerning *Delegated legislation monitor* No. 14 of 2015 in which the Committee requested a response in relation to five legislative instruments.

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

- Attachment A – *Comptroller-General of Customs Instrument of Approval No. 2 of 2015* [F2015L01501], *Comptroller-General of Customs Instrument of Approval No. 12 of 2015* [F2015L01541], *Comptroller-General of Customs Instrument of Approval No. 14 of 2015* [F2015L01529], and *Comptroller-General of Customs Instrument of Approval No. 15 of 2015* [F2015L01532]; and
- Attachment B - *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015* [F2015LO1461].

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

Yours sincerely

✓  
PETER DUTTON

30/11/15

**Attachment A**

*Comptroller-General of Customs Instrument of Approval No. 2 of 2015 - [F2015L01501]*  
*Comptroller-General of Customs Instrument of Approval No. 12 of 2015 - [F2015L01541]*  
*Comptroller-General of Customs Instrument of Approval No. 14 of 2015 - [F2015L01529]*  
*Comptroller-General of Customs Instrument of Approval No. 15 of 2015 - [F2015L01532]*

The Committee notes that its usual expectation is, where an instrument incorporates extrinsic material by reference, that the manner of incorporation is clearly specified in the instrument, and ideally, in the Explanatory Statements, and that it 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's comments relate to the UN/LOCODE, the ISO Country Code and the ISO Currency Code that are referred to in the Instruments of Approval which provide for information that must be communicated to the Department electronically through the Integrated Cargo System (the ICS). The ICS is a software application that is used for all import and export reporting and processing procedures and is the only method of electronically reporting the legitimate movement of goods across Australia's borders.

I agree with the Committee's view that the relevant codes are incorporated as extrinsic material in the relevant instruments.

The materials are not legislative instruments and are incorporated to provide for those codes relevantly published by the United Nations Economic Commission for Europe, set out in ISO 3166-1: 1997 Codes for the representation of names of countries and their subdivisions - Part 1: Country codes (as published by the International Organization for Standardization), or set out in ISO 4217: 2001 Codes for the representation of currencies and funds (also as published by the International Organization for Standardization), at the time the instruments commence.

For companies or individuals to become users of the ICS, certain requirements (such as holding a digital certificate) and particular technical specifications must be met. As such, one time or infrequent importers or exporters would generally engage the services of a Customs broker to conduct business on their behalf. Use of the ICS is predominantly by cargo industry professionals who are familiar with the international standard identified UN/LOCODE, ISO Country Code and ISO Currency Code. For this reason, the manner of incorporation of the codes as extrinsic material was not specified in the instruments themselves.

I accept the Committee's expectations, however, that the manner of incorporation of extrinsic material is clearly specified in the instrument and the Explanatory Statement, and undertake to ensure that future instruments and Explanatory Statements are consistent with those expectations.

I thank the Committee for raising this matter for my consideration.

***Migration Amendment (Conversion of Protection Visa Applications)***  
***Regulation 2015 - [F2015L01461]***

The committee notes that, although the instrument is not strictly retrospective, it is restrospective in effect and the committee assesses such instruments against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle 23(3)(b)).

I accept the committee's view that the instrument is retrospective in its effect. However, this conclusion needs to be appreciated within the context of the legislative scheme for dealing with the asylum claims of unauthorised arrivals which was approved by the Parliament in December 2014. By passing the *Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2014* (the Legacy Act) the Parliament agreed to a number of measures to strengthen Australia's policy in relation to the deterrence of people-smuggling activities. Included in these measures was the reintroduction of temporary protection visas (TPVs) for unauthorised arrivals, and the removal of access by unauthorised arrivals to permanent protection visas (PPVs). A further measure in the Legacy Act was the amendment of the *Migration Regulations 1994* (the Regulations) to introduce a conversion regulation (regulation 2.08F) which has the effect of converting existing PPV applications by unauthorised arrivals into TPV applications. This measure is retrospective. It covers persons meeting the definition of prescribed applicants including unauthorised arrivals, who applied for PPVs prior to the enactment of the Legacy Act, with the result that they only have access to TPVs.

The instrument queried by the committee is intended to ensure that the conversion process operates as envisaged by the Legacy Act. As the committee notes in the Delegated legislation monitor No. 14, the legal framework inserted by the Legacy Act contemplates and specifically authorises conversion regulations which have retrospective effect.

The instrument does not involve any change to the policy which underpins the Legacy Act and regulation 2.08F. The instrument merely removes gaps and potential gaps in the operation of regulation 2.08F. It ensures that unauthorised arrivals who might potentially benefit from these gaps are placed in the position which was always intended, and which is the same position as the majority of unauthorised arrivals. It would be anomalous if a minority of unauthorised arrivals were to be placed in a more beneficial position than the majority as a result of inadvertent inadequacies or potential inadequacies in the drafting of regulation 2.08F. For that reason, I do not consider that the instrument unduly trespasses on personal rights and liberties,

I again thank the committee for raising this matter for my consideration.





## ASSISTANT MINISTER TO THE TREASURER

The Hon Alex Hawke MP

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

Dear Senator Williams

I refer to your letter of 12 November 2015 requesting a response in relation to issues identified in the Senate Standing Committee on Regulations and Ordinances' (the Committee) *Delegated Legislation monitor* No. 14 of 2015 regarding AASB 132 Financial Instruments: Presentation.

The Committee drew attention to the fact that various items of this instrument refer to other accounting standards. The Committee's letter stated that its normal expectation is that where an instrument incorporates extrinsic material by reference, that the manner of incorporation is clearly specified in the instrument.

In my opinion AASB 132 is consistent with the current practice adopted for the full suite of legislative instruments:

- The Accounting Standards referred to in AASB 132 are all disallowable legislative instruments, made under section 334 of the *Corporations Act 2001*.
- Under section 14(1)(a) of the *Legislative Instruments Act 2003* (LIA), a legislative instrument may make provision in relation to a matter by “applying, adopting or incorporating, with or without modification, the provisions of any Act, or of any disallowable legislative instrument, as in force at a particular time or as in force from time to time”.
- Under section 10(a) of the *Acts Interpretation Act 1901* (AIA), where an Act contains a reference to a short title for the citation of another Act as originally enacted, or of another Act as amended, then the reference is to be construed as a reference to that other Act as originally enacted and as amended from time to time;
- Under section 13(1)(a) of the LIA, the AIA applies to a legislative instrument (such as AASB 132 and the incorporated Accounting Standards) as if it were an Act;

- Therefore, the references in AASB 132 to the titles of Standards that are legislative instruments:
  - are to be construed as references to those other Standards as originally made and as amended from time to time; and
  - are effective in incorporating provisions of those Standards as in force from time to time, without further specification in AASB 132, for the purposes of section 14(1)(a) of the LIA.
- The Australian Accounting Standards Board (AASB) staff have consulted with the Office of Parliamentary Counsel, which confirms that in not expressly stating that the “incorporated” Standards are incorporated as in force from time to time, AASB 132 is drafted consistently with the long-standing practice adopted by the Office of Parliamentary Counsel in drafting regulations and other legislative instruments that refer to other disallowable legislative instruments (including regulations).
- Further, the AASB has also indicated that in future, an explanation could be included in Explanatory Statements for Standards that other Standards were incorporated as in force from time to time, to assist readers.

I hope this addresses the Committee’s concerns. If the Committee requires further information please contact Ms Zoe Irwin, Analyst, Treasury on 02 6263 4470 or by email on [zoe.irwin@treasury.gov.au](mailto:zoe.irwin@treasury.gov.au). Alternatively you may wish to contact Mr Clark Anstis, Australian Accounting Standards Board at [canstis@aab.gov.au](mailto:canstis@aab.gov.au).

Yours sincerely

**The Hon Alex Hawke MP**





ATTORNEY-GENERAL

CANBERRA

MC15-008537

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

02 DEC 2015

<regords.sen@aph.gov.au >

Dear Senator Williams *Wacka*

Thank you for the letter from Mr Ivan Powell, Committee Secretary, advising my Office of the Senate Standing Committee on Regulations and Ordinances' request for information regarding the Legislation (Exemption and Other Matters) Regulation 2015 in its Delegated Legislation Monitor No. 14.

The Committee requested my advice regarding item 20 under section 10 of the Regulation, noting that the Explanatory Statement does not provide sufficient justification for that item. That item provides exemptions from disallowance under the *Legislation Act 2003* (as the *Legislative Instruments Act 2003* is soon to be renamed) for certain instruments made under the *Migration Act 1958* and the *Migration Regulations 1994*. The Regulation would replicate the exemption currently found in item 26 of the table in subsection 44(2) of the *Legislative Instruments Act*. The current exemption will cease to have effect when the *Acts and Instruments (Framework Reform) Act 2015* comes into force on 5 March 2016.

Examples of the nature and purpose of these instruments have been provided by the Department of Immigration and Border Protection at Attachment A.

It is appropriate to continue to exempt the relevant instruments from disallowance. These instruments are crucial to the operation of the migration program. Continuing to exempt such instruments from disallowance ensures certainty in operational matters, as well as certainty for the rights and obligations of individuals with regard to visa and migration status.

Many of these instruments support the machinery of the migration program by providing for administrative matters, such as the form required to make a valid visa application, the manner and place for lodging applications and appropriate course qualifications or language proficiency. In addition to ensuring certainty in the operation of the immigration program, these instruments are largely administrative in nature, and therefore would not ordinarily be considered legislative instruments under the *Legislative Instruments Act*.

I am also concerned that if these instruments were subject to disallowance, the Government would be less agile in addressing issues relating to trends in global population movements.

I trust this information will assist the Committee in its consideration of the Regulation.

The responsible adviser for this matter in my Office is James Lambie, who can be contacted on 02 6277 7300.

Thank you again for writing on this matter.

(George Brandis)



Encl: Attachment A - Examples of the nature of instruments under the *Migration Act 1958* and *Migration Regulation 1994*

## Examples of the nature of instruments under the *Migration Act 1958* and *Migration Regulation 1994*

Legislative Reference	Examples of the nature of instruments
<i>Migration Act 1958</i> , Part 1	<ul style="list-style-type: none"> <li>• Authorisation of officers for certain purposes</li> <li>• Approved places of immigration detention</li> <li>• Appointment of ports</li> </ul>
<i>Migration Act 1958</i> , Part 2	<ul style="list-style-type: none"> <li>• Provisions here deal with arrival and departures of persons and border control. These matters require certainty for effective implementation</li> <li>• Setting out the number of visas granted for a particular class of visa in a particular year</li> <li>• Particular occupations and applicable sponsorship obligations</li> <li>• Approved reporting systems</li> <li>• Types of evidence required</li> </ul>
<i>Migration Act 1958</i> , Part 9	<ul style="list-style-type: none"> <li>• Use of computer programs to make decisions</li> </ul>
<i>Migration Regulations 1994</i> , Part 1	<ul style="list-style-type: none"> <li>• Eligible passports for internet application lodgement</li> <li>• Specified occupations for certain visa eligibility</li> <li>• Appropriate English language test results</li> <li>• Course qualifications for certain visas</li> </ul>
<i>Migration Regulations 1994</i> , Part 2	<ul style="list-style-type: none"> <li>• Prescribed qualifications and number of points for certain visas</li> </ul>
<i>Migration Regulations 1994</i> , Part 5	<ul style="list-style-type: none"> <li>• Specification of evidence</li> <li>• Specify particular level of English language proficiency</li> <li>• Detailed requirements for nominations of sponsors</li> <li>• Paying fees in foreign currencies</li> </ul>
<i>Migration Regulations 1994</i> , Schedule 1	<ul style="list-style-type: none"> <li>• Form required to make a valid visa application</li> <li>• The manner and place for lodging applications</li> </ul>
<i>Migration Regulations 1994</i> , Schedule 2	<ul style="list-style-type: none"> <li>• Specify members of industry associations in relation to certain streams</li> </ul>
<i>Migration Regulations 1994</i> , Schedule 4	<ul style="list-style-type: none"> <li>• Specify certain applicants required to undertake medical assessments</li> <li>• Persons who make the medical assessment</li> </ul>
<i>Migration Regulations 1994</i> , Schedule 5A	<ul style="list-style-type: none"> <li>• Specify agencies that can assess levels of education</li> <li>• Specify calculation of living costs</li> <li>• Specify courses and tests for students assessment requirements</li> </ul>
<i>Migration Regulations 1994</i> , Schedule 8	<ul style="list-style-type: none"> <li>• Circumstances in which certain conditions apply</li> <li>• Specify a list of chemicals for 'chemicals of concern'</li> </ul>





**SENATOR THE HON MITCH FIFIELD**

MINISTER FOR COMMUNICATIONS  
MINISTER FOR THE ARTS  
MINISTER ASSISTING THE PRIME MINISTER FOR DIGITAL GOVERNMENT  
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

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

**Radiocommunications Licence Conditions (Outpost Licence)  
Determination 2015 [F2015L01433]**

Dear Senator Williams *John*

Thank you for your letter of 13 October 2015 regarding comments contained in the report of the Senate Regulations and Ordinances Committee, *Delegated legislation monitor* No. 12 of 2015.

I refer to the Committee's comments on the reference at section 5 of the *Radiocommunications Licence Conditions (Outpost Licence) Determination 2015* (Outpost Licence Conditions Determination) to the *Radiocommunications (Interpretation) Determination 2015* (Interpretation Determination).

By way of clarification, the Interpretation Determination has not been incorporated into the Outpost Licence Conditions Determination by reference, in reliance on either section 14 of the *Legislative Instruments Act 2003* or section 314A of the *Radiocommunications Act 1992* (Radiocommunications Act).

As stated in Note 2 to section 5 of the Outpost Licence Conditions Determination, the expressions listed under that note and which are used in that Determination are instead defined by the Interpretation Determination. This is in reliance on section 64 of the *Australian Communications and Media Authority Act 2005* (ACMA Act). Subsection 64(1) of the ACMA Act provides that:

The ACMA may make a written determination defining 1 or more expressions used in specified instruments, being instruments that are made by the ACMA under 1 or more specified laws of the Commonwealth.

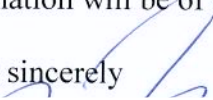
The ACMA has confirmed that the Outpost Licence Conditions Determination, made under paragraph 107(1)(f) of the Radiocommunications Act, is an instrument to which the Interpretation Determination applies (refer sections 3, 4, 5 and 7 of the Interpretation Determination).

The explanatory memorandum for the Australian Communications and Media Authority Bill 2004 stated (at page 33):

Clause 64 ... will facilitate the standardisation of terms in such instruments, and the ready amendment of terms without the need for amendment to each affected instrument.

The ACMA has advised that the Interpretation Determination applies to the relevant specified instruments, including the Outpost Licence Conditions Determination, as in force from time to time (and not as in force at a particular time). That being the effect of the ACMA Act, and given the overall purpose and intent of subsection 64(1), which is to foster the efficient administration of a large number of legislative instruments, the ACMA does not customarily repeat that effect of the ACMA Act in each of those affected instruments.

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

Yours sincerely 

MITCH FIFIELD

27/11/05

## 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.



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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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances) or by contacting the committee secretariat at:

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