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Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

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

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

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

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

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

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

Nature of the committee's scrutiny

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

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

Publications

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

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

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

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:

  (a) seeking an explanation/information; or

  (b) seeking further explanation/information subsequent to a response; or

  (c) on an advice only basis.

- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.
- **Appendix 2 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.

Acknowledgement

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

General information

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

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

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

Senator John Williams (Chair)

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

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

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

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 20 November 2015 and 17 December 2015 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

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

Instrument	**Agricultural and Veterinary Chemicals Legislation Amendment (Simplified Formulation Variations and Other Measures) Regulation 2015 [F2015L02042]**
Purpose	Amends the Agricultural and Veterinary Chemicals (Administration) Regulations 1995 and the Agricultural and Veterinary Chemicals Code Regulations 1995 to provide simplified formulation variations and processes for registering or varying a suite of chemical products; and to declare restricted chemical products
Last day to disallow	11 May 2016
Authorising legislation	*Agricultural and Veterinary Chemicals (Administration) Act 1992; Agricultural and Veterinary Chemicals Code Act 1994*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulation amends the Agricultural and Veterinary Chemicals (Administration) Regulations 1995 (Administration Regulations) and the Agricultural and Veterinary Chemicals Code Regulations 1995 (Principal Code Regulations) to provide for various efficiency measures. Item 7 of Schedule 1 of the regulation substitutes an updated table of fees and periods for completion of modules, levels and types of assessments in Schedule 7 of the Principal Code Regulations. The fees range from $460 to $27 920.

The explanatory statement (ES) to the regulation states:

> Item 7 replaces Schedule 7 to remove the spent 1 July 2014 fee provisions and correct errors in the fees for items 5.6 and 6.3. The fee in item 5.6 has been reduced so that it is the same as the fee in item 5.1. The fee in item 6.3 has been reduced to correct an error… Section 164 of the Agvet Code (Schedule to the *Agricultural and Veterinary Chemicals Code Act 1994*) provides specific authority for fees to be prescribed in regulations, including the manner and the time in which they are due and payable.

Similarly, item 5 of Schedule 2 of the regulation substitutes a new subsection 71A(1) in the Principal Code Regulations to provide for fees payable for an application for renewal of the registration of a chemical product. The fees prescribed are $2150 for a five year period, or $430 for a 12-month period. The ES to the regulation states:

> The fee for a one-year renewal period is unchanged and the fee for the five-year renewal period is five times the fee payable for a one-year renewal.

Finally, item 7 of Schedule 3 of the regulation provides that the fee for an application to make an interchangeable constituent determination made under new regulation 19AEB of the Principal Code Regulations will be the modular assessment fee (as provided for in the table in Schedule 7 of the Principal Code Regulations).

The ES states:

> For the authorities in subsections 164(1) and 165(1) of the Agvet Code, item 7 amends the table in Part 2 of Schedule 6 to specify that the assessment period for an application under regulation 19AEB is the modular assessment period, and the fee is the modular assessment fee. The amendment also provides that the extended assessment period is one and one third of the modular assessment period, rounded up to the nearest whole month, plus a month (similar to the existing item 28).

While section 164 of the Agvet Code provides authority for fees to be prescribed in regulations, it does not provide the basis on which those fees are to be calculated. 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.

While the committee notes that the fees in Schedule 7 have been amended to correct errors, the ES does not state either the basis on which the correct amount of the fees is to be calculated, or the basis for calculation of the modular assessment fee that is to apply to applications under new regulation 19AEB.

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

Instrument	**ASIC Corporations (Real Estate Companies) Instrument 2015/1049 [F2015L01831]**
Purpose	Exempts real estate agents who offer for sale shares in real estate companies and valuers who value shares in real estate companies from holding a financial services licence
Last day to disallow	1 March 2016
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	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 section 4(b) of the instrument refers to the *Transfer of Land Act 1958* of Victoria (TLA). However, neither the text of the instrument nor the explanatory statement (ES) expressly state the manner in which the TLA is incorporated.

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

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

Instrument	**Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015 [F2015L01991]**
Purpose	Aligns the Australian Federal Police's drug and alcohol testing framework with contemporary sample collection and testing procedures
Last day to disallow	11 May 2016
Authorising legislation	*Australian Federal Police Act 1979*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a) and (b)

Access to extrinsic material

Item 32 of Schedule 1 to this regulation repeals and replaces regulation 13V of the Australian Federal Police Regulations 1979.

The ES for the regulation notes that regulation 13V sets out the standard that the Australian Federal Police (AFP) must comply with in relation to collecting and analysing urine samples for the purposes of a prohibited drug test and that the effect of the new regulation is to update the reference to the new standard that applies – the *Australian/New Zealand Standard AS/NZS 4308 – 2008*, 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine'.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally 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.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

While the committee notes that the new regulation 13V is helpful in making it clear which particular version of the standard is relied upon, the committee also notes that the standard in question is only available from SAI Global, on the payment of a fee of

$220.63. 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.

Retrospective effect

Item 7 of Schedule 1 to this regulation inserts new subregulation 5(3), which provides that an AFP employee who is suspended is entitled to be paid remuneration but is not entitled to penalties, composites, overtime or other allowances while suspended.

Item 33 of Schedule 1 inserts application and transitional provisions in relation to the amendments made by the regulation. New subregulation 37(2) provides that the above new provision applies to an AFP employee who is suspended on or after the commencement of these provisions, whether or not the suspension begins on or after the commencement of those provisions. This means that a person who was suspended prior to the commencement of the new provision is subject to requirements that did not apply to them at the time that they were suspended.

The committee's usual approach in cases such as this is to regard the instrument as being retrospective in effect and to asses 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 ES to the instrument states that the amendment is appropriate 'as suspended employees are not performing any duties for the AFP and financial entitlements related to working hours and arrangements should not be payable'. The committee acknowledges that it is appropriate that suspended employees are not entitled to allowances related to working hours and arrangements. However, the committee notes that the provision also removes the entitlement to 'other allowances' while an employee is suspended, and it is unclear whether a suspended employee may have been entitled to other allowances before the commencement of this provision that do not relate to their performance of duties and working hours for the AFP.

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

Instrument	**Australian Immunisation Register Rule 2015 [F2015L01946]**
Purpose	Prescribes the bodies authorised to have access to protected information contained within the register for the purposes of section 4 of the *Australian Immunisation Register Act 2015*
Last day to disallow	11 May 2016
Authorising legislation	*Australian Immunisation Register Act 2015*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

> The Department of Humans Services and the Department of Social Services were consulted in the preparation of this legislative instrument.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003*. In this case, the committee notes that the rule appears to be largely mechanical and relevant to inter-agency relationships. However, the committee considers that the information provided does not describe the nature of the consultation undertaken (such as, for example, the manner, purpose and outcome of the consultation with the Department of Human Services and the Department of Social Services).

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

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

Drafting

This rule was made on 25 November 2015 in reliance on section 31 of the *Australian Immunisation Act 2015*.

Notwithstanding the fact that section 31 of the *Australian Immunisation Act 2015* commenced on 1 January 2016, the rule was made on 25 November 2015; the rule was therefore made in reliance on an empowering provision that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ES to the rule does not identify the relevance of subsection 4(2) to the operation of the instrument.

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

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

Instrument	**Carbon Credits (Carbon Farming Initiative – High Efficiency Commercial Appliances) Methodology Determination 2015 [F2015L01839]**
Purpose	Prescribes rules for implementing offsets projects to avoid greenhouse gas emissions by installing high efficiency appliances in commercial operations
Last day to disallow	15 March 2016
Authorising legislation	*Carbon Credits (Carbon Farming Initiative) Act 2011*
Department	Environment
Scrutiny principle	Standing Order 23(3)(a)

Access to extrinsic material

Section 5 of the determination defines key terms used in the determination. It defines the terms below as follows:

- ***annual coefficient of performance*** and ***annual energy efficiency ratio*** for air conditioners has the meaning given by *AS/NZS 3823.1.1:2012 Performance of electrical appliances – Airconditioners and heat pumps Part 2: Energy labelling and minimum energy performance standards (MEPS) requirements*; and
- ***sensible energy efficiency ratio***, for a close control air conditioner, has the meaning given by A*S/NZS 4965.1:2008 Performance of close control air conditioners. Part 1: Testing for rating.*

The ES to the determination expressly states the manner in which these documents are incorporated, such that in applying a definition that references an Australian/New Zealand Standard, the version of the standard for which the year is specified in the definition applies.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally 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.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

In this respect, the committee notes that the above referenced Australian/New Zealand Standards are published by and available for sale from SAI Global Limited for a fee. However, neither the instrument nor the ES provide information about whether the standards are otherwise freely and readily available.

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

Instrument	**Civil Aviation Legislation Amendment (Part 66) Regulation 2015 [F2015L01992]**
Purpose	Amends Part 66 of the Civil Aviation Safety Regulations 1998 to provide for a small aircraft maintenance engineer licence structure
Last day to disallow	11 May 2016
Authorising legislation	*Civil Aviation Act 1988*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This regulation amends Part 66 of the Civil Aviation Safety Regulations 1998 (CASR) to provide for a small aircraft maintenance engineer licence structure. Item 2 of

Schedule 1 to this regulation substitutes a new subregulation 66.015(1) of CASR, which allows the Civil Aviation Safety Authority (CASA) to issue a 'Manual of Standards' for Part 66, prescribing matters 'required or permitted' or 'necessary or convenient' for Part 66. Item 3 of Schedule 1 makes a further amendment that is consequential on the item 2 amendment. In explaining these amendments, the ES for the regulation states:

> **Item [2] Subregulation 66.015(1)**
>
> Item [2] repeals subregulation (1) and substitutes with a new subregulation (1) to comply with the Office of Parliamentary Counsel's (OPC) current policy for legal drafting used to prescribe matters that may be provided in a MOS instrument issued by CASA under subsection 98(5A) of the *Civil Aviation Act 1988*.
>
> **Item [3] Subregulation 66.015(2)**
>
> Item [3] omits "In particular, a" and substitutes it with "Without limiting subregulation (1), the Part 66" to comply with the OPC's most current style of legal drafting used to prescribe matters that may be provided in a MOS instrument issued by CASA under subsection 98(5A) of the *Civil Aviation Act 1988*.

However, neither the instrument nor the ES state what the 'current policy for legal drafting used to prescribe matters' refers to, or why compliance with the policy requires these amendments.

Scrutiny principle (d) of the committee's terms of reference requires that the committee seek to ensure that instruments do not contain matter more appropriate for parliamentary enactment. In accordance with this principle, the committee has had a longstanding interest in the balance of what matters should be dealt with in primary as opposed to delegated legislation.[1]

The committee seeks further detail from the minister as to the OPC policy referred to in the ES for this regulation and as to why compliance with the policy requires these amendments.

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1 See for example the committee's consideration of the implementation of a general instrument-making power, *Delegated Legislation Monitor*, No. 17 of 2014 (3 December 2014) pp 6–24.

Instrument	**Defence (Security Authorised Members—Military Working Dog Handlers: Training and Qualification Requirements) Determination 2015 [F2015L01943]**
Purpose	Identifies the training and qualification requirements for Military Working Dog Handlers
Last day to disallow	11 May 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	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 section 5(2) of the determination, which provides for the training and qualification requirements for Military Working Dog Handlers, states: '[t]he person must satisfy the training and qualification requirements for a security authorised member of the Defence Force—identification and search warden, as set out in the *Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualification Requirements) Determination 2014*'. However, neither the text of the instrument nor the ES expressly state the manner in which the Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualification Requirements) Determination 2014 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Defence (Security Authorised Members—Identification and Search Wardens: Training and Qualification Requirements) Determination 2014) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**Export Charges (Imposition—General) Regulation 2015 [F2015L01873]** **Export Charges (Imposition—Customs) Regulation 2015[F2015L01876]**
Purpose	The regulations prescribe charges for the export of regulated goods; and prescribe who is liable to pay a specified charge and the persons or classes of persons that are exempt from a charge
Last day to disallow	16 March 2016
Authorising legislation	*Export Charges (Imposition—General) Act 2015; Export Charges (Imposition—Customs) Act 2015*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Access to extrinsic material

Section 5 of each regulation defines key terms used in the regulations. The regulations provide: '***Australian Standard for Meat*** means the *Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption* (AS 4696–2007), published on 31 July 2007'.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally 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.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

In this respect, the committee notes that AS 4696–2007 can be purchased from the Commonwealth Scientific and Industrial Organisation (CSIRO) for a fee. However, neither the instrument nor the ES provide information about whether AS 4696-2007 is otherwise freely and readily available.

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

Instrument	**Farm Household Support Minister’s Amendment Rule 2015 [F2015L01948]**
Purpose	Increases the activity supplement by $1000 for Farm Household Allowance recipients to spend on ‘high value’ activities in their final (third) year of payment
Last day to disallow	11 May 2016
Authorising legislation	*Farm Household Support Act 2014*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Consultation

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

> The Office of Parliamentary Counsel drafted the Amendment Rule. Extensive stakeholder consultation was also undertaken as part of the ACWP [Agricultural Competitiveness White Paper].

In the committee's view, the generalised statement that extensive consultation was undertaken as part of the ACWP is insufficient to meet the requirements of the *Legislative Instruments Act 2003*. Where consultation has taken place, the ES to an instrument should set out the method and purpose of consultation, the bodies, groups and/or individuals consulted and the issues raised in consultations and the outcomes of the consultation process.

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

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

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 36 of 2015 [F2015L01971]** **Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2015 [F2015L01981]** **Financial Sector (Collection of Data) (reporting standard) determination No. 37 of 2015 [F2015L01984]** **Financial Sector (Collection of Data) (reporting standard) determination No. 42 of 2015 - SRS 720.0 - ABS Statement of Financial Position [F2015L01997]** **Financial Sector (Collection of Data) (reporting standard) determination No. 43 of 2015 - SRS 721.0 - ABS Securities Subject to Repurchase and Resale and Stock Lending and Borrowing [F2015L01998]** **Financial Sector (Collection of Data) (reporting standard) determination No. 44 of 2015 - SRS 722.0 - ABS Derivatives Schedule [F2015L01999]**
Purpose	These instruments determine updated reporting standards with which financial sector entities must comply to ensure that data collected for the purposes of the Australian Bureau of Statistics complies with revised international statistical standards
Last day to disallow	11 May 2016
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Department	Treasury
Scrutiny principle	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 interpretation provision in each of these instruments contains the following definition:

> ***defined benefit RSE*** means an RSE that is a defined benefit fund within the meaning given in *Prudential Standard SPS Defined Benefit Matters*.

However, neither the text of the instruments nor the ESs state the manner in which the document referred to is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as *Prudential Standard SPS Defined Benefit Matters*) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**Fisheries Management Amendment (Fees) Regulation 2015 [F2015L01856]**
Purpose	Increases fees for the processing of paper logbooks
Last day to disallow	16 March 2016
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Imposition of fees

The regulation amends the Fisheries Management Regulations 1992 to increase fees for the furnishing of logbooks when electronic communication is not used. The committee notes that Schedule 1, item 1 of the regulation increases the fee for the furnishing of a log book for each fishing day in various Fisheries from $8.40 to $11; from $12 to $18.40; and from $2.40 to $4.00.

The ES to the instrument states:

> Fees are charged per fishing day for the processing of paper logbooks. Fees are not charged for the processing of electronic logbooks as there is little cost associated with processing these records.
>
> Increasing the use of fee for service arrangements increases the incentive to use more cost efficient electronic services. This reduces the overall costs to the fishing industry.

It appears that the primary purpose of the fee increase is to penalise users of paper logbooks to create or increase an incentive to use electronic services. 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 notes that section 168 of the *Fisheries Management Act 1991* (FMA Act) provides that regulations may prescribe fees in respect of various activities under the FMA Act. However, the committee is concerned that this regulation uses a method of encouraging the use of electronic logbooks, by increasing the fee for processing paper logbooks, which may not be authorised under the FMA Act.

In this respect, the committee notes that neither the instrument nor the ES provide information about whether it is both permitted and appropriate for this regulation to apply fees which use an incentive as their basis rather than fees which reasonably reflect the cost of providing the service.

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

Instrument	**Foreign Judgments Amendment (Miscellaneous) Regulation 2015 [F2015L01892]**
Purpose	Amends the Foreign Judgments Regulations 1992 to remove reference to New Zealand's courts and corrects the names of United Kingdom courts
Last day to disallow	10 May 2016
Authorising legislation	*Foreign Judgments Act 1991*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The regulation amends the Foreign Judgments Regulations 1992 to remove the reference to New Zealand as recognition of judgments from New Zealand's courts in Australia is now wholly governed by the *Trans-Tasman Proceedings Act 2010*. The regulation also corrects the names of the United Kingdom courts listed in the Schedule as the names of the courts have changed.

The ES to the regulation states:

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

However, no attachment to the ES is provided.

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

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*.

No description of consultation

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

> The Office of Best Practice Regulation was consulted and a Regulation Impact Statement was not required.

While the committee does not usually interpret section 26 as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislative Instruments Act 2003* (LIA). The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 2.The committee's guideline on the requirement to address the question of consultation under the LIA also states:

> It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

The committee therefore considers that the ES for the instrument provides no information regarding consultation for the purposes of the LIA.

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

Instrument	**Greenhouse and Energy Minimum Standards (Clothes Washing Machines) Determination 2015 [F2015L01816]** **Greenhouse and Energy Minimum Standards (Dishwashers) Determination 2015 [F2015L01825]** **Greenhouse and Energy Minimum Standards (Rotary Clothes Dryers) Determination 2015 [F2015L01828]**
Purpose	The determinations establish energy labelling and associated testing requirements for clothes washing machines, dishwashers and rotary clothes dryers
Last day to disallow	29 February 2016; 1 March 2016; 1 March 2016
Authorising legislation	*Greenhouse and Energy Minimum Standards Act 2012*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)

Access to extrinsic material

Section 3 of the determinations defines key terms used in the determinations.

Section 3 of the first determination defines the terms below as follows:

- ***AS/NZS 2040.1:2005*** means Australian/New Zealand Standard 2040.1:2005 Performance of household electrical appliances – Clothes washing machines – Part 1: Methods for measuring performance, energy and water consumption, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2040.1:2005 is available from Standards Australia Limited.

  Note 2: AS/NZS 2040.1:2005 includes all amendments up to and including AS/NZS 2040.1:2005/Amdt 3:2010 made on 1 April 2012.

- ***AS/NZS 2040.2:2005*** means Australian/New Zealand Standard 2040.2:2005 Performance of household electrical appliances – Clothes washing machines – Part 2: Energy efficiency labelling requirements, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2040.2:2005 is available from Standards Australia Limited.

  Note 2: AS/NZS 2040.2:2005 includes all amendments up to and including AS/NZS 2040.2:2005/Amdt 1:2012 made on 20 June 2012.

Section 3 of the second determination defines the terms below as follows:

- ***AS/NZS 2007.1:2005*** means Australian/New Zealand Standard 2007.1:2005 Performance of household electrical appliances – Dishwashers – Part 1:

Methods for measuring performance, energy and water consumption, as it existed on the date this Determination came into force.

Note: AS/NZS 2007.1:2005 is available from Standards Australia Limited.

- ***AS/NZS 2007.2:2005*** means Australian/New Zealand Standard 2007.2:2005 Performance of household electrical appliances – Dishwashers – Part 2: Energy efficiency labelling requirements, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2007.2:2005 is available from Standards Australia Limited.

  Note 2: AS/NZS 2007.2:2005 includes all amendments up to and including AS/NZS 2007.2:2005/Amdt 1:2012 made on 30 May 2012.

Section 3 of the third determination defines the terms below as follows:

- ***AS/NZS 2442.1:1996*** means Australian/New Zealand Standard 2442.1:1996 Performance of household electrical appliances – Rotary clothes dryers – Part 1: Energy consumption and performance, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2442.1:1996 is available from Standards Australia Limited.

  Note 2: AS/NZS 2442.1:1996 includes all amendments up to and including AS/NZS 2442.1:1996/Amdt 4:2006 made on 8 September 2006.

- ***AS/NZS 2442.2:2000*** means Australian/New Zealand Standard 2442.2:2000 Performance of household electrical appliances – Rotary clothes dryers – Part 2: Energy labelling requirements, as it existed on the date this Determination came into force.

  Note 1: AS/NZS 2442.2:2000 is available from Standards Australia Limited.

  Note 2: AS/NZS 2442.2:2000 includes all amendments up to and including AS/NZS 2442.2:2000/Amdt 2:2007 made on 30 April 2007.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally 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.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

In this respect, the committee notes that the above referenced Australian/New Zealand Standards are published by and available for sale from SAI Global Limited for a fee. However, neither the instrument nor the ES provide information about whether the standards are otherwise freely and readily available.

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

Instrument	**Marine Order 28 (Operations standards and procedures) 2015 [F2015L01947]**
Purpose	Gives effect to parts of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention), the STCW Code and the International Convention for the Safety of Life at Sea (SOLAS) regarding vessel operations standards and procedures
Last day to disallow	11 May 2016
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	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 provisions of this instrument refer to other Marine Orders. However, neither the text of the instrument nor the ES expressly state the manner in which the Marine Orders referred to are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as Marine Orders) can be taken to be references to versions of those instruments as in force from time to time. However, 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.

Access to extrinsic material

Various provisions of the instrument refer to the International Convention on Certification and Watchkeeping for Seafarers (STCW) Convention and the STCW Code.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally 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.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

In this respect, the committee notes that the above referenced STCW Convention and STCW Code can be purchased from the International Marine Organisation for a fee. However, neither the instrument nor the ES provide information about whether the STCW Convention and STCW Code are otherwise freely and readily available.

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

Instrument	**Marine Order 74 (Masters and deck officers — yachts) 2015 [F2015L01895]** **Marine Order 76 (Seafarer certification amendment) 2015 [F2015L01896]**
Purpose	The orders set standards of competence and other conditions to be satisfied by a person to be qualified under the *Navigation Act 2012* to be a master or deck officer for regulated Australian vessels that are yachts
Last day to disallow	10 May 2016
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	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 provisions of both orders refer to other Marine Orders; and various provisions of the first order and Schedule 2, item 1 of the second order refer to the International Convention on Certification and Watchkeeping for Seafarers (STCW) Convention and the STCW Code. However, while the ES for the first order seeks to incorporate the STCW Convention and STCW Code by reference, neither the text of the instruments nor the ESs expressly state the manner in which the documents referred to are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as Marine Orders, STCW Convention and STCW Code) can be taken to be references to versions of those instruments as in force from time to time. However, 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.

Access to extrinsic material

Various provisions of the first order refer to the STCW Convention and the STCW Code; and the second order inserts a new note to subsection 2(1) that also refers to the STCW Convention and the STCW Code.

The committee's expectations where provisions allow the incorporation of legislative provisions by reference to other documents generally 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.

The committee understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make

available copies to users who fall outside of the particular commercial or regulatory sector.

In this respect, the committee notes that the above referenced STCW Convention and STCW Code can be purchased from the International Marine Organisation for a fee. However, neither the instrument nor the ES provide information about whether the STCW Convention and STCW Code are otherwise freely and readily available.

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

Instrument	**Medicines Advisory Statements Specification 2016 [F2015L01916]**
Purpose	Specifies the advisory statements that are required to be set out on the label of medicines (mainly, those other than prescription medicines or certain medicines used mostly in hospitals)
Last day to disallow	11 May 2016
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	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 section 4(2) of the specification defines the 'SUSMP' as the Standard for the Uniform Scheduling of Medicines and Poisons, as set out in Schedule 1 of the current *Poisons Standard*. However, neither the text of the instrument nor the ES expressly state the manner in which the Poisons Standard is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Poisons Standard) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or

persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 [F2015L01961]**
Purpose	Amends the Migration Regulations 1958 to introduce a range of measures to support the new provisions introduced by the *Migration Amendment (Charging for a Migration Outcome) Act 2015*
Last day to disallow	11 May 2016
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)

Retrospective effect

The regulation makes various amendments to the Migration Regulations 1994 to support changes made to the *Migration Act 1958* by the *Migration Amendment (Charging for a Migration Outcome) Act 2015*. The ES states that the latter Act makes it unlawful for a person to ask for, receive, offer or provide a benefit in return for a migration outcome ('payment for visas' conduct) in relation to certain skilled visa programs.

Item 52 of Schedule 1 to the regulation inserts a new item into Schedule 13 to the Migration Regulations 1958 dealing with the application of the amendments made by the regulation. New paragraph 5101(4)(a) provides that the amendments made by various items of Schedule 1 to this regulation apply to an application for a visa made, but not finally determined, before the commencement of those items (i.e. 14 December 2015).

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 visa was made on or before 14 December 2015 is now subject to criteria for the grant of the visa that did not apply at the time of their application.

The committee's usual approach in cases such as this is to regard the instrument as being retrospective in effect and to asses 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 notes that the ES for the regulation does not address this issue.

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

Instrument	**Primary Industries (Excise) Levies Amendment (Sweet Potatoes, Chestnuts and Olives) Regulation 2015 [F2015L02039]** **Primary Industries (Customs) Charges Amendment (Sweet Potatoes and Chestnuts) Regulation 2015 [F2015L02040]**
Purpose	These regulations amend the Primary Industries (Excise) Levies Regulations 1999 and the Primary Industries (Customs) Charges Regulations 2000 to introduce a new statutory levy and a new export charge on sweet potato growers, increase the Emergency Plant Pest Response levy on chestnuts and name the Australian Olive Association as the eligible industry body for olives
Last day to disallow	11 May 2016
Authorising legislation	*Primary Industries (Excise) Levies Act 1999; Primary Industries (Customs) Charges Act 1999*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulations amend the Primary Industries (Excise) Levies Regulations 1999 and the Primary Industries (Customs) Charges Regulations 2000 respectively, to introduce a new statutory levy and export charge on sweet potato growers and increase the Emergency Plant Pest Response (EPPR) levy on chestnuts. Item 5 of Schedule 1 of the first regulation provides for marketing, vegetable research and development (R&D) and Plant Health Australia (PHA) components of levy to be set at 1, 0.485 and 0.0150 per cent, respectively, of the amount paid for the sweet potatoes at the first point of sale.

The ES to the first instrument states:

> Previously, there was no Australian Government marketing levy or charge on sweet potatoes…Sweet potatoes are now a separate leviable horticultural commodity with R&D and marketing component of levy and with scope for a PHA and an EPPR component of levy (Part 30 of Schedule 15 of the Regulation).
>
> HIA Ltd [Horticulture Innovation Australia Ltd] is the relevant industry services body for the administration of the sweet potato industry levies and charges for marketing and is the body to manage money collected from this levy and charge imposed on sweet potato growers…The Regulation implements a levy component to be paid to HIA Ltd on fresh sweet potatoes at a marketing rate of levy of one per cent (1%) of the value of the sweet potato at the first domestic point of sale. The sweet potato marketing

> levy and export charge is expected to raise approximately $800 000 annually.

In relation to the charge, the ES to the second instrument states:

> The Regulation implements an export charge, to be paid to HIA Ltd, on fresh sweet potatoes at a rate of charge of one per cent (1%) of the free on board value of the sweet potatoes immediately before export.

While the committee notes that the purpose of both the levy and export charge is generally to fund marketing, 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.

Instrument	**Primary Industries Levies and Charges Collection Amendment (Sweet Potatoes and Honey) Regulation 2015 [F2015L02041]**
Purpose	Sets details for the payment by growers of a new statutory levy and export charge on sweet potatoes to fund marketing activities and increases the estimated revenue threshold below which a honey levy payer is eligible to apply for exemption from lodging quarterly returns
Last day to disallow	11 May 2016
Authorising legislation	*Primary Industries Levies and Charges Collection Act 1991*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(b)

Insufficient information regarding strict liability offences

The regulation creates a new strict liability offence for failing to keep records. The offence carries a penalty of 10 penalty units (or $1700).

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

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

Instrument	**Quarantine Charges (Imposition—Customs) Amendment (Cost Recovery) Regulation 2015 [F2015L01864]**
Purpose	Adjusts and prescribes new charges for matters connected with the administration of the *Quarantine Act 1908*; and prescribes who is liable to pay a specified charge and the persons or classes of persons that are exempt from a charge
Last day to disallow	16 March 2016
Authorising legislation	*Quarantine Charges (Imposition—Customs) Act 2014*
Department	Agriculture and Water Resources
Scrutiny principle	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 Schedule 1, item 5 of the regulation defines quarantine station as a place appointed as a quarantine station by *Quarantine Proclamation 1998*. However, neither the text of the instrument nor the ES expressly state the manner in which the Quarantine Proclamation is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as the Quarantine Proclamation 1998) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**Social Security (Administration) (Trial Area - Ceduna and Surrounding Region) Determination 2015 [F2015L01836]**
Purpose	Declares Ceduna and the Surrounding Region as a trial area for the cashless welfare debit card trial
Last day to disallow	3 March 2016
Authorising legislation	*Social Security (Administration) Act 1999*
Department	Social Services
Scrutiny principle	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 section 4 of the instrument refers to the *Local Government Act 1999* (SA) (LGA). However, neither the text of the instrument nor the ES expressly state the manner in which the LGA is incorporated.

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

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

Instrument	**Southern Squid Jig Fishery Total Allowable Effort Determination 2015 [F2015L01945]**
Purpose	Determines the total allowable effort in the Southern Squid Jig Fishery for the 2016 fishing year
Last day to disallow	11 May 2016
Authorising legislation	*Fisheries Management Act 1991*; *Southern Squid Jig Fishery Management Plan 2005*
Department	Agriculture and Water Resources
Scrutiny principle	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 section 4 of the determination provides: '[t]erms used in this Determination that are defined for the purposes of the *Southern Squid Jig Fishery Management Plan 2005* have the same meanings in this Determination as they have in that Plan'. However, neither the text of the instrument nor the ES expressly state the manner in which the Southern Squid Management Plan 2005 is incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislative Instruments Act 2003*) has the effect that reference to external documents which are Commonwealth disallowable instruments (such as Southern Squid Jig Fishery Management Plan 2005) can be taken to be references to versions of those instruments as in force from time to time. However, the committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

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

Instrument	**Therapeutic Goods Amendment (Listed Medicines) Regulation 2015 [F2015L01909]**
Purpose	Specifies the ingredients that can be used in medicines listed on the Australian Register of Therapeutic Goods under section 26A of the *Therapeutic Goods Act 1989* and requirements in relation to those ingredients being contained in such medicines
Last day to disallow	10 May 2016
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

The regulation amends the Therapeutic Goods Regulations 1990 to specify the ingredients that can be used in medicines listed on the Australian Register of Therapeutic Goods and requirements in relation to those ingredients being contained in such medicines. Item 14 of the regulation prescribes evaluation fees for an application or variation under subsection 26BD(1) of the *Therapeutic Goods Act 1989* in relation to an ingredient of excipient. The application fees range from $9870 to $69 000.

The ES to the instrument states:

> The level of these fees reflects the current level of fees charged in the evaluation of ingredients or new excipients under regulation 16GA of the Principal Regulations.

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. Regulation 16GA of the Therapeutic Goods Regulations 1990 provides for the imposition of an evaluation fee, however, it does not provide the basis on which that fee is to be calculated.

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

Further response required

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	**ASIC Corporations (Division 4 Financial Products) Instrument 2015/1030 [F2015L01771]**
Purpose	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 *Corporations Act 2001*
Last day to disallow	25 February 2016
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 16 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 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.

Assistant Treasurer's response

The Assistant Treasurer advised:

> ASIC Legislative Instrument 2015/1030, which was prepared and issued by the Australian Securities and Investments Commission (ASIC), makes reference to extrinsic material by way of the definition of "AQUA Quote Display Board", which is defined as having 'the meaning given by the operating rules of ASX'.
>
> The 'operating rules of ASX' refer to the operating rules of the market licensee, ASX Limited, created for the purposes of satisfying section 793A of the *Corporations Act 2001* (the Act). Operating rules of a financial market are defined by the Act as '*any rules (however described), including the market's listing rules (if any), that are made by the operator of the market, or contained in the operator's constitution and that deal with the activities or conduct of the market; or the activities or conduct of persons in relation to the market*' (section 761A). They are binding and have the effect of a contract underseal between ASX and market participants (e.g. brokers).
>
> ASIC Legislative Instrument 2015/1030 regulates and facilitates the transfer through ASX Settlement Pty Ltd (ASXS) of certain classes of financial products. The parties that facilitate and engage in the trading of these financial products - i.e. ASXS and other clearing and settlement facilities, as well as market operators (e.g. the ASX) and market participants - should therefore understand what is meant by the term 'operating rules of ASX' and should be familiar with the content of these operating rules.
>
> I have raised this issue with ASIC, who have advised that it is common practice for ASIC to refer to the operating rules of a facility in legislative instruments that it drafts. In ASIC's view, the definition of "AQUA Quote Display Board" in ASIC Legislative Instrument 2015/1030, by merely referring to the operating rules of ASX, does not amount to an incorporation of matter by reference to the operating rules of ASX within the meaning of Section 14 of the *Legislative Instruments Act 2003*.
>
> In drafting a legislative instrument, ASIC's test is whether the content of any extrinsic document or material (in this case, the operating rules of ASX) affects the operation of the legislative instrument. A mere reference in a legislative instrument to another document does not apply, adopt or incorporate that extrinsic document. The definition of "AQUA Quote Display Board" is relevant only for the purposes of identifying a certain class of financial products (warrants and interests in unregistered managed investment schemes) to which ASIC Legislative Instrument 2015/1030 relates.

Committee's response

The committee thanks the Assistant Treasurer for her response.

The committee notes the advice that, in determining whether a document is incorporated by reference, ASIC applies a test to determine whether the content of the document affects the operation of the instrument.

However, the committee notes that the definition of 'AQUA Quote Display Board' could be said to affect the operation of the instrument, because it determines whether a certain class of financial products is subject to the instrument's provisions. It is therefore unclear to the committee the basis on which the definition cited may be regarded as not affecting the operation of the instrument.

The committee requests the further advice of the Assistant Treasurer in relation to this matter.

Instrument	**Charter of the United Nations (Sanctions—Syria) Regulation 2015 [F2015L01463]** **Charter of the United Nations (Sanctions—Iraq) Amendment Regulation 2015 [F2015L01464]**
Purpose	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
Last day to disallow	10 May 2016
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitors* No. 14 and 16 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 first 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 first 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.

Minister's second response

The Minister for Foreign Affairs advised:

> The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015) (the Resolution) and Australia is under an international obligation to implement the terms of the Resolution into Australian law. The *Charter of the United Nations Act 1945* only provides authority to implement the terms of each UN Security Council Resolution in accordance with Australia's international legal commitments. To give additional definition to the term 'illegally removed' would go beyond the scope and meaning provided in the Resolution. The drafting of the Regulations was consistent with the drafting of the *Charter of the United Nations (Sanctions-Iraq) Regulation 2008* and is in accordance with the implementation of the Resolution by like-minded states.

Committee's second response

The committee thanks the minister for her response.

However, scrutiny principle (b) of the committee's terms of reference requires the committee to ensure that the exercise of the Parliament's delegated legislative powers does not trespass unduly on personal rights and liberties.

In this regard, the committee's request of the minister effectively sought an explanation of the scope and operation of the term 'illegally removed cultural property' as it is unclear to the committee 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.

First, while the minister's response advises that the term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015), a review of Resolution 2199 (2015) does not assist the committee to understand its meaning. In this regard, the minister does not address the committee's concerns that the term 'illegally removed' 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).

Second, the minister's response advises that 'to give additional definition to the term 'illegally removed' would go beyond the scope and meaning provided in the resolution'. However, the committee notes that the UN Security Council's 7379th meeting, in which resolution 2199 (2015) was adopted, states:

> …by imposing a new ban on the trade in smuggled Syrian antiquities, the resolution both cuts off a source of ISIL revenue and helps to protect an

> irreplaceable cultural heritage of the region and the world. To help stop that trade, the United States has sponsored the publication of so-called emergency red lists of Syrian and Iraqi antiquities at risk, which can help international law enforcement catch antiquities trafficked out of those countries.

The committee understands this to mean that further documents exist (that is, emergency red lists) that may assist in clarifying the items to which this regulation may apply. The committee therefore remains concerned that the definition of the term 'illegally removed' in these instruments is unclear. As previously noted, the committee 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.

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 first 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 first response

The committee thanks the minister for her response.

The committee notes the minster'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).[2] 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.

Minister's second response

The Minister for Foreign Affairs advised:

> 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 (under Regulation 5 of the Syria Regulations). The Committee noted this offence was also designated a UN Sanction Enforcement Law. This occurred as the result of a drafting error. To clarify this issue, I have made a revised UN Sanction Enforcement Law Declaration which removes Regulation 5 of the Syria Regulation as a UN Sanction Enforcement Law. Accordingly, the penalty for this Regulation will be the same as for the Iraq Regulations, making it appropriate that it be subject to strict liability.

Committee's second response

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

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2 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.

The committee notes that the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2015 (No. 3) [F2015L02098], made on 17 December 2015, appears to give effect to the minister's undertaking in relation to the drafting error concerning a penalty of ten years imprisonment and/or a fine of up to 2500 penalty units (or $450 000).

Instrument	**Excise (Mass of CNG) Determination 2015 (No. 1) [F2015L01733]** **Excise (Volume of Liquid Fuels - Temperature Correction) Determination 2015 (No. 1) [F2015L01732]** **Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1) [F2015L01745]**
Purpose	These instruments specify methods for determining the volume or mass of particular excisable substances
Last day to disallow	22 February 2016
Authorising legislation	*Excise Act 1901*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 15 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 the first instrument refers to the:

- Australian Standard/International Organization for Standardization AS ISO 13443-2007, *Natural gas – Standard reference conditions*; and
- International Organization for Standardization ISO 6976-1995 *Natural gas – Calculation of calorific values, density and Wobbe index from composition*.

The second instrument refers to the American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables Volume Correction Factors, Volume VIII* and *Practical Alcohol Tables*.

The third instrument refers to the:

- American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables for Light Hydrocarbon Liquids – Density Range 0.500 to 0.653 Kg/L at 15º C*; and
- American Petroleum Institute (API) *Manual of Petroleum Measurement Standards, Chapter 11.2.2M – Compressibility Factors for Hydrocarbons: 350-637 kg/m3 Density (15º C) and -46º C to 60º C metering temperature*.

However, while the ESs for the instruments include a hyperlink to these documents as at the time of their publication, neither the text of the instruments nor the ESs expressly state the manner in which the documents are incorporated.

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

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

Assistant Treasurer's response

The Assistant Treasurer advised:

> The legislative instruments provide the rules for how fuel is to be measured for the purposes of paying excise duty. These new instruments are identical in effect to the former instruments and have been developed merely to reflect minor technical amendments following the commencement of the *Excise Regulation 2015* and the *Excise Tariff Amendment (Ethanol and Biodiesel) Act 2015*.
>
> The material referenced in each of the determinations is incorporated through necessity as they contain numeric correction tables or standard procedures that are required to consistently determine the quantity of each product upon which excise is payable. The use of these referenced materials in the instruments is explained in more detail and exemplified in each explanatory statement. As noted in the Delegated legislation monitor, in the appendices of each explanatory statement hyperlinks are provided where each published standard reference may be purchased.
>
> Each determination specifies quantitative thresholds that must be reached prior to the prescribed requirement for the use of the above correction factors or standard procedures. As such, the users or persons affected by these instruments are limited to large bulk fuel suppliers that currently use the described processes for the internationally accepted standardisation of gaseous and liquid fuels as part of their normal business practice. These major fuel manufacturers and suppliers have a clear understanding of the stated requirements and were consulted during the original development of the instruments.

The Assistant Treasurer also provided a number of examples where the referenced materials are incorporated within the instruments.

Committee's response

The committee thanks the Assistant Treasurer for her response.

However, the Assistant Treasurer's response has not addressed the concern raised by the committee—namely whether the documents referred to are incorporated as in force from time to time or as in force at a particular date.

In this regard, the committee reiterates its previous comments that neither the instrument nor the ES expressly states the manner of incorporation of the documents in question. The committee's usual expectation where an instrument incorporates extrinsic material by reference is that the manner of incorporation is clearly specified in the instrument and, ideally, in the ES. The committee regards this as a best-practice approach that enables anticipated users or persons affected by any such instrument to understand its operation without the need to rely on specialist legal knowledge or advice or to necessarily consult extrinsic material.

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

Instrument	**International Organisations (Privileges and Immunities—Asian Infrastructure Investment Bank) Regulation 2015 [F2015L01737]**
Purpose	Provides privileges and immunities to the Asian Infrastructure Investment Bank (the bank) to give effect to Australia’s obligations as a prospective member of the bank and facilitating Australia’s ratification of the bank's Articles of Agreement
Last day to disallow	22 February 2016
Authorising legislation	*International Organisations (Privileges and Immunities) Act 1963*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 15 of 2015

Sub-delegation

The committee commented as follows:

Section 13 of the regulation provides that the minister may, by writing, delegate his or her powers under paragraphs 9(1)(b) and (5)(b) of the instrument to 'a person'. Section 9 of the regulation enables the minister to set requirements for the Asian Infrastructure Investment Bank to receive indirect tax concessions for the acquisition of motor vehicles, goods and services.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the ES for the instrument provides no justification for the broad delegation of the minister's powers under paragraphs 9(1)(b) and (5)(b) of the regulation to 'a person'.

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

Minister's response

The Minister for Foreign Affairs advised:

> Section 13 of the regulation is similar to the delegation provisions set out in other regulations governing the presence of international bank organisations operating in Australia (section 11 of the *European Bank for Reconstruction and Development (Privileges and Immunities) Regulations 1992* and section 9A of the *Asian Development Bank (Privileges and Immunities) Regulations 1967)*. Section 13 of the regulation was simplified in line with modern drafting practice, relying on section 34AB of the *Acts Interpretation Act 1901* (when read together with section 13 of the *Legislative Instruments Act 2003*).
>
> In October 2013, I signed an Instrument of Delegation revoking all previous delegations and delegating my powers and functions under the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to the SES employee, or acting SES employee, from time to time holding, occupying or performing the duties of the position of Chief of Protocol in the Department of Foreign Affairs and Trade (DFAT). When the regulation commences, this instrument of delegation will be updated to include it in the list of regulations made under the Act, thereby empowering the Chief of Protocol to exercise certain of my powers and functions under the regulation.
>
> The Chief of Protocol will thus be empowered to make decisions on a narrow range of matters involving the indirect tax concession scheme (ICTS). These matters apply only to the ability of the Asian Infrastructure Investment Bank to claim indirect tax benefits when operating in Australia. They have very limited financial implications and do not affect the broader Australian community.

Committee's response

The committee thanks the minister for her response.

However, notwithstanding the minister's delegation powers and functions under the *International Organisations (Privileges and Immunities) Act 1963* to the SES employee, or acting SES employee, from time to time holding, occupying or performing the duties of the position of Chief of Protocol in the Department of Foreign Affairs and Trade, it remains unclear to the committee why it is necessary for there to be such a broad delegation of the minister's powers under paragraphs 9(1)(b) and 5(b) of the instrument to 'a person'. The committee notes that the minister's intention appears to be for the Chief of Protocol in the Department of Foreign Affairs and Trade to exercise the powers delegated by the instrument. However, it remains unclear to the committee why this has not been provided for in the instrument itself.

The committee reiterates its expectations regarding sub-delegation that accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

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

Advice only

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulation 2015 [F2015L02001]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Agriculture and Water Resources
Last day to disallow	11 May 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(d)

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—previously unauthorised expenditure

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

The instrument adds a new item to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities. New table item 113 to Part 4 of Schedule 1AB appears to authorise expenditure not previously authorised by legislation. This item establishes legislative authority for the Commonwealth government to fund activities to improve the management of established pest animals and weeds. Funding for the activities will be drawn from $50 million for the management of established pest animals and weeds announced in the Agricultural Competitiveness White Paper, which was released on 4 July 2015. Funding details will be set out in the *Portfolio Additional Estimates Statements 2015‑16, Agriculture and Water Resources Portfolio*.

The committee considers that, prior to the enactment of the *Financial Framework Legislation Amendment Act (No. 3) 2012*, this program would properly have been contained within an appropriation bill not for the ordinary annual services of

government, and subject to direct amendment by the Senate. The committee will draw these matters to the attention of the relevant portfolio committees.

The committee therefore draws the attention of the Senate to the expenditure authorised by this instrument.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Employment Measures No. 1) Regulation 2015 [F2015L02008]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Employment
Last day to disallow	11 May 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(d)

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997—previously unauthorised expenditure

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

The instrument adds new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities. New table items 123-129 and 133-135 appear to authorise the redirection of existing funding to new or continuing programs. However, the remaining three items appear to be expenditure not previously authorised by legislation:

- New table item 130 to Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Engaging Early School Leavers Programme, which aims to improve the educational outcomes and employment prospects for those who have not completed high school, by ensuring they are either studying or looking for work. Funding of $13.5 million has been allocated to the program over four years from 2015-16, and it is to be administered by the Department of Employment.
- New table item 131 to Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Transition to Work

Programme, which provides intensive, pre-employment support to improve the work readiness of young people and to help them into work or education. Funding of $212 million has been allocated to the program for four years from 2015-16, and it is to be administered by the Department of Employment.

- New table item 132 to Part 4 of Schedule 1AB establishes legislative authority for the Commonwealth government to fund the Empowering YOUth Initiatives Programme, which will provide assistance for vulnerable young job seekers in areas of entrenched youth disadvantage. Funding of $55.2 million has been allocated to the program for five years from 2015-16, and it is to be administered by the Department of Employment.

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

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

- **Engaging Early School Leavers;**
- **Transition to Work; and**
- **Empowering YOUth Initiatives.**

Instrument	**Foreign Acquisitions and Takeovers Regulation 2015 [F2015L01854]** **Foreign Acquisitions and Takeovers Legislation Amendment Regulation 2015 [F2015L01860]** **Foreign Acquisitions and Takeovers Legislation (Transitional) Rule 2015 [F2015L01884]**
Purpose	The instruments prescribe definitions, exemptions, and time limits for decision making, and provide for the Australian Electoral Commission to disclose information from the Electoral Rolls to the Australian Taxation Office and the Department of the Treasury for the purposes of administering Australia's Foreign Investment Framework
Last day to disallow	16 March 2016
Authorising legislation	*Commonwealth Electoral Act 1918; Foreign Acquisitions and Takeovers Act 1975; Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

These instruments were made on 26 and 30 November 2015 in reliance on subsection 139(1) of the *Foreign Acquisitions and Takeovers Act 1975* and item 13 of Schedule 3 of the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*.

Notwithstanding the fact that subsection 139(1) of the *Foreign Acquisitions and Takeovers Act 1975* and item 13 of Schedule 3 of the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* commenced on 1 December 2015, the instruments were made on 26 and 30 November 2015; the regulations were therefore made in reliance on empowering provisions that had not yet commenced. While this approach is authorised by subsection 4(2) of the *Acts Interpretation Act 1901* (which allows, in certain circumstances, the making of legislative instruments in anticipation of the commencement of relevant empowering provisions), the ESs to the regulations do not identify the relevance of subsection 4(2) to the operation of the regulations.

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

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

Instrument	**Health Insurance (Diabetes Testing in Aboriginal and Torres Strait Islander Primary Health Care Sites) Determination 2015 [F2015L01837]**
Purpose	Amends the Quality Assurance in Aboriginal and Torres Strait Islander Medical Services pathology programme to allow for use of the glycosylated haemoglobin (HbA1c) test for the diagnosis of diabetes
Last day to disallow	15 March 2016
Authorising legislation	*Health Insurance Act 1973*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES for the regulation states:

> Flinders University advised that the use of the HbA1c test to diagnose patients who are at risk of diabetes, when the patient is visiting a clinic for other reasons, would make a significant improvement to the care of previously undiagnosed patients…
>
> The Act specifies no conditions which need to be met before the power to make the Determination may be exercised.

In effect, it appears that consultation (within the general meaning of public consultation or consultation with stakeholders) was unnecessary in this instance because the inclusion of the HbA1c test to diagnose patients who are at risk of diabetes, essentially reflects the advice provided by Flinders University.

While the information regarding this advice, and the fact that the Act specifies no conditions regarding consultations, is usefully included in the ES, in terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

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

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

Instrument	**Marine Order 11 (Living and working conditions on vessels) Amendment 2015 (No. 1) [F2015L01950]**
Purpose	Amends Marine Order 11 (Living and working conditions on vessels) 2015 to update references to Marine Orders 15 and 28
Last day to disallow	11 May 2016
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of extrinsic material

The committee thanks the Australian Maritime Safety Authority for amending Marine Order 11 (Living and working conditions on vessels) 2015 to update references to Marine Order 15 and Marine Order 28 which the committee commented on in *Delegated legislation monitors* No. 7 and 8 of 2015.

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

In this context, the committee notes the Deputy Prime Minister's previous advice that clarifies that the instrument is intended to incorporate current Marine Order 15 as amended from time to time; and that this is provided for under section 14 of the *Legislative Instruments Act 2003*.[3]

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

Instrument	**National Health (Concession or entitlement card fee) Amendment Determination 2015 (No. 1) (PB 124 of 2015) [F2015L01935]**
Purpose	Replaces the fee payable to approved suppliers for issuing pharmaceutical benefits entitlement cards and/or safety net concession cards during the 2016 calendar year
Last day to disallow	11 May 2016
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

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

> The Sixth Community Pharmacy Agreement has no provisions relating to determining the fee for issuing these cards.

3 See *Delegated legislation monitor* No. 8 of 2015, entry on Marine Order 11 (Living and working conditions on vessels) 2015 [F2015L00609], pp 38–40.

> The Pharmacy Guild of Australia has been consulted on this matter as required under subsection 84HA(2) of the Act, and has agreed in writing, to the amendment made by this Determination.

In effect, it appears that consultation (within the general meaning of public consultation or consultation with stakeholders) was unnecessary in this instance because the instrument essentially replaces the current fee payable to approved suppliers for issuing pharmaceutical benefits entitlement cards and safety net concession cards during the 2016 year.

While the information regarding the Pharmacy Guild Australia, and the fact that the Sixth Community Pharmacy Agreement specifies no conditions regarding determining fees for issuing these cards, is usefully included in the ES, in terms of complying with sections 17 and 18 of the *Legislative Instruments Act 2003*, the committee considers it would be better for the ES to have also explicitly stated, with a supporting explanation, that consultation was considered unnecessary or inappropriate in this case.

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

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

Instrument	**National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No. 2) [F2015L01901]**
Purpose	Amends National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No. 1) (PB 89 of 2015) to correct the word ‘few’ to ‘fewer’
Last day to disallow	10 May 2016
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)

Retrospectivity

This determination corrects a misdescribed amendment in the National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No. 1) (PB 89 of 2015) by correcting the word 'few' to 'fewer' in item 17 of that determination and commences retrospectively on 10 November 2015.

Subsection 12(2) of the *Legislative Instruments Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than

the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth. However, in this case the committee notes that the amendments appear to be minor and beneficial in their effect.

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

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

Instruments	AASB 2015-8 - Amendments to Australian Accounting Standards - Effective Date of AASB 15 - October 2015 [F2015L01840] AASB 2015-9 - Amendments to Australian Accounting Standards – Scope and Application Paragraphs [F2015L01832] Admiralty Amendment (Electronic Communication) Rules 2015 [F2015L01883] ASA 2015-1 - Amendments to Australian Auditing Standards - December 2015 [F2015L02032] ASIC Corporations (Amendment and Repeal) Instrument 2015/876 [F2015L01835] ASIC Corporations (Amendment and Repeal) Instrument 2015/1079 [F2015L01983] Australian Meat and Live-stock Industry (High Quality Beef Export to the European Union) Amendment (Fees) Order 2015 [F2015L01886] CASA EX186/15 - Exemption — side-facing seats on aircraft not occupied for take-off or landing [F2015L01906] Civil Aviation Order 48.1 Amendment Instrument 2015 (No. 1) [F2015L01829] Export Control (Fees) Order 2015 [F2015L01881] Export Control (Plants and Plant Products) Amendment (Registered Establishments) Order 2015 [F2015L01885] Fair Work Act 2009 - Direction to Inspectors (19/11/2015) [F2015L01907] Farm Household Support Minister’s Amendment Rule 2015 [F2015L01948] Health Insurance (Diabetes Testing in Aboriginal and Torres Strait Islander Primary Health Care Sites) Determination 2015 [F2015L01837] Military Rehabilitation and Compensation (Specification In Relation To Definition of Specified Number) Instrument 2015 [F2015L01942] National Health (Australian Community Pharmacy Authority Rules) Amendment Determination 2015 (No. 2) [F2015L01901]

	National Health (Concession or entitlement card fee) Amendment Determination 2015 (No. 1) (PB 124 of 2015) [F2015L01935]
	National Health (Weighted average disclosed price – April 2016 reduction day) Determination 2015 (PB 126 of 2015) [F2015L02033]
	Quarantine Service Fees Amendment (Cost Recovery) Determination 2015 [F2015L01887]
	Quarantine Service Fees (Australia Post) Amendment (Cost Recovery) Determination 2015 [F2015L01888]
	Radiocommunications (Duration of Community Television Transmitter Licences) Determination (No. 1) of 2008 (Amendment No. 1 of 2015) [F2015L02049]
	Social Security (Employment Pathway Plan Requirements) Determination 2015 [F2015L02029]
	Vehicle Standard (Australian Design Rule 43/04 – Vehicle Configuration and Dimensions) 2006 Amendment 2 [F2015L01934]
	Vehicle Standard (Australian Design Rule 57/00 - Special Requirements for L-Group Vehicles) 2006 Amendment 1 [F2015L01933]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

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

> Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[4]

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

Chapter 2
Concluded matters

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

Correspondence relating to these matters is included at Appendix 1.

Instrument	**CASA EX174/15 - Exemption — from welding training for grant of aircraft welding authority [F2015L01699]**
Purpose	Exempts a class of applicants for an aircraft welding authority from the requirement to have completed welding training as prescribed in Civil Aviation Regulations 1988
Last day to disallow	22 February 2016
Authorising legislation	*Civil Aviation Safety Regulations 1998*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* No. 15 of 2015

Timetable for making substantive amendments to Civil Aviation Regulations 1988

The committee commented as follows:

The instrument exempts an aircraft welding authority applicant who previously held an aircraft welding authority from the training requirement prescribed in Civil Aviation Regulations 1998 (CAR 1988). In doing so, the instrument creates an exemption so that applicants with an expired welding authority will not incur the cost or inconvenience of undertaking further training, which they would have avoided if their welding authority had not expired.

The ES for this instrument states:

> CASA is considering updating the legislation covering maintenance permissions for aircraft welding, including making it capable of being responsive to changes in technology and practice. CASA intends to propose amendments to CAR 1988 to make the necessary changes. This instrument has been made in anticipation of those more extensive changes.

The committee generally prefers that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation. Given the committee's general expectation in this regard, the committee notes that the

instrument grants the exemption from the welding training as prescribed in CAR 1988 until the end of September 2017; however, no information is provided as to the expected timetable for the proposed amendments to CAR 1988.

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

Minister's response

The Deputy Prime Minister and Minister for Infrastructure and Regional Development advised:

> I note the concerns of the Committee that exemptions should not be used in place of amendments to principal legislation.
>
> I am advised that EX174/15 was made in October 2015 in its current form to provide immediate relief to industry, pending the introduction of amending regulations to formalise arrangements relating to welding training requirements. I am further advised that CASA expects to begin preparing the relevant amending regulations, in consultation with industry, next financial year.
>
> I am aware that the Committee places considerable reliance on explanatory statements to understand legislative instruments and to assess their purpose. Accordingly, I have requested of CASA that, where possible, future explanatory statements contain greater clarity around the expected timing of associated regulatory amendments.

Committee's response

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

The committee also thanks the minister for requesting CASA, where possible, to provide greater clarity around the expected timing of associated regulatory amendments in future explanatory statements.

Instrument	**Insurance (prudential standard) determination No. 1 of 2015 - Prudential Standard GPS 320 - Actuarial and Related Matters [F2015L01768]**
Purpose	Sets out the roles and responsibilities of an Actuary and determines actuarial review requirements
Last day to disallow	25 February 2016
Authorising legislation	*Insurance Act 1973*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 16 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 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.

Assistant Treasurer's response

The Assistant Treasurer advised:

> APRA Prudential Standard OPS 320, which was issued by the Australian Prudential Regulation Authority (APRA), references a number of other APRA Prudential Standards- specifically 'Prudential Standards GPS 001, GPS 110, GPS 112, GPS 114, OPS 115, OPS 116, GPS 230, OPS 310, OPS 320, and CPS 520'.
>
> I have raised this issue with APRA who have advised that APRA Prudential Standard GPS 320 was developed as a technical document for reference by actuaries and insurers and forms part of APRA's prudential framework for general insurers, along with other documents referred to in APRA Prudential Standard GPS 320. APRA Prudential Standard GPS 320 is directed at actuaries and staff at insurers who have specialist technical skills and knowledge of the prudential framework and this specialisation is necessary for those individuals to be appointed to such positions in APRA-regulated insurers.
>
> All references to other prudential standards in APRA Prudential Standard GPS 320 refer to those prudential standards as in force from time to time, and APRA is confident this would be understood by the intended users of the standards. In many cases, APRA Prudential Standard GPS 320 references requirements in other relevant prudential standards to assist the reader by adding context and not for the purpose of incorporating those other documents by reference. For the reasons outlined above, APRA

> considers that including further description in the explanatory statement would be appropriate for this instrument. APRA will include further description in a revised explanatory statement and will also include further explanation, where appropriate, for future instruments.

Committee's response

The committee thanks the Assistant Treasurer for her advice and has concluded its examination of this instrument.

The committee also thanks the Assistant Treasurer for her advice that APRA will issue a revised explanatory statement for this instrument which will include further description of the referenced APRA Prudential Standards, and that where appropriate for future instruments descriptions of referenced APRA Prudential Standards will be included.

Instrument	**Migration Agents Regulations 1998 - Declaration of value of activities, fees for assessments and standards for professional development activities 2015 - IMMI 15/106 [F2015L01710]**
Purpose	Updates matters for migration agents in relation to the value of activities, fees for assessments and standards for professional development activities
Last day to disallow	22 February 2016
Authorising legislation	Migration Agents Regulations 1998
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 15 of 2015

Unclear basis for determining fees

The committee commented as follows:

The instrument specifies the fee for performing assessments of migration agents' activities for continuing professional development. The committee notes that the fee will be $99, which is the same as the fee specified in a previous instrument. However, the ES does not explicitly state the basis on which the fee has been calculated.

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.

Minister's response

The Minister for Immigration and Border Protection advised:

> Part 3A of the Migration Agents Regulations 1998 (the Regulations) outlines the approved activities in relation to the continuing professional development of registered Migration Agents. Regulation 9F of Part 3A of the Regulations outlines the assessment of an activity before the Minister's decision approving that activity is made. If the Minister considers approving an activity at the request of a provider of that activity and assesses the activity (and in subregulation 9F(2) specifies the activity as an approved activity), the Minister may charge the provider a fee for performing the assessment of the activity as specified in an instrument in writing.
>
> The fee specified by the Minister in the instrument in writing has not changed since last varied on 21 July 2003 when the fee was set at $99. This amount was set to recover a greater proportion of the cost of assessing and approving continuing professional development activities that can be considered approved activities. This instrument is not setting or calculating a new fee. The fee remains at $99. If the fee is recalculated in the future, a basis for calculating the fee will be articulated in the accompanying Explanatory Statement.

Committee's response

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

The committee also thanks the minister for his advice that if the fee is recalculated in future instruments the ES will state the basis on which the fee has been calculated.

Instrument	**Removal of Prisoners (Territories) Regulation 2015 [F2015L01524]**
Purpose	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
Last day to disallow	10 May 2016
Authorising legislation	*Removal of Prisoners (Territories) Act 1923*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* No. 14 and 16 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*.

Minister's second response

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

> I have also instructed the Department to ensure that the Explanatory Statement for the Removal of Prisoners (Territories) Regulation 2015 is amended to reflect the consultation that was undertaken for the purposes of making this instrument. The Department will make the updated Explanatory Statement available to the Committee.

Committee's second response

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

Instrument	**Safety, Rehabilitation and Compensation (Definition of Employee) Amendment Notice 2015 [F2015L01665]**
Purpose	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 Safety, Rehabilitation and Compensation Act 1988 – Notice of Declaration under subsection 5(6) (Notice No. V1 of 1995)
Last day to disallow	22 February 2016
Authorising legislation	*Safety, Rehabilitation and Compensation Act 1988*
Department	Employment
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* No. 14 and 16 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 first 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 first 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*.

Minister's second response

The Minister for Employment advised:

> As the Department of Employment noted in its reply of 19 November 2015, the *Legislative Instruments Act 2003* requires consultation during the making of a legislative instrument unless an exemption applies, such as where the instrument is of a minor or machinery nature, and one that does not substantially alter existing arrangements (section 18).
>
> The Notice in question replaces references to the 'Australian National Gallery' in the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* - Notice of Declarations and Specifications (Notice No. 1 of 1990) 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. V 1 of 1995) in a reference to the 'National Museum of Australia'.
>
> These are the only effects of the Notice and the Notice does not alter the operation of the two abovementioned declarations in any way. I therefore consider that the Notice is exempted from the requirement to consult as it is of a minor or machinery nature, and does not substantially alter existing arrangements.
>
> The *Legislative Instruments Act 2003* also requires, however, that the Explanatory Statement refer to any consultation undertaken, or if consultation was not undertaken, the reasons why it was not undertaken (section 26). I will therefore arrange for the Explanatory Statement to the Notice to be updated to include reference to why it was not necessary to undertake consultation for the Notice.

Committee's second response

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

In concluding this matter, the committee notes the minister's advice that the ES to the Notice will be updated to include the information provided regarding consultation.

Instrument	**Special Research Initiatives Funding Rules for funding commencing in 2008-2009 or 2009-2010 Variation (No. 1) 2014 [F2015L01690]**
Purpose	Clarifies that the version of Appendix 2 that appears in the Special Research Initiatives Funding Rules for funding commencing in 2008-09 or 2009-10 Variation (No. 2) is the current law
Last day to disallow	22 February 2016
Authorising legislation	*Australian Research Council Act 2001*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 15 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 Education and Training provided an updated ES, which advised:

> The Australian Research Council sought advice from the Australian Government Solicitor who prepared the above mentioned documents including the varied instrument and explanatory statement.
>
> Consultation [was undertaken] with the Office of Parliamentary Counsel in preparing the lodgement through the Federal Registrar of Legislative Instruments (FRLI).

Committee's response

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

Instrument	**Therapeutic Goods (Medical Devices) Amendment (In Vitro Diagnostic Medical Devices) Regulation 2015 [F2015L01791]**
Purpose	Amends the Therapeutic Goods (Medical Devices) Regulations 2002 to provide alternative conformity assessment procedures for Class 4 in-house in vitro diagnostic medical devices
Last day to disallow	29 February 2016
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* No. 16 of 2015

Unclear basis for determining fees

The committee commented as follows:

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.

Minister's response

The Minister for Rural Health advised:

> The Amendment Regulation introduced new, alternative approval pathways that are better tailored for laboratories manufacturing Class 4 in-house IVDs. In-house Class 4 IVDs are tests used only within a laboratory setting for diagnosing serious transmissible diseases such as HIV. These in-house IVDs are not supplied commercially. The new pathways are better suited to laboratories because they allow the laboratories to make use of evidence of compliance with quality standards that they are already likely to hold rather than generate new forms of evidence to suit TGA's requirements.
>
> With few exceptions, TGA recovers the costs of applications for approval of medicines and medical devices, including IVDs, from the applicant. Therefore, in introducing two new approval pathways for in-house Class 4 IVDs, the Amendment Regulation also introduced fees for the assessment of those IVD products that use the new pathways: a fee of $59,900 for Class 4 in-house IVDs other than immunohaematology reagent (IHR) IVDs, and a fee of $14,600 for Class 4 in-house IVDS that are IHR IVDs.
>
> These are the same level of fees that would apply if an applicant chooses not to use the new approval pathways but instead uses the existing pathways. They are not in addition to any other fees. The fees and charges relating to the IVD regulatory framework were developed using an activity-based costing model in close consultation with industry. The resulting cost recovery impact statement, released in September 2009, identified a reduced fee for Class 4 IHR IVDs (including Class 4 in-house IHR IVDs). The lower IHR fee was established because these types of IVDs often have very similar characteristics. Applications for the marketing approval of such devices will commonly involve elements that the TGA will be familiar with and therefore will need to spend less time assessing.

> The evaluation fee for IHR IVDs also reflects concerns that as there are only a relatively small number of suppliers of IHR IVDs and that IHR IVDs are often supplied in low volumes at low commercial value to the sponsor, it may be unprofitable and could potentially limit market availability and choice, if manufacturers were required to pay the full fee applicable to other Class 4 IVDs.
>
> It should be noted too that these new fees reflect the maximum payment for an assessment – under regulations 9.6 and 9.7 of the Therapeutic Goods (Medical Devices) Regulations 2002, the Secretary of the Department of Health may reduce such fees if the supply of a device is in the interests of public health and would not be commercially viable otherwise (regulation 9.6) or if the Secretary has information allowing for an abridged assessment (regulation 9.7).

Committee's response

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

Access to extrinsic material

The committee commented as follows:

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.[1] 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.

---

1 As at 1 December 2015, CHF 178 (178 Swiss Franc) converted to approximately AUD $240.

Minister's response

The Minster for Rural Health advised:

> The Amendment Regulation applies ISO 15189 and ISO/IEC 17025, General requirement for the competence of testing and calibration laboratories (ISO 17025).
>
> Both of these international standards are available from the website for the International Organization for Standardization (www.iso.org), for a specified fee - I am not aware that these are available for free.
>
> Demonstrating compliance with appropriate international standards, such as these ISOs, is accepted by industry, including the laboratory sector, as best practice and is considered to be critical to establishing that their products meet minimum requirements for quality, safety and performance.
>
> While these ISOs are not available for free, the fee charged by the Organization does not appear to be prohibitive (for example, according to their website, the cost for ISO 15189 is 178 Swiss francs, or $245 AUD).
>
> Further, the laboratory sector would in most cases be required to have access to these documents for other reasons - as a requirement of their accreditation with the National Association of Testing Authorities (NATA) or, for medical testing laboratories, in relation to Medicare benefits for pathology services. In order to be accredited for reimbursement under Medicare, a pathology laboratory must meet specified quality standards, including compliance with ISO 15189, as assessed by NATA.
>
> As such, compliance with these standards does not increase the burden on, or cost to, the majority of laboratories that manufacture in-house IVDs.

Committee's response

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

The committee notes the importance of ISO 15189 as a point of access to understanding this regulation and understands that there are cases in which incorporated material will, in practice, only be accessed by persons acting in commercial or regulatory environments, and that in these environments the required fee will not present an unreasonable barrier to access. However, the committee considers that a best-practice approach in such cases is for administering agencies and departments to make available copies to users who fall outside of the particular commercial or regulatory sector.

Appendix 1

Correspondence

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

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

Dear Chair

Thank you for your letter of 4 December 2015 requesting a response to the issues identified in regards to the *ASIC Corporations (Division 4 Financial Products) Instrument 2015/1030* (ASIC Legislative Instrument 2015/1030) and the *Insurance (prudential standard) determination No. 1 of 2015 – Prudential Standard GPS320 – Actuarial and Related Matters* (APRA Prudential Standard GPS320) in your Committee's *Delegated legislation monitor*, No. 16 of 2015.

You have sought advice on the manner in which extrinsic materials that are referenced in the two legislative instruments are incorporated.

ASIC Legislative Instrument 2015/1030, which was prepared and issued by the Australian Securities and Investments Commission (ASIC), makes reference to extrinsic material by way of the definition of "AQUA Quote Display Board", which is defined as having 'the meaning given by the operating rules of ASX'.

The 'operating rules of ASX' refer to the operating rules of the market licensee, ASX Limited, created for the purposes of satisfying section 793A of the *Corporations Act 2001* (the Act). Operating rules of a financial market are defined by the Act as '*any rules (however described), including the market's listing rules (if any), that are made by the operator of the market, or contained in the operator's constitution and that deal with the activities or conduct of the market; or the activities or conduct of persons in relation to the market*' (section 761A). They are binding and have the effect of a contract under seal between ASX and market participants (e.g. brokers).

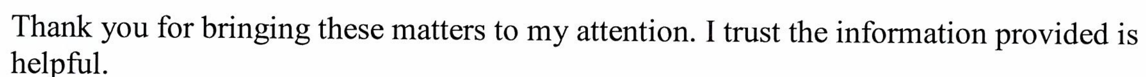
ASIC Legislative Instrument 2015/1030 regulates and facilitates the transfer through ASX Settlement Pty Ltd (ASXS) of certain classes of financial products. The parties that facilitate and engage in the trading of these financial products – i.e. ASXS and other clearing and settlement facilities, as well as market operators (e.g. the ASX) and market participants – should therefore understand what is meant by the term 'operating rules of ASX' and should be familiar with the content of these operating rules.

I have raised this issue with ASIC, who have advised that it is common practice for ASIC to refer to the operating rules of a facility in legislative instruments that it drafts. In ASIC's view, the definition of "AQUA Quote Display Board" in ASIC Legislative Instrument 2015/1030, by merely referring to the operating rules of ASX, does not amount to an incorporation of matter by reference to the operating rules of ASX within the meaning of section 14 of the *Legislative Instruments Act 2003*.

In drafting a legislative instrument, ASIC's test is whether the content of any extrinsic document or material (in this case, the operating rules of ASX) affects the operation of the legislative instrument. A mere reference in a legislative instrument to another document does not apply, adopt or incorporate that extrinsic document. The definition of "AQUA Quote Display Board" is relevant only for the purposes of identifying a certain class of financial products (warrants and interests in unregistered managed investment schemes) to which ASIC Legislative Instrument 2015/1030 relates.

APRA Prudential Standard GPS 320, which was issued by the Australian Prudential Regulation Authority (APRA), references a number of other APRA Prudential Standards – specifically 'Prudential Standards GPS 001, GPS 110, GPS 112, GPS 114, GPS 115, GPS 116, GPS 230, GPS 310, GPS 320, and CPS 520'.

I have raised this issue with APRA who have advised that APRA Prudential Standard GPS 320 was developed as a technical document for reference by actuaries and insurers and forms part of APRA's prudential framework for general insurers, along with other documents referred to in APRA Prudential Standard GPS 320. APRA Prudential Standard GPS 320 is directed at actuaries and staff at insurers who have specialist technical skills and knowledge of the prudential framework and this specialisation is necessary for those individuals to be appointed to such positions in APRA-regulated insurers.



All references to other prudential standards in APRA Prudential Standard GPS 320 refer to those prudential standards as in force from time to time, and APRA is confident this would be understood by the intended users of the standards. In many cases, APRA Prudential Standard GPS 320 references requirements in other relevant prudential standards to assist the reader by adding context and not for the purpose of incorporating those other documents by reference. For the reasons outlined above, APRA considers that including further description in the explanatory statement would be appropriate for this instrument. APRA will include further description in a revised explanatory statement and will also include further explanation, where appropriate, for future instruments.

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

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

I write in response to the 2 December report of the Senate Standing Committee on Regulations and Ordinances (the Committee) which sought my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions-Syria) Regulation 2015* and the *Charter of the United Nations (Sanctions-Iraq) Amendment Regulation 2015.*

The term 'illegally removed' is drawn directly from the terms of UN Security Council Resolution 2199 (2015) (the Resolution) and Australia is under an international obligation to implement the terms of the Resolution into Australian law. The *Charter of the United Nations Act 1945* only provides authority to implement the terms of each UN Security Council Resolution in accordance with Australia's international legal commitments. To give additional definition to the term 'illegally removed' would go beyond the scope and meaning provided in the Resolution. The drafting of the Regulations was consistent with the drafting of the *Charter of the United Nations (Sanctions-Iraq) Regulation 2008* and is in accordance with the implementation of the Resolution by like-minded states.

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 (under Regulation 5 of the Syria Regulations). The Committee noted this offence was also designated a UN Sanction Enforcement Law. This occurred as the result of a drafting error. To clarify this issue, I have made a revised UN Sanction Enforcement Law Declaration which removes Regulation 5 of the Syria Regulation as a UN Sanction Enforcement Law. Accordingly, the penalty for this Regulation will be the same as for the Iraq Regulations, making it appropriate that it be subject to strict liability.

18 DEC 2015

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Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Ref: MS15-000112

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

Dear Chair

The Senate Standing Committee on Regulations and Ordinances has requested further information in relation to the issues identified in the *Delegated legislation monitor* No. 15 of 2015 concerning the, *Excise (Mass of CNG) Determination 2015 (No. 1)* [F2015L01733], *Excise (Volume of Liquid Fuels – Temperature Correction) Determination 2015 (No. 1)* [F2015L01732] *and Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1)* [F2015L01745] for which the Treasurer is the responsible minister. The Treasurer has asked me to respond.

The legislative instruments provide the rules for how fuel is to be measured for the purposes of paying excise duty. These new instruments are identical in effect to the former instruments and have been developed merely to reflect minor technical amendments following the commencement of the *Excise Regulation 2015* and the *Excise Tariff Amendment (Ethanol and Biodiesel) Act 2015.*

The material referenced in each of the determinations is incorporated through necessity as they contain numeric correction tables or standard procedures that are required to consistently determine the quantity of each product upon which excise is payable. The use of these referenced materials in the instruments is explained in more detail and exemplified in each explanatory statement. As noted in the *Delegated legislation monitor*, in the appendices of each explanatory statement hyperlinks are provided where each published standard reference may be purchased.

Each determination specifies quantitative thresholds that must be reached prior to the prescribed requirement for the use of the above correction factors or standard procedures. As such, the users or persons affected by these instruments are limited to large bulk fuel suppliers that currently use the described processes for the internationally accepted standardisation of gaseous and liquid fuels as part of their normal business practice. These major fuel manufacturers and suppliers have a clear understanding of the stated requirements and were consulted during the original development of the instruments.

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In particular, the incorporation within the instruments and examples of where the referenced materials are applied can be found at the following:

(a) *Excise (Mass of CNG) Determination 2015 (No. 1)* [F2015L01733] - Methods 2 and 3 of paragraph 9 incorporates the use of the international standardised methods to determine the mass of excisable compressed natural gas (CNG) namely:

International Organization for Standardization ISO 6976-1995, *Natural gas - Calculation of calorific values, density and Wobbe index from composition*, and

Australian Standard / International Organization for Standardization AS ISO 13443-2007, *Natural gas - Standard reference conditions*

Paragraph 13 of the accompanying explanatory statement provides examples of where these methods may be applied.

(b) *Excise (Volume of Liquid Fuels – Temperature Correction) Determination 2015 (No. 1)* [F2015L01732] - Paragraph 11 incorporates the use of the below mentioned standard tables to determine the volume of excisable liquid fuels:

American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables Volume Correction Factors, Volume VIII*, and

Practical Alcohol Tables

Paragraph 13 of the accompanying explanatory statement provides an example of how the referenced petroleum tables may be used to correct a measured volume of liquid to 15° Celsius.

(c) *Excise (Volume of LPG – Temperature and Pressure Correction) Determination 2015 (No. 1)* [F2015L01745] - Methods 1 and 2 of Paragraph 8 incorporates the use of the below mentioned standard tables to determine the volume of excisable liquefied petroleum gas (LPG):

American Petroleum Institute (API) *Manual of Petroleum Measurement Standards, Chapter 11.2.2M - Compressibility Factors for Hydrocarbons:* 350-637 kg/m^3 *Density (15° C) and -46° C to 60° C Metering Temperature,* and

American Society for Testing and Materials (ASTM) *Petroleum Measurement Tables for Light Hydrocarbon Liquids - Density Range 0.500 to 0.653 Kg/L at 15° C*

Method 2 at paragraph 12 of the accompanying explanatory statement provides an example of how the referenced petroleum tables may be used to correct a measured volume of LPG to a standardised pressure at 15° Celsius.

I hope this information addresses the Committee's concerns raised in the *Delegated legislation monitor*.

Yours sincerely

Kelly O'Dwyer

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator Williams

Thank you for the Committee's letter of 26 November 2015 concerning the *International Organisations (Privileges and Immunities – Asian Infrastructure Investment Bank) Regulation 2015* (the regulation).

The letter specifically refers to Section 13 of the regulation and the provision that provides that the minister may, by writing, delegate his or her powers under paragraphs 9(1)(b) and 5(b) of the instrument to 'a person'.

Section 13 of the regulation is similar to the delegation provisions set out in other regulations governing the presence of international bank organisations operating in Australia (section 11 of the *European Bank for Reconstruction and Development (Privileges and Immunities) Regulations 1992* and section 9A of the *Asian Development Bank (Privileges and Immunities) Regulations 1967).* Section 13 of the regulation was simplified in line with modern drafting practice, relying on section 34AB of the *Acts Interpretation Act 1901* (when read together with section 13 of the *Legislative Instruments Act 2003*).

In October 2013, I signed an Instrument of Delegation revoking all previous delegations and delegating my powers and functions under the *International Organisations (Privileges and Immunities) Act 1963* (the Act) to the SES employee, or acting SES employee, from time to time holding, occupying or performing the duties of the position of Chief of Protocol in the Department of Foreign Affairs and Trade (DFAT). When the regulation commences, this instrument of delegation will be updated to include it in the list of regulations made under the Act, thereby empowering the Chief of Protocol to exercise certain of my powers and functions under the regulation.

The Chief of Protocol will thus be empowered to make decisions on a narrow range of matters involving the indirect tax concession scheme (ICTS). These matters apply only to the ability of the Asian Infrastructure Investment Bank to claim indirect tax benefits when operating in Australia. They have very limited financial implications and do not affect the broader Australian community.

I trust this information is of assistance.

Julie Bishop

18 DEC 2015

The Hon Warren Truss MP
Deputy Prime Minister
Minister for Infrastructure and Regional Development
Leader of The Nationals
Member for Wide Bay

21 DEC 2015

PDR ID: MC15-006214

Senator John Williams
Chair
Standing Committee on Regulations and Ordinances
Senator for New South Wales
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Williams~~ John

Thank you for the letter dated 26 November 2015 regarding Civil Aviation Safety Authority (CASA) exemption - CASA EX174/15 - relating to welding training requirements for the grant of an aircraft welding authority.

I note the concerns of the Committee that exemptions should not be used in place of amendments to principal legislation.

I am advised that EX174/15 was made in October 2015 in its current form to provide immediate relief to industry, pending the introduction of amending regulations to formalise arrangements relating to welding training requirements. I am further advised that CASA expects to begin preparing the relevant amending regulations, in consultation with industry, next financial year.

I am aware that the Committee places considerable reliance on explanatory statements to understand legislative instruments and to assess their purpose. Accordingly, I have requested of CASA that, where possible, future explanatory statements contain greater clarity around the expected timing of associated regulatory amendments.

Thank you again for taking the time to write and inform me of the Committee's concerns on this matter.

Yours sincerely

WARREN TRUSS

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THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS16-000149

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

Dear Mr Powell

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 26 November 2015 concerning the *Delegated Legislation Monitor No. 15 of 2015* and for the extension of time to respond to that letter. I apologise for the time it has taken to provide my response.

To summarise, in that Monitor, the Committee requested a response regarding the following legislative instrument:

- *Migration Agents Regulations 1998* – Declaration of value of activities, fees for assessments and standards for professional development activities 2015 – IMMI 15/106 (F2015L01710)

The Committee noted that the instrument specifies the fees for performing assessments of migration agents' activities for continuing professional development. However, the Explanatory Statement did not explicitly state the basis on which the fee has been calculated.

Part 3A of the *Migration Agents Regulations 1998* (the Regulations) outlines the approved activities in relation to the continuing professional development of registered Migration Agents. Regulation 9F of Part 3A of the Regulations outlines the assessment of an activity before the Minister's decision approving that activity is made. If the Minister considers approving an activity at the request of a provider of that activity and assesses the activity (and in subregulation 9F(2) specifies the activity as an approved activity), the Minister may charge the provider a fee for performing the assessment of the activity as specified in an instrument in writing.

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The fee specified by the Minister in the instrument in writing has not changed since last varied on 21 July 2003 when the fee was set at $99. This amount was set to recover a greater proportion of the cost of assessing and approving continuing professional development activities that can be considered approved activities. This instrument is not setting or calculating a new fee. The fee remains at $99. If the fee is recalculated in the future, a basis for calculating the fee will be articulated in the accompanying Explanatory Statement.

I thank you for bringing this matter to my attention.

Yours sincerely

THE HON. PETTER DUTTON MP
Minister for Immigration and Border Protection

02/02/2016

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

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

PDR ID: MC15-006342

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

Dear Senator Williams

Further advice for the Senate Standing Committee on Regulations and Ordinances

I write in response to the letter dated 4 December 2015 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) concerning the content of the Explanatory Statements accompanying the [redacted] the Removal of Prisoners (Territories) Regulation 2015.

I have also instructed the Department to ensure that the Explanatory Statement for the Removal of Prisoners (Territories) Regulation 2015 is amended to reflect the consultation that was undertaken for the purposes of making this instrument.
The Department will make the updated Explanatory Statement available to the Committee.

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Following my letter of 1 December 2015 on these same matters I understand that the Department contacted the Committee's Secretariat staff to assure the Committee that the Explanatory Statements for the above-mentioned legislative instruments would be amended as per the Committee's requests.

Paul Fletcher

18 / 1 /2016

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC15-004346

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

Dear Senator

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

Thank you for the letters of 12 November and 4 December 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 for the Notice be updated in accordance with the requirements of the *Legislative Instruments Act 2003*.

As the Department of Employment noted in its reply of 19 November 2015, the *Legislative Instruments Act 2003* requires consultation during the making of a legislative instrument unless an exemption applies, such as where the instrument is of a minor or machinery nature, and one that does not substantially alter existing arrangements (section 18).

The Notice in question replaces references to the 'Australian National Gallery' in the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* – Notice of Declarations and Specifications (Notice No. 1 of 1990) 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. V1 of 1995) in a reference to the 'National Museum of Australia'.

These are the only effects of the Notice and the Notice does not alter the operation of the two abovementioned declarations in any way. I therefore consider that the Notice is exempted from the requirement to consult as it is of a minor or machinery nature, and does not substantially alter existing arrangements.

The *Legislative Instruments Act 2003* also requires, however, that the Explanatory Statement refer to any consultation undertaken, or if consultation was not undertaken, the reasons why it was not undertaken (section 26). I will therefore arrange for the Explanatory Statement to the Notice to be updated to include reference to why it was not necessary to undertake consultation for the Notice.

Yours sincerely

Senator the Hon Michaelia Cash
/ 2015

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MS15-005554

15 DEC 2015

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

Dear Mr Powell

Thank you for your letter of 26 November 2015 concerning the committee's comments to the Australian Research Council's (ARC) Special Research Initiatives—Funding Rules for funding commencing in 2008–2009 or 2009–2010 Variation No.1.

As requested by the committee, I have been advised by the ARC of the varied instrument for the above mentioned scheme which relates to administrative amendments to the instrument which was approved by the Hon Christopher Pyne MP, former Minister for Education and Training.

The committee also requested an update to the existing Explanatory Statement to include consultation in accordance with the *Legislative Instruments Act* 2003—this has been updated and is enclosed for your information.

Thank you for bringing this matter to my attention.

Yours sincerely

Simon Birmingham

Encl.

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EXPLANATORY STATEMENT

Variation to Funding Rules made under section 60 of the Australian Research Council Act 2001

Special Research Initiatives

Issued by the authority of the Minister for Education

Authority

Section 61(1) of the *Australian Research Council Act 2001* provides that if the CEO considers that a variation of a set of approved funding rules is necessary or desirable, the CEO may, with the approval of the Minister vary the set of rules.

Purpose and effect

On 18 February 2008, the *Special Research Initiatives Funding Rules for funding commencing in 2008-2009 or 2009-2010* (Funding Rules) were approved under section 60 of the Act.

The Funding Rules were varied by three variation instruments:

- *Special Research Initiatives* Funding Rules for funding commencing in 2008-2009 or 2009-2010 Variation (No.1) (FRLI: F2009L02868) (date approved 27 May 2009)
- *Special Research Initiatives* Funding Rules for funding commencing in 2008-2009 or 2009-2010 Variation (No.2) (FRLI: F2009L02303) (date approved 26 May 2009), and
- *Special Research Initiatives* Funding Rules for funding commencing in 2008-2009 or 2009-2010 Variation (No.2) (FRLI: 2009L02869) (date approved 29 May 2009).

The three variation instruments were all registered on the Federal Register of Legislative Instruments on 28 July 2009 and commenced simultaneously on 29 July 2009 as a consequence of the operation of s 12(1)(d) of the *Legislative Instruments Act 2003*. As a consequence of all three instruments seeking to vary Appendix 2 at the same time, there is uncertainty about what version of Appendix 2 is the law.

The Australian Research Council has administered the Funding Rules on the basis that the version of Appendix 2 that is the law is the version appearing in *Special Research Initiatives* Funding Rules for funding commencing in 2008-2009 or 2009-2010 Variation (No.2) (FRLI: F2009L02303). This variation clarifies which version of Appendix 2 is the current law.

Commencement

This variation takes effect from 26 May 2009.

Retrospective commencement is appropriate in this instance to clarify which version of Appendix 2 is the law. This variation does not breach s 12(2) of the *Legislative Instruments Act 2003*.

Consultation

The Australian Research Council sought advice from the Australian Government Solicitor who prepared the above mentioned documents including the varied instrument and explanatory statement.

Consultation with the Office of Parliamentary Counsel in preparing the lodgement through the Federal Registrar of Legislative Instruments (FRLI).

Senator the Hon. Fiona Nash
Minister for Rural Health
Deputy Leader of The Nationals in the Senate

Ref No: MC15-021318

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

Dear Chair

Thank you for your correspondence of 4 December 2015 regarding the Therapeutic Goods (Medical Devices) Amendment (In Vitro Diagnostic Medical Devices) Regulation 2015 [F2015L01791].

The Committee has requested advice in relation to the basis for determining two fees introduced by the Amendment Regulation for Class 4 in-house *in vitro* diagnostic medical devices (IVDs), and in relation to access to the international standard, ISO 15189 *Medical laboratories – Requirements for quality and competence* (ISO 15189).

Basis for fees
The Amendment Regulation introduced new, alternative approval pathways that are better tailored for laboratories manufacturing Class 4 in-house IVDs. In-house Class 4 IVDs are tests used only within a laboratory setting for diagnosing serious transmissible diseases such as HIV. These in-house IVDs are not supplied commercially. The new pathways are better suited to laboratories because they allow the laboratories to make use of evidence of compliance with quality standards that they are already likely to hold rather than generate new forms of evidence to suit TGA's requirements.

With few exceptions, TGA recovers the costs of applications for approval of medicines and medical devices, including IVDs, from the applicant. Therefore, in introducing two new approval pathways for in-house Class 4 IVDs, the Amendment Regulation also introduced fees for the assessment of those IVD products that use the new pathways: a fee of $59,900 for Class 4 in-house IVDs other than immunohaematology reagent (IHR) IVDs, and a fee of $14,600 for Class 4 in-house IVDS that are IHR IVDs.

These are the same level of fees that would apply if an applicant chooses not to use the new approval pathways but instead uses the existing pathways. They are not in addition to any other fees.

The fees and charges relating to the IVD regulatory framework were developed using an activity-based costing model in close consultation with industry. The resulting cost recovery impact statement, released in September 2009, identified a reduced fee for Class 4 IHR IVDs (including Class 4 in-house IHR IVDs). The lower IHR fee was established because these types of IVDs often have very similar characteristics. Applications for the marketing approval of such devices will commonly involve elements that the TGA will be familiar with and therefore will need to spend less time assessing.

The evaluation fee for IHR IVDs also reflects concerns that as there are only a relatively small number of suppliers of IHR IVDs and that IHR IVDs are often supplied in low volumes at low commercial value to the sponsor, it may be unprofitable and could potentially limit market availability and choice, if manufacturers were required to pay the full fee applicable to other Class 4 IVDs.

It should be noted too that these new fees reflect the maximum payment for an assessment – under regulations 9.6 and 9.7 of the Therapeutic Goods (Medical Devices) Regulations 2002, the Secretary of the Department of Health may reduce such fees if the supply of a device is in the interests of public health and would not be commercially viable otherwise (regulation 9.6) or if the Secretary has information allowing for an abridged assessment (regulation 9.7).

Access to extrinsic material
The Amendment Regulation applies ISO 15189 and ISO/IEC 17025, *General requirement for the competence of testing and calibration laboratories* (ISO 17025).

Both of these international standards are available from the website for the International Organization for Standardization (www.iso.org), for a specified fee – I am not aware that these are available for free.

Demonstrating compliance with appropriate international standards, such as these ISOs, is accepted by industry, including the laboratory sector, as best practice and is considered to be critical to establishing that their products meet minimum requirements for quality, safety and performance.

While these ISOs are not available for free, the fee charged by the Organization does not appear to be prohibitive (for example, according to their website, the cost for ISO 15189 is 178 Swiss francs, or $245 AUD).

Further, the laboratory sector would in most cases be required to have access to these documents for other reasons – as a requirement of their accreditation with the National Association of Testing Authorities (NATA) or, for medical testing laboratories, in relation to Medicare benefits for pathology services. In order to be accredited for reimbursement under Medicare, a pathology laboratory must meet specified quality standards, including compliance with ISO 15189, as assessed by NATA.

As such, compliance with these standards does not increase the burden on, or cost to, the majority of laboratories that manufacture in-house IVDs.

I hope the above information addresses the issues raised by the Committee.

Thank you for raising this matter.

Yours sincerely

FIONA NASH

15 DEC 2015

Appendix 2

Guideline on consultation

Purpose

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

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

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

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

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

Requirements of the *Legislative Instruments Act 2003*

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

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

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

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

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

Describing the nature of consultation

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

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

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

Explaining why consultation has not been undertaken

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

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

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

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

Seeking further advice or information

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

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