The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

Monitor 10 of 2016

30 November 2016

ISSN 2201-8689 (print)
ISSN 1447-2147 (online)

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

Membership of the committee

Current members

Senator John Williams (Chair)	New South Wales, NAT
Senator Gavin Marshall (Deputy Chair)	Victoria, ALP
Senator Anthony Chisholm	Queensland, ALP
Senator Jane Hume	Victoria, LP
Senator Claire Moore	Queensland, ALP
Senator Linda Reynolds	Western Australia, LP

Secretariat

Ms Toni Dawes, Secretary
Ms Jessica Strout, Principal Research Officer
Ms Eloise Menzies, Senior Research Officer
Ms Morana Kavgic, Legislative Research Officer

Committee legal adviser

Mr Stephen Argument

Committee contacts

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

Contents

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 scrutiny principles capture a wide variety of issues but relate 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 *Legislation Act 2003*.[1]

Publications

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

---

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

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

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Consultation**: includes the committee's guideline on addressing the consultation requirements of the *Legislation Act 2003*.[3]
- **Appendix 2 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.

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 Legislation should be consulted for the text of instruments, explanatory statements, and associated information.[4]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[5]

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.[6]

---

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

4 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

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

6 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2016*, 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 4 and 24 November 2016 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).[1]

Response required

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

Instrument	**Defence and Strategic Goods List Amendment Instrument 2016 [F2016L01727]**
Purpose	Aligns the Defence and Strategic Goods List with changes to the international control lists for the non-proliferation and export control regimes to which Australia is a member
Last day to disallow	20 March 2017
Authorising legislation	*Customs Act 1901*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

1 The committee has deferred its consideration of Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] and Part 132 Manual of Standards Instrument 2016 [F2016L01762]. The committee continues to defer its consideration of Civil Aviation Legislation Amendment (Part 132) Regulation 2016 [F2016L01655].

With reference to the above the committee notes that the instrument incorporates:

- ITU Radio Regulations in its definition of 'allocated by the ITU' in Schedule 1, section 4.2;
- ISO 230-2:2014 in its definition of 'Undirectional positioning repeatability' in Schedule 1, section 4.2; and
- ISO 492 Tolerance Class 4 in Schedule 1, sections 2A001 and 2A101.

However, neither the text of the instrument nor the explanatory statement (ES) expressly states the manner in which the ITU Radio Regulations, ISO 230-2:2014, and ISO 492 Tolerance Class 4 are incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the 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 documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the ITU Radio Regulations, ISO 230-2:2014 and ISO 492 Tolerance Class 4. However, neither the text of the instrument nor the ES provides a description of these documents or indicates how they may be freely obtained.

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of where an incorporated document may be accessed fails to satisfy the requirements of the *Legislation Act 2003*.

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

Instrument	**Federal Court Legislation Amendment (Criminal Proceedings) Rules 2016 [F2016L01728]**
Purpose	These rules amend the Federal Court Rules 2011 to make changes consequential to the enactment of the Federal Court (Criminal Proceedings) Rules 2016
Last day to disallow	20 March 2017
Authorising legislation	*Federal Court of Australia Act 1976*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

No description of consultation

Section 17 of the *Legislation 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. 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 (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the Rules provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

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 *Legislation Act 2003*.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751]**
Purpose	Amends the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Health
Last day to disallow	20 March 2017
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)

Addition of matters to schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (constitutional authority for expenditure)

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

The committee notes that, in *Williams No. 2*,[2] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulation 2016 [F2016L01751] (the regulation) adds eight new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) to establish legislative authority for spending in relation to these items. New table items 180–182 establish legislative authority for the:

- Primary Health Care Development Program;
- Health Policy Research and Data Program; and
- Health Protection Program.

2 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

These programs each cover a wide range of objectives, and the ES for the regulation identifies the constitutional basis for expenditure in relation to each of these initiatives as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the telecommunications power (section 51(v));
> - the census and statistics power (section 51(xi));
> - the social welfare power (section 51(xxiiiA));
> - the races power (section 51(xxvi));
> - the external affairs power (section 51(xxix));
> - the Territories power (section 122);
> - the power to grant financial assistance to the States (section 96); and
> - the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

The ES also identifies the naturalization and aliens power (section 51(xix)) to authorise the Health Policy Research and Data Program and the Health Protection Program; in addition to the defence power (section 51(vi)), the quarantine power (section 51(ix)) and the immigration power (section 51(xxvii)) to authorise the Health Protection Program.

The regulation thus appears to rely on numerous constitutional heads of legislative power to authorise the addition of the items to Schedule 1AB (and therefore the spending of public money under them).

With reference to the committee's ability to effectively undertake its scrutiny of regulations adding items to Part 4 of Schedule 1AB to the FFSP Regulations, the committee notes its preference that an ES to a regulation include a clear statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

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

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (merits review)

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The regulation adds eight new table items to Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 establishing legislative

authority for spending activities administered by the Department of Health. New table items 179, 181 and 183 establish authority for the:

- Drug and Alcohol Program;
- Health Policy Research and Data Program; and
- Public Health and Chronic Disease Program.

While the ES is generally helpful in providing information about the proposed administration of these programs, in relation to merits review, the ES states that details on merits review will be provided in guidelines for each program. The committee notes that, currently, these guidelines do not appear to be publicly available.

In order to assess whether a program in Schedule 1AB possesses characteristics justifying exclusion from merits review, the committee's expectation is that ESs specifically address this question in relation to each new and/or amended program added to Schedule 1AB, including a description of the policy considerations and program characteristics that are relevant to the question of whether or not decisions should be subject to merits review. In this instance, the ES has not sufficiently addressed whether the Drug and Alcohol Program, Health Policy Research and Data Program and the Public Health and Chronic Disease Program, will or will not be subject to merits review, and if not, what characteristics of each of the programs justify the exclusion.

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

Instrument	**Forms, Fees, Circumstances and Different Way of Making an Application Amendment Instrument 2016/107 [F2016L01776]**
Purpose	Specifies matters relating to nominations, approvals and variation to approvals for standard business sponsors and temporary activity sponsors
Last day to disallow	21 March 2017
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

Unclear basis for determining fees

Schedule 1 items 10 and 13 of the instrument set two new fees of $420 and $170 relating to sponsorship and nomination for temporary activities visas. However, the ES does not explicitly state the basis on which the fees have been calculated.

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

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 the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights, and must be included in the ES for the instrument.

With reference to this requirement, the committee notes that the ES for this instrument includes a statement of compatibility for a different instrument, the Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (temporary activity visas regulation). While noting that the amendments in this instrument are consequential to the measures in the temporary activity visas regulation, the committee considers that a statement of compatibility that relies solely on an assessment of measures in related legislation is insufficient to satisfy the requirements of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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*.

Instrument	**Intellectual Property Legislation Amendment (Single Economic Market and Other Measures) Regulation 2016 [F2016L01754]**
Purpose	Prescribes matters to implement a Trans-Tasman patent attorney regime between Australia and New Zealand
Last day to disallow	20 March 2017
Authorising legislation	*Designs Act 2003*; *Intellectual Property Laws Amendment Act 2015*; *Patents Act 1990*; *Plant Breeder's Rights Act 1994*; *Trade Marks Act 1995*
Department	Industry, Innovation and Science
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that the regulation appears to incorporate various New Zealand Acts, including:

- Designs Act 1953 of New Zealand;
- Patents Act 1953 of New Zealand;
- Patents Act 2013 of New Zealand;
- Plant Variety Rights Act 1987 of New Zealand;
- Trade Marks Act 2002 of New Zealand; and
- Companies Act 1993 of New Zealand.

However, neither the text of the regulation nor the ES expressly states the manner in which these New Zealand Acts are incorporated. In contrast, the committee notes that the Interpretation Act 1999 of New Zealand and Education Act 1989 of New Zealand

are incorporated into the definitions of ***New Zealand*** and ***NZQF*** in the regulation as in force at the commencement of the relevant definitions.[3]

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the 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.

Sub-delegation

Item 4 of Schedule 6 amends item 3 of Schedule 3 to the Trade Marks Regulations 1995 to correctly refer to customs legislation for Norfolk Island. One effect of the amendment is to allow 'any officer of Customs' to determine who is the designated owner of goods under section 133A of the *Trade Marks Act 1995*, which could previously only be determined by the Comptroller-General of Customs.

The *Trade Marks Act 1995* defines an 'officer of Customs' as an officer within the meaning of the *Customs Act 1901*, which provides a very broad definition of the term.[4]

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 committee notes that the ES provides the following justification for the broad sub-delegation of the Comptroller-General's power to determine the designated owner of goods under section 133A of the *Trade Marks Act 1995*:

> Currently, item 3 of Schedule 3 allows only the Comptroller-General of Customs to make those determinations; this is unnecessarily restrictive, as it may be impractical for the Comptroller-General to personally make all determinations.

3 See Schedule 1, items 3 and 13.

4 See *Customs Act 1901*, section 4.

However, the ES provides no justification for the need to sub-delegate the Comptroller-General's power to determine the designated owner of goods under section 133A of the *Trade Marks Act 1995* to an 'officer of Customs'.

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

Instrument	**Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743]**
Purpose	Amends the Migration Regulations 1994 in relation to the temporary activity visas framework and the visa application charge for the Subclass 888 (Business Innovation and Investment (Permanent)) visa
Last day to disallow	20 March 2017
Authorising legislation	*Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(b)

Retrospective in effect

The Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (the regulation) amends the Migration Regulations 1994 to repeal five classes of temporary activity visas,[5] and create two new visas to replace them.[6]

Part 6 of Schedule 1 of the regulation deals with the application of the amendments made by the regulation. New paragraph 6002(1)(d) provides that the amendments made by Parts 5 and 6 of Schedule 1 to the regulation apply to a nomination made in an application for a visa made, but not yet finally determined, before the commencement of the regulation (19 November 2016).

The ES explains that an effect of this paragraph is that:

> …no new nominations for applicants for Subclasses 401, 402 (Occupational Trainee stream) and 420 visas can be made, including by legacy sponsors and including for applications made before 19 November 2016, as those provisions have been repealed.

5 Subclass 401 (Temporary Work (Long Stay Activity)) visa; Subclass 402 (Training and Research) visa; Subclass 416 (Special Program) visa; Subclass 420 (Temporary Work (Entertainment)) visa; and Subclass 488 (Superyacht Crew) visa.

6 Subclass 407 (Training) visa and Subclass 408 (Temporary Activity) visa.

The ES also notes that an application for these visas cannot validly be made without a nomination in place at the time of making the application, and therefore the amendments will not affect the majority of visa applicants. However, notwithstanding this, the ES acknowledges that there may be cases where an applicant's nomination could expire between the visa application being made and a visa decision being made, or where an applicant may change their sponsor and wish to provide a new nomination. The ES makes clear that in those cases, the applicant will not be able to provide a new nomination for the purposes of a visa grant. In this respect, the ES states:

> Given the small number impacted, it would have been inefficient to continue to support the operation of the repealed nomination provisions after 19 November 2016 in a context where all paper-based applications are being replaced by online applications and where the new visa scheme for Subclass 408 no longer requires nominations. However, the Department will consider alternative arrangements for applicants who are adversely affected.

The committee is concerned that while the ES acknowledges that some applicants who applied for the repealed visa classes before 19 November 2016 will be adversely affected, it only goes so far as to say that the Department will 'consider alternative arrangements' for these applicants. Without knowing what these alternative arrangements are, it is difficult for the committee to assess whether the regulation will have a retrospective effect that will unduly trespasses on personal rights and liberties (scrutiny principle 23(3)(b)).

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

Instruments	**Migration Regulations 1994 - Specification of Criteria for Approval of Nomination and Occupational Training for the Purposes of Subclass 407 (Training) Visa 2016/108 - IMMI 16/108 [F2016L01777]** **Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2016/118 [F2016L01787]**
Purpose	The instruments specify sponsor and occupational training for Subclass 407 (Training) visa and occupations in relation to the nominated occupational training in applications made for this type of visa
Last day to disallow	21 March 2017
Authorising legislation	Migration Regulations 1994
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)

No statement of compatibility

Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the maker of a disallowable instrument to have prepared a statement of compatibility in relation to the instrument. The statement of compatibility must include an assessment of whether the instrument is compatible with human rights, and must be included in the ES for the instrument.

With reference to this requirement, the committee notes that the ESs for these instruments include a statement of compatibility for a different instrument, the Migration Amendment (Temporary Activity Visas) Regulation 2016 [F2016L01743] (temporary activity visas regulation). While noting that these instruments are consequential to the measures in the temporary activity visas regulation, the committee considers that statements of compatibility that rely solely on an assessment of measures in related legislation are insufficient to satisfy the requirements of section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The committee requests the advice of the minister in relation to this matter; and requests that the ESs be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Instrument	**Trans-Tasman Proceedings Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01746]**
Purpose	Amends Trans-Tasman Proceedings Regulation 2012 to reflect changes to New Zealand's financial markets laws and give effect to the Trans-Tasman patent attorney regime between Australia and New Zealand
Last day to disallow	20 March 2017
Authorising legislation	*Trans-Tasman Proceedings Act 2010*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that the regulation appears to incorporate various New Zealand Acts, including:

- *Auditor Regulation Act 2011* (NZ);
- *Financial Advisers Act 2008* (NZ);
- *Financial Markets Conduct Act 2013* (NZ);
- *Financial Reporting Act 2013* (NZ); and
- *Food Act 2014* (NZ).

However, neither the text of the regulation nor the ES expressly states the manner in which these New Zealand Acts are incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the 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.

Drafting

The regulation was registered on the Federal Register of Legislation on 11 November 2016. Section 2 of the regulation provides that Schedule 1, items 4 to 7 are to commence the day after registration, that is, on 12 November 2016.

However, with reference to section 2, the ES states that Schedule 1, items 4 to 7 will commence on 1 December 2016.

While the committee understands that Schedule 1, items 4 to 7 of the regulation commenced on 12 November 2016, the committee notes that ESs should be drafted with sufficient care to avoid potential confusion for anticipated users of instruments caused by discrepancies between the text of an instrument and its ES.

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

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 2.

Instrument	**Army and Air Force (Canteen) Regulation 2016 [F2016L01455]**
Purpose	Repeals and replaces the Army and Air Force Canteen Service Regulations 1959 that sunsetted on 1 October 2016
Last day to disallow	1 December 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Sub-delegation

The committee commented as follows:

Section 23 of the regulation provides that the Army and Air Force Canteen Service Board of Management (the Board) may delegate any of its powers under the regulation (other than section 23) to the Board's Chair or Deputy Chair, the Managing Director of the Canteen Service or an employee of the Board. An 'employee of the Board' is not defined in the regulation or the *Defence Act 1903*.

By way of comparison, the committee notes that section 24 of the Navy (Canteen) Regulation 2016 [F2016L01454] provides that the Royal Australian Navy Central Canteens Board may only delegate its powers under that regulation (other than section 24) to the Chief Executive Officer of the Canteens Service.

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 regulation provides no justification for the broad delegation and sub-delegation of the Board's powers under the regulation to an 'employee of the Board'.

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

Minister's response

The Minister for Defence advised:

> This Regulation and the Navy (Canteen) Regulation 2016 were introduced to replace the Army and Air Force Canteen Service Regulations 1959 and Navy (Canteens) Regulations 1954 respectively, which were to sunset on 1 October 2016. The legal entities established under these regulations, and options for the broader governance arrangements of Australian Defence Force (ADF) canteen services, service trusts and companies established in legislation for the welfare of serving and former ADF members, are currently the subject of an internal Defence review as part of the Government's smaller government initiative. When complete, recommendations from that review could lead to significant change to legislation establishing these entities, including possible repeal of the Army and Air Force (Canteen) Regulation 2016.
>
> In this context, the decision was made to re-make the regulations with substantively the same effect so that existing canteen services could continue uninterrupted, without undertaking a more thorough review of the regulations, pending completion of the review and a decision on the long term governance of these entities. It is acknowledged that this has perpetuated some irregularities and inconsistencies in the regulations. An example is the capacity of the Board to delegate to 'employees of the Board' in the Army and Air Force (Canteen) Regulation 2016, which may be unnecessarily broad and is different from the equivalent provision in the Navy (Canteen) Regulation 2016. The only substantive change made to the previous regulations was to replace references to the Service Chiefs with references to the Chief of the Defence Force (CDF), consistent with the outcome of the First Principles Review.

Committee response

The committee thanks the minister for her response.

The committee notes the minister's advice that the regulation has been remade with substantively the same effect so that existing canteen services can continue uninterrupted pending completion of a review and a decision on the long term governance of these entities.

However, the minister's response does not directly address the committee's concern about sub-delegation.

In this regard, the committee reiterates its expectations in relation 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 regulation provides no justification for the broad delegation and sub-delegation of the Board's powers under the regulation to an 'employee of the Board'.

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

The committee also notes the minister's advice that:

- the regulation and the Navy (Canteen) Regulation 2016 [F2016L01454] were introduced to replace the Army and Air Force Canteen Service Regulations 1959 and Navy (Canteens) Regulation 1959, which were due to sunset on 1 October 2016; and
- options for the broader governance arrangements of the ADF canteen services are currently the subject of an internal Defence review as part of the Government's smaller government initiative.

However, in the committee's view, re-making a regulation with substantively the same effect so that existing services can continue uninterrupted pending completion of a broader review may undermine the importance of the sunsetting mechanism.

The committee notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects agencies to plan for sunsetting well in advance of an instrument's sunset date.[7] The *Legislation Act 2003* also provides a mechanism by which an instrument-maker can apply to the Attorney-General to align sunsetting dates if this will facilitate review of instruments (see section 51A). This allows deferral of a sunsetting date of up to 5 years.

The committee draws this matter to the attention of ministers, instrument-makers and senators.

7 Attorney-General's Department, Guide to Managing Sunsetting of Legislative Instruments (April 2014), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-april2014.doc (accessed 29 November 2016).

Instrument	**Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 3) [F2016L01596]**
Purpose	Amends the Private Health Insurance (Prostheses) Rules 2016 (No. 4) by changing listings in Part A and B of the Schedule
Last day to disallow	1 December 2016
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Drafting

The committee commented as follows:

Schedule 1, item 1 of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 3) [F2016L01596] (the amendment instrument) amends the minimum benefit for billing code BS120 in Part A of Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L00381] (the principal instrument) to correct an error. The amendment instrument increases the minimum benefit for billing code BS120 in Part A from $168 to $336. The minimum benefit represents the amount that is required to be paid for the provision of certain prostheses under private health insurance policies covering hospital treatment, where relevant conditions are met.

However, the committee notes that the minimum benefit of $168 for billing code BS120, which relates to intraoperative accessories in Part A of the principal instrument, was in effect from 8 September to 6 October 2016, and that the correction in the amendment instrument to specify a minimum benefit of $336 is not applied retrospectively.

The committee therefore seeks clarification as to whether the correct minimum benefit was applied for the supply of the relevant listed prosthesis during that period (if any). The committee seeks to ensure that no person was disadvantaged by the apparent error in the principal instrument.

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

Minister's response

The Minister for Health and Aged Care advised:

> The minimum benefit of $168 for billing code BS120, which relates to intraoperative accessories in Part A of the principal instrument, was in effect from 8 September to 6 October 2016. The correction in the

amendment instrument to specify a minimum benefit of $336 was not applied retrospectively. The device sponsor has advised my Department that the device was used 12 times during this period at a benefit of $168 each. Making these amendments retrospectively would have imposed a retrospective liability on private health insurers.

Committee response

The committee thanks the minister for her response.

The committee notes the minister's advice that applying the correction to the minimum benefit retrospectively would have imposed a retrospective liability on private health insurers.

However, the committee is concerned about any possible detrimental effect on individuals that may arise if an incorrect benefit was provided between 8 September and 6 October 2016. The committee therefore seeks clarification as to whether any individual was disadvantaged by the apparent error in the principal instrument in any of the 12 instances in which the relevant listed prosthesis was provided during that period.

The committee requests the further 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	**ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 [F2016L01757]**
Purpose	Allows Luxembourg fund managers who hold a current licence granted by the Commission de Surveillance du Secteur Financier to provide certain financial services in relation to certain types of financial products to wholesale clients in Australia without an Australian Financial Services licence
Last day to disallow	20 March 2017
Authorising legislation	*Corporations Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

Section 17 of the *Legislation 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. 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 (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for this instrument states:

> ASIC consulted with industry stakeholders on its proposal to make *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109*.
>
> ASIC proposes to review *ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109* in two years. At this time we will consult publically on any changes that we propose to make.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) 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 *Legislation Act 2003*. In this case, the committee considers that the ES, while stating

that consultation occurred in relation to the making of the instrument, does not describe the *nature* of any consultation undertaken (such as for example, the manner and purpose of the the consultation; the parties consulted; and the issues raised in, and outcomes of, the consultation).

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

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

Instrument	**Federal Court (Criminal Proceedings) Rules 2016 [F2016L01726]**
Purpose	These rules facilitate the fair, efficient and timely determination of criminal proceedings in the Federal Court
Last day to disallow	20 March 2017
Authorising legislation	*Federal Court of Australia Act 1976*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Federal Court Rules 2011

The *Legislation Act 2003* (other than sections 8, 9, 10 and 16) applies in relation to the Federal Court (Criminal Proceedings) Rules 2016 [F2016L01726] (the instrument) as if a reference to a legislative instrument were a reference to a rule of court.[8]

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time.

The instrument incorporates the Federal Court Rules 2011 [F2011L01551]. However, neither the text of the instrument nor the ES states the manner in which the Federal Court Rules 2011 are incorporated.

The committee understands that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to the court rules in the instrument can be taken to be references to versions of those court rules as in force from time to time.

8 Subsection 59(4) of the *Federal Court of Australia Act 1976*.

However, the committee expects instruments to clearly state the manner of incorporation (that is, either as in force from time to time or as in force at a particular time) of external documents. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee therefore considers that, notwithstanding the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*), and in the interests of promoting clarity and intelligibility of an instrument to persons interested in or affected by an instrument, instruments (and ideally their accompanying ESs) should clearly state the manner in which court rules are incorporated.

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

Instrument	**Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 5) Regulation 2016 [F2016L01739]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for a spending activity administered by the Department of Education and Training
Last day to disallow	20 March 2017
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 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

The instrument adds 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 13 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 The Smith Family to

expand its Learning for Life Program. Funding for the Learning for Life Program will come from the Department of Education and Training:

> Funding is expected to be detailed as a measure in the *Mid-Year Economic and Fiscal Outlook 2016-17*, and subsequently in Program 1.3: Early Learning and Schools Support, in Outcome 1 in the *Portfolio Additional Estimates Statements 2016–17* for the Education and Training 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 in 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 committee.

The committee therefore draws this matter to the minister's attention and the expenditure authorised by this instrument to the attention of the Senate.

Instrument	**Legislation (Agricultural Levies Instruments) Sunset-altering Declaration 2016 [F2016L01741]**
Purpose	Aligns the sunsetting dates of 25 agricultural levies instruments to enable their inclusion in a thematic review
Last day to disallow	20 March 2017
Authorising legislation	*Legislation Act 2003*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)

Extending the sunsetting date of instruments

Unless otherwise provided by an enabling Act, all legislative instruments made on or after 1 January 2005 are repealed on the first 1 April or 1 October that falls on or after their tenth anniversary of registration (section 50 of the *Legislation Act 2003*). This process is called 'sunsetting', and the relevant date of repeal is known as the 'sunsetting date'.

Section 51A of the *Legislation Act 2003* allows the Attorney-General to align the sunsetting of instruments where two or more instruments are to be reviewed together. The Attorney-General must be satisfied that all the instruments to be reviewed would, apart from section 51A, be repealed by section 50 or 51 of the *Legislation Act 2003*; are the subject of a single review; and the making of the declaration to align sunsetting dates will facilitate the undertaking of the review and the implementation of its findings.

The Legislation (Agricultural Levies Instruments) Sunset-altering Declaration 2016 [F2016L01741] (the declaration) aligns the sunsetting date for 25 instruments relating to agricultural levies, which would have otherwise sunset between 1 April 2018 and 1 October 2022. The new sunsetting date for each of these instruments will be 1 April 2023. The ES to the declaration explains that the 25 instruments 'are or will be the subject of a single review' and that the declaration facilitates that review and the implementation of its findings, as otherwise the instruments would be repealed by section 50 of the *Legislation Act 2003.* Additionally, the committee notes that eight of the instruments listed for review were subject to a previous sunset-altering declaration (Legislative Instruments (Agricultural Export Instruments) Sunset-altering Declaration 2014 [F2014L01592]) which is still in force.[9]

The committee draws the extension of the sunsetting dates for 25 instruments (including eight instruments that have been the subject of a previous deferral of sunsetting) to 1 April 2023 to the attention of the Senate.

Instrument	**Northern Prawn Fishery (Early Closure) Direction No. 173 [F2016L01765]**
Purpose	Establishes additional area closures for the last 10 days of the 2016 tiger prawn season and closes all waters at the end of the sixteenth fishing week
Last day to disallow	20 March 2017
Authorising legislation	*Fisheries Management Act 1991*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

Section 17 of the *Legislation 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. The ES which must accompany an instrument is required

9 Australian Meat and Live-Stock Industry Act 1997 - Declaration of Approved Donor (30/06/1998) [F2006B11743]; (07/07/1998) [F2006B117453]; (21/08/1998) [F2006B11747]; Declaration of Industry Marketing Body (30/06/1998) [F2006B11746]; Declaration of Research Body (30/06/1998) [F2006B11741]; Australian Meat and Live-Stock Industry (Live-stock Export Marketing Body and Live-stock Export Research Body) Declaration 2004 [F2006B11748]; (Meat Processor Marketing and Research Bodies) Declaration 2007 [F2007L02579]; and Australian Meat and Live-Stock Industry Regulations 1998 [F2011C00808].

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 (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the Northern Prawn Fishery (Early Closure) Direction No. 173 [F2016L01765] (the direction) states:

> The Direction is made under subsection 41A(3) of the Management Act [*Fisheries Management Act 1991*], therefore no consultation is required. However, AFMA has consulted with the Northern Prawn Fishery Industry Pty Ltd in relation to the Direction.

The committee notes that the information that the *Fisheries Management Act 1991* specifies no conditions regarding consultation is usefully included in the ES. However, in terms of complying with the separate requirements of section 17 of the *Legislation Act 2003*, the committee considers it would have been better for the ES to have explicitly stated, with a supporting explanation, that consultation (within the general meaning of public consultation) was unnecessary in this instance because consultation was undertaken with the peak industry body for the relevant fishery, Northern Prawn Fishery Industry Pty Ltd.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

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

Multiple instruments that appear to rely on subsection 4(2) of the *Acts Interpretation Act 1901*

Instruments	Forms, Fees, Circumstances and Different Way of Making an Application Amendment Instrument 2016/107 [F2016L01776] Migration Regulations 1994 - Specification of Criteria for Approval of Nomination and Occupational Training for the Purposes of Subclass 407 (Training) Visa 2016/108 - IMMI 16/108 [F2016L01777] Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2016/118 [F2016L01787]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above were 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 instruments do not identify the relevance of subsection 4(2) to their operation.

The committee considers that, in the interests of promoting clarity and intelligibility of instruments 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 attention of ministers.

Multiple instruments that appear to rely on section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*)

Instruments	Intellectual Property Legislation Amendment (Single Economic Market and Other Measures) Regulation 2016 [F2016L01754] Northern Prawn Fishery (Early Closure) Direction No. 173 [F2016L01765]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time.

The instruments identified above incorporate Commonwealth disallowable legislative instruments. However, neither the text of the instruments nor their accompanying ESs state the manner in which they are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

However, the committee expects instruments to clearly state the manner of incorporation (that is, either as in force from time to time or as in force at a particular time) of external documents, including other legislative instruments. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee therefore considers that, notwithstanding the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*), and in the interests of promoting clarity and intelligibility of an instrument to persons interested in or affected by an instrument, instruments

(and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated.

The committee draws this matter to the attention of ministers.

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

Instruments	Family Law (Superannuation) (Provision of Information—Military Superannuation and Benefits Scheme) Amendment Determination 2016 [F2016L01759] Forms, Fees, Circumstances and Different Way of Making an Application Amendment Instrument 2016/107 [F2016L01776] National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment Rules 2016 [F2016L01733] National Health (Concession or entitlement card fee) Amendment Determination 2016 (No. 1) (PB 106 of 2016) [F2016L01789] Native Title (Assistance from Attorney-General) Amendment Guidelines 2016 [F2016L01775] Private Health Insurance (Complying Product) Amendment Rules 2016 (No. 6) [F2016L01790] Southern Bluefin Tuna Fishery Fishing Season and Australia's National Catch Allocation Determination 2017 [F2016L01715] Vehicle Standard (Australian Design Rule 57/00 – Special Requirements for L-Group Vehicles) 2006 Amendment 2 [F2016L01761]
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.[10]

10 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 following the receipt of additional information from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 2.

Instrument	**Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016 - Prudential Standard 3PS 310 - Audit and Related Matters [F2016L01437]** **Banking, Insurance and Life Insurance (prudential standard) determination No. 8 of 2016 - Prudential Standard CPS 510 Governance [F2016L01432]**
Purpose	The instruments determine Prudential Standard 3PS 310 Audit and Related Matters and Prudential Standard CPS 510 Governance
Last day to disallow	1 December 2016
Authorising legislation	*Banking Act 1959*; *Insurance Act 1973*; *Life Insurance Act 1995*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

The committee commented in relation to two matters as follows:

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above the committee notes that:

- Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016 - Prudential Standard 3PS 310 - Audit and Related Matters

[F2016L01437] (Prudential Standard 3PS 310) provides at paragraph 10 that the terms 'reasonable assurance' and 'limited assurance' have the meanings given in the *Framework for Assurance Engagements* issued by the Australian and Assurance Standards Board (AUASB); and

- Banking, Insurance and Life Insurance (prudential standard) determination No. 8 of 2016 - Prudential Standard CPS 510 Governance [F2016L01432] (Prudential Standard CPS 510) incorporates at paragraph 80 the *APES 110 Code of Ethics for Professional Accountants*, issued by the Accounting Professional and Ethical Standards Board (APESB) in December 2010.

However, neither the text of Prudential Standards 3PS 310 and CPS 510 nor their ESs expressly state the manner in which *Framework for Assurance Engagements* and *APES 110 Code of Ethics for Professional Accountants* are incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the 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 documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that while Prudential Standard 3PS 310 incorporates *Framework for Assurance Engagements* issued by the AUASB; and Prudential Standard CPS 510 incorporates *APES 110 Code of Ethics for Professional Accountants*, issued by the APESB in December 2010, neither the text of Prudential Standards 3PS 310 and CPS 510 nor the ESs provide a description of these documents or indicate how they may be freely obtained.

While the committee does not interpret paragraph 15J(2)(c) as requiring a detailed description of an incorporated document and how it may be obtained, it considers that an ES that does not contain any description of an incorporated document fails to satisfy the requirements of the *Legislation Act 2003*. However, in this case the committee notes that *Framework for Assurance Engagements* issued by the AUASB; and *APES 110 Code of Ethics for Professional Accountants*, issued by the APESB in

December 2010 are available for free online.[1] Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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

Minister's response

The Treasurer advised:

> APRA noted that Prudential Standard 3PS 310 – Audit and Related Matters [F2016L01437] (3PS 310), is part of a suite of legislative instruments that provide for the regulation of Level 3 Groups (Level 3 Standards). It was developed as a technical document for reference by auditors and regulated entities (authorised deposit-taking institutions, general insurers and life insurance companies) who have specialist technical skills and knowledge of the prudential framework.
>
> Prudential Standard 3PS 001[F2016L01428] (3PS 001), which comes into effect on the same day as 3PS 310, provides definitions which are required to be used by regulated entities when interpreting the other Level 3 Standards.
>
> Paragraph 4 of Prudential Standard 3PS 001 provides that "Australian Auditing and Assurance Standards is a reference to the Australian Auditing and Assurance Standards issued by the Australian Auditing and Assurance Standards Board (AUASB) as in force from time to time."
>
> APRA considers that it is implicit that the guidance material issued (which includes the Framework for Assurance Engagements) would also be incorporated as in force from time to time, and that auditors and regulated entities would understand this.
>
> APRA agrees however that this could be made clearer and consider that including further description in the ES would be appropriate for this instrument and will revise the ES accordingly. APRA will also include in the revised ES a description of the document and where it can be freely obtained. APRA will also include further clarification in 3PS 310 the next time that the instrument is amended.
>
> Prudential Standard CPS 510 Governance [F2016L01432] (CPS 510) refers at paragraph 80 to APES 110 Code of Ethics for Professional Accountants, issued by the Accounting Professional and Ethical Standards Board in December 2010 (APES 110). It was developed as a technical document for reference by regulated entities (authorised deposit-taking institutions, general insurers and life insurance companies) who have specialist technical

1 See Australian Government, Auditing and Assurance Standard Board, *Framework for Assurance Engagements*, http://www.auasb.gov.au/Pronouncements/Framework-for-Assurance-engagements.aspx (accessed 7 November 2016); and Australian Professional and Ethical Standard Board Limited, *APES 110 Code of Ethics for Professional Accountants*, http://www.apesb.org.au/page.php?id=12 (accessed 7 November 2016).

skills and knowledge of the prudential framework. All references to extrinsic material in Prudential Standards made by APRA have, unless the contrary intention has been overtly expressed, been to material as it exists or is in force from time to time. In the case of APES 110 the inclusion of the date of publication was not intended to indicate that the document referred to was only as it existed at the date of publication.

APRA accepts that the paragraph is not clear on this point, but given the nature of the readership of the prudential standard, considers that including further description in the ES would be appropriate for this instrument and will revise the ES accordingly, with APRA including clarification in CPS 510 the next time that the instrument is amended. APRA will also include in the revised ES a description of the document and where it can be freely obtained.

Committee response

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

The committee notes the Treasurer's undertaking that when the instruments are next amended the accompanying ESs will be revised to clearly state the manner in which documents are incorporated, and include a description of the incorporated documents and where they can be freely obtained.[2]

2 The committee notes that the issue raised here applies to Superannuation (prudential standard) determination No. 1 of 2016 - Prudential Standard SPS 510 – Governance [F2016L01707] which also incorporates at paragraph 51 the A*PES 110 Code of Ethics for Professional Accountants*, issued by the APESB in December 2010.

Instrument	**Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 10/2016 [F2016L01601]** **Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 11/2016 [F2016L01591]** **Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 12/2016 [F2016L01592]**
Purpose	The instruments declare new quality assurance activities
Last day to disallow	1 December 2016
Authorising legislation	*Health Insurance Act 1973*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Description of consultation

The committee commented as follows:

Section 17 of the *Legislation 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. 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 (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for each of the declarations, under the heading 'consultation', states:

> An assessment of the application included an assessment of the potential value of declaring the activity as a quality assurance activity for the purposes of the Act, the methodology used to conduct the activity, and whether the application met the criteria required for declaration as set out in the Regulations [Health Insurance Regulations 1975].
>
> The declaration of this activity will not result in any direct or substantial indirect effect on business.

In respect of Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 11/2016 [F2016L01591] and Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 12/2016 [F2016L01592], the ES for each of these instruments also states, under the heading 'consultation', that the activity was previously declared to be quality

assurance activity under section 124X of the *Health Insurance Act 1973* and that the applicant applied to continue the declaration of their activity as a quality assurance activity.

While the committee does not interpret paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* as requiring a highly detailed description of consultation undertaken, the committee does not consider that the above statements describe the *nature* of any consultation undertaken, or explain why consultation was not undertaken in each case.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

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

Minister's response

The Minister for Health and Aged Care advised:

> QAA 10/2016: Australian Vigilance and Surveillance System for Organ Donation and Transplantation
>
> The *Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 10/2016* was made following an application from the Australian Organ and Tissue Donation and Transplantation Authority for a declaration under section 124X of the *Health Insurance Act 1973* in respect of the Australian Vigilance and Surveillance System for Organ Donation and Transplantation, which it conducts. An application to have an activity declared under section 124X of the Act requires the applicant to provide details of two independent referees, typically members of the medical profession, who support the application.
>
> My Department consulted with the Australian Organ and Tissue Donation and Transplantation Authority in relation to the final design and content of the declaration, including through correspondence and meetings between the agencies. Wider consultation was not considered necessary as QAA 10/2016 relates only to the Australian Organ and Tissue Donation and Transplantation Authority's Australian Vigilance and Surveillance System for Organ Donation and Transplantation.
>
> QAA 11/2016: Professional Qualities Reflection of the Royal Australasian College of Physicians and
>
> QAA 12/2016: MyCPD of the Royal Australasian College of Physicians
>
> The *Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 - QAA 11/2016* and *Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 - QAA 12/2016* were made in respect of two continuing professional development activities conducted by the Royal Australasian College of Physicians (RACP). These activities had previously been declared as

quality assurance activities under section 124X of the *Health Insurance Act 1973*, however those declarations were expiring.

The two declarations were made to replace those expiring declarations following applications from the RACP wanting to continue the declaration of their activities as quality assurance activities. An application to have an activity declared under section 124X of the Act requires the applicant to provide details of two independent referees, typically members of the medical profession, who support the application.

I am advised that my Department consulted with the RACP in writing about the design of the program during the assessment process. Wider consultation was not considered necessary as QAA 11/2016 and QAA 12/2016 relate only to the RACP's Professional Qualities Reflection of the Royal Australasian College of Physicians and MyCPD programs. Additionally, the new declarations replaced the existing declarations that had expired and did not substantially change existing arrangements.

Amendments to Explanatory Statements Replacement Explanatory Statements for QAA 10/2016, QAA 11/2016 and QAA 12/2016 will be prepared and registered, as soon as practicable, to clearly describe the nature of consultation.

Committee response

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

The committee also notes the minister's undertaking to prepare and register updated ESs to describe the nature of consultation undertaken.

Instrument	**Defence Force Discipline Appeals Regulation 2016 [F2016L01452]**
Purpose	Repeals and replaces the Defence Force Discipline Appeals Regulations 1957 that sunsetted on 1 October 2016
Last day to disallow	1 December 2016
Authorising legislation	*Defence Force Discipline Appeals Act 1955*
Department	Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Unclear basis for determining fees

The committee commented as follows:

Section 17 of the regulation sets fees for the Registrar of the Defence Force Discipline Appeal Tribunal to supply copies of documents relating to an appeal to an appellant. If the document is under 50 pages the fee is $12, and if the document is over 50 pages the fee is $12 plus 10 cents per page in excess of 50 pages.

The committee's usual expectation in cases where an instrument of delegated legislation carries financial implications via the imposition of a charge, fee, levy, scale or rate of costs or payment is that the relevant ES makes clear the specific basis on which an individual imposition or change has been calculated. While the committee notes that the fees described above reflect existing fees, the ES does not state the basis on which the fees have been calculated.

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

Minister's response

The Attorney-General advised:

> The Regulation was remade in substantially the same form in circumstances where it was otherwise due to sunset on 1 October 2016 and the regulations were, and continue to, work efficiently and effectively. As such, the Regulation updated phrasing and references to conform to current drafting practices and otherwise preserved the existing arrangement and procedures of the Tribunal…
>
> The Tribunal and the Department of Defence were consulted throughout the process of re-making the Regulation and raised no issues with the fee structure or amounts in section 17. As noted in Monitor 8, these fees reflect those that existed in the previous regulations and have remained the same since 1985. The Tribunal has confirmed the fee amounts remain appropriate and justified and additionally advised that there are very few, if any, occasions where the fee has been charged.
>
> I also draw to your attention to the consistency of these fees with the prescribed fees payable under the *Defence Force Discipline Act 1982* (see section 195) and the Defence Force Discipline Regulations 1985 (see section 46) for the supply of a copy of the record of proceedings of a trial. Given that the Tribunal is empowered to hear and determine appeals by persons convicted or acquitted of relevant service offences by a court martial or a Defence Force Magistrate, under the Defence Force Discipline Act and Regulations, it is appropriate that the same fees apply for the similar circumstances in relation to the supply of copies of documents.
>
> For these reasons, I am of the view that the fee amounts for supplying copies of documents in section 17 of the Regulation continue to be appropriate and justified. I trust that this information will assist the Committee in its consideration of the Regulation.

Committee response

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

In concluding this matter, the committee notes the Attorney-General's advice that no issues with the fee structure were raised during the consultation process prior to remaking this regulation, and that there have been few, if any, occasions where the fee was charged.

However, the committee reiterates its expectations that where delegated legislation carries financial implications via the imposition of a fee, the relevant ES should make clear the specific basis on which an individual imposition or change has been calculated. While the committee notes the Attorney-General's advice that the fees in the regulation are consistent with the fees payable under the overarching Act and regulations, the response does not strictly state the method by which the fees have been calculated, so as to demonstrate that the fees reflect recovery of reasonable costs for the supply of copies of documents.

Instrument	**Defence Regulation 2016 [F2016L01568]**
Purpose	Replaces three instruments made under the *Defence Act 1903* and enhances the Chief of the Defence Force's position as the sole commander of the Defence Force
Last day to disallow	1 December 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(b) and (a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

The committee commented in relation to two matters as follows:

Insufficient information regarding strict liability offences

Section 76 of the regulation makes it an offence to use a prohibited word or letter (prescribed in sections 73 and 74) in connection with a trade, business, calling or profession, or in connection with an organisation or body of persons, unless the use is in accordance with consent obtained under section 77. The maximum punishment for this offence is 10 penalty units. Strict liability applies to the element of the offence that the use is not in accordance with a consent obtained under section 77 (subsection 76(2)).

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 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.

The committee also draws the minister's attention to the discussion of strict and absolute liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers,*[3] as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

Sub-delegation

Part 16 of the regulation provides for certain powers of the Minister, Secretary and Chief of the Defence Force in the regulation to be delegated.

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 committee notes that the ES for the regulation provides detailed information about the nature of the powers to be delegated and the categories of people to whom powers under the regulation may be delegated. However, it provides no justification for the need to sub-delegate certain powers under the regulation to an Australian Public Service level 4 or 6 employee.[4]

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

Minister's response

The Minister for Defence advised:

> Strict liability offence
>
> The strict liability offence in section 76 of the Regulation makes it an offence to use prohibited words or letters in connection with business if the use is not in accordance with a consent obtained under section 77. Strict liability applies to the requirement that the use is not in accordance with a consent, which means that it is not necessary for the prosecution to prove that the person knew that the use was not in accordance with a consent. This offence is substantively identical to the offence previously contained in sub regulation 2(2) of the Defence (Prohibited Words and

3 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf (accessed 8 November 2016).

4 See Defence Regulation 2016 [F2016L01568], paragraphs 82(2)(d), 83(2)(d), 84(1)(e) and 84(3)(d).

Letters) Regulations 1957, including the strict liability element. The only change has been to increase the penalty from five to ten penalty units.

In reviewing the offence provision, as re-made in section 76, it was considered that the difficulty of proving that a person has positive knowledge of the non-existence of the relevant consent would undermine the effectiveness of this offence provision as a deterrent. Accordingly, the strict liability element was retained. The relatively low penalty is well within the penalties discussed in relation to strict liability offences in the Attorney-General Department's: *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers*.

Delegation of powers

For the purposes of performing clerical duties (as opposed to the exercise of military command responsibilities), the APS classifications in each provision in Part 16 are treated in Defence as comparable to the military ranks listed. Defence is an increasingly integrated work environment, where ADF members and APS employees work together. Some decision-making previously conducted by ADF members is now conducted by APS employees (including where a particular position is temporarily filled by an APS employee) and this possibility may continue in the future. Accordingly, all delegation powers in the Regulation have been written to enable delegations to be made both ADF members and APS employees at comparable levels.

Subsection 82(2) provides that the Minister's powers under Part 14 can be delegated to ADF officers down to Major or equivalent rank, and to APS employees down to APS 6 classification. These powers are to accept or refuse, or accept with conditions, applications for consent to use prohibited words and letters. A similar power exists under section 83 of the *Defence Act 1903* in relation to the use of emblems and flags, which is not limited by rank or classification, and it was considered important that delegations under the Regulation correspond with authorisations under section 83 of the Act. Brand managers for the ADF, Navy, Army and Air Force, and their staff (including both ADF members and APS employees), are responsible for administering applications for consent. Elevating the level of delegates in relation to these powers could unnecessarily slow down the decision-making process.

Subsections 83(2) and 84(3) provide that the Secretary's and CDF's powers under Part 11 can be delegated to ADF officers down to Major or equivalent rank, and to APS employees down to APS 6 classification. These powers are to: determine when entry to a defence area is prohibited; direct the removal of property from a defence area while entry is prohibited; authorise the installation of equipment in a defence area; and authorise a person to grant permission for a person to enter a defence area while it is prohibited. These are decisions that, by their nature, are undertaken at a local level in relation to particular defence areas, in order to facilitate defence operations or practices as they arise. Commanders and other staff responsible for the day to day decision-making in defence areas will often

> be at the levels outlined in subsection 83(2) and 84(3), and the ability to delegate these powers to these levels is essential for the effective operation of Part 11 of the Regulation.
>
> Subsection 84(1) provides that the CDF's powers under Parts 3, 4 and 5 can be delegated to ADF members down to Warrant Officer 2 or equivalent rank, and to APS employees down to APS 4 classification. These powers relate to personnel decision-making for ADF members, and there are a massive volume of these decisions made every day. In order to effectively administer the ADF, it is necessary that they be delegable to relatively low levels. For example, the CDF's power in paragraph 12(1)(b) to enlist a person in the Army has been delegated to Warrant Officers posted to Defence Force Recruiting…
>
> I regret that these matters were not more fully explained in the explanatory statements for each Regulation. In future, I will endeavour to ensure that more complete explanations in relation to expansive delegations and strict liability offences are included for instruments in my portfolio.

Committee response

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

The committee also thanks the minister for her advice that endeavours will be made to include sufficient information in relation to strict liability offences and expansive delegations in ESs for future instruments in the Defence portfolio.

Instrument	**Excise (Mass of CNG) Determination 2016 (No. 2) [F2016L01522]**
Purpose	Provides rules for working out the mass of Compressed Natural Gas delivered for home consumption which is used to work out the amount of excise duty payable on such fuel
Last day to disallow	1 December 2016
Authorising legislation	*Excise Act 1901*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Access to incorporated documents

The committee commented as follows:

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of a legislative instrument, unless authorising or other legislation alters the operation of section 14.

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that paragraph 9 of the determination incorporates the following documents as at the time of the commencement of the determination:

- 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*.

While the ES to the determination provides a description of these standards and how they may be obtained, the committee notes that they are only available for sale from SAI Global and the International Organization for Standardization store for a fee of $91.09 and CHF 178[5] respectively, and neither the determination nor the ES provides information about whether the standards are otherwise freely and readily available.

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

Minister's response

The Minister for Revenue and Financial Services advised:

> The Australian Taxation Office (ATO) has advised me that the Legislative Instrument provides a number of alternatives to calculate the mass of CNG without the requirement to use the incorporated Australian and International Standards. These freely available alternatives include the use of a conversion factor as prescribed in section 24(3) of the Excise Regulation 2015 and the use of corrected heating values as supplied by gas distributors with their tax invoice. The prescribed conversion factor is based on an average of the energy content of natural gasses supplied for use in Australia.
>
> Where a person elects not to use the prescribed average based conversion factor and selects to calculate the mass of CNG using a precise measurement of the energy content for a particular gas supply, the Legislative Instrument provides accepted methods that incorporate the Australian and International Standards.
>
> Due to the technical expertise and the cost of equipment required to determine the energy content for a particular gas supply, the ATO considers the methods in the Legislative Instrument which incorporate the Australian and International Standards will not be used by the general public but by members of the petroleum and gas supply industry if they elect to do so.
>
> The ATO are mindful of the recent issues surrounding the loss of electronic access to Australian and International Standards at the National and State Libraries of Australia. The National Library of Australia has been contacted and confirms that due to their year of publication, the incorporated standards are still freely accessible through the comprehensive hardcopy collections of Australian and International Standards held by the National Library of Australia and State Libraries.
>
> The ATO will forward an amended Explanatory Statement to the Table Office of the House of Representatives and Senate respectively in order to further address the concerns of the Committee. The amended Explanatory Statement will include information detailing that the incorporated standards are subject to copyright and publically accessible free of charge through the National Library of Australia or alternatively may be purchased at the website from which they are available at the time of publication (currently,

5 As at 1 November 2016, CHF 178 (178 Swiss Franc) converted to approximately $235 AUD.

the websites are https://infostore.saiglobal.com and http://www.iso.org respectively).

The amended Explanatory Statement will be forwarded to the Tabling Offices prior to the last day to disallow on 1 December 2016.

Committee response

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

The committee notes that a replacement ES which includes information detailing where the incorporated standards may be accessed has been registered on the Federal Register of Legislation and received by the committee.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulation 2016 [F2016L01555]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to insert item 170 which recognises and rewards Indigenous Australians
Last day to disallow	1 December 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (merits review)

The committee commented as follows:

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

The regulation adds new table item 170 to Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 establishing legislative authority for spending activities in relation to the National Indigenous Law Awards Programme. While the ES is generally helpful in providing information about the proposed administration of the National Indigenous Law Awards Programme, the committee

notes that the program will not be subject to merits review. The ES provides the following justification for the exclusion:

> Due to the programme's small scale and low monetary cost, the National Indigenous Law Awards Programme will not be subject to merits review arrangements. Similarly, the Attorney-General's Department will not provide feedback to applicants.

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

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

Minister's response

The Minister for Finance provided the following advice, received from the Attorney-General:

> The objective of the programme is to recognise and reward publicly the exceptional achievements of Indigenous Australians who either work or study in the legal sector and can demonstrate that they are committed to achieving real and positive change for Indigenous Australians. The programme is administered through the Indigenous Legal Assistance Program, the objective of which is to ensure Indigenous people are able to access justice and exercise their rights in the same way as other Australians.
>
> The programme includes the National Indigenous Law Professional of the Year Award (the Professional Award) and the National Indigenous Law Student of the Year Prize (the Student Prize). The process for determining recipients will be based on assessment criteria and guidelines published on the Attorney-General's Department website. Applications will be assessed by an appropriate panel, which will make recommendations to me as the final decision-maker.
>
> Funding decisions for the measure will be made in accordance with the above selection process, and in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grant Rules and Guidelines*. The guaranteed right of review under section 75(v) of the Australian Constitution, and review under section 39B of the *Judiciary Act 1903*, would still be available. Persons affected by spending decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

As noted in the Explanatory Statement for the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulation 2016*, the programme has a small scale.

The programme is not considered suitable for independent merits review because it will involve the allocation of finite resources (with the Student Prize valued at $2 500 and the Professional Award valued at $5 000). Since the Programme has limited funds, only a proportion of applications may be met. The remaking of a decision under merits review would necessarily affect allocations available to other parties. An application for merits review also may result in delays in finalising annual awards, which would affect the timely provision of support to recipients for the purpose of professional development or further studies.

Committee response

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

Instrument	**Human Services (Centrelink) Amendment (Protected Symbols) Regulation 2016 [F2016L01578]**
Purpose	Makes 'myGov' a 'protected name' and the two logos associated with myGov 'protected symbols' under the *Human Services (Centrelink) Act 1997*
Last day to disallow	1 December 2016
Authorising legislation	*Human Services (Centrelink) Act 1997*
Department	Human Services
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

No description of consultation

The committee commented as follows:

Section 17 of the *Legislation 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. 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 (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the regulation provides no information regarding consultation.

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 *Legislation Act 2003*.

Minister's response

The Minister for Human Services advised:

> The Regulation amended the Human Services (Centrelink) Regulations 2011 to provide that the name 'myGov' is a protected name and that two logos associated with the myGov digital service are protected symbols. Consultation was not undertaken prior to making the Regulation. Consultation was considered unnecessary as the amendment:
>
> - was of a minor and machinery nature; and
> - would not impact on existing rights, as the use of the 'myGov' name is already restricted due to its registration as a trademark under the *Trade Marks Act 1995*.
>
> I am advised that the omission of information about consultation in the Explanatory Statement was an oversight. My Department is currently preparing a Supplementary Explanatory Statement to address this oversight.

Committee's response

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

In concluding this matter, the committee notes the minister's advice that the Department for Human Services is preparing a supplementary ES which, in accordance with the *Legislation Act 2003,* will include an explanation of why consultation was not undertaken.

Instrument	**Inspector-General of the Australian Defence Force Regulation 2016 [F2016L01558]**
Purpose	Prescribes the powers and functions of the Inspector-General of the Australian Defence Force (ADF) and details the appointment, role, functions and powers of inquiry officers, inquiry assistants and Assistant Inspectors-General ADF
Last day to disallow	1 December 2016
Authorising legislation	*Defence Act 1903*
Department	Defence
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Sub-delegation

The committee commented as follows:

Section 6 of the regulation provides that the following persons are eligible for appointment as an inquiry officer, inquiry assistant or Assistant Inspectors-General ADF (Assistant IGADF) for the purposes of section 110P of the *Defence Act 1903:*

- a member of the Defence Force, of any rank;
- an APS [Australian Public Service] employee, of any classification (including an SES employee or an acting SES employee); and
- any other person who has agreed, in writing, to the appointment.

The committee notes that the ES states that section 6 of the regulation 'substantially reflects' the eligibility requirements previously provided for in the Defence (Inquiry) Regulations 1985. However, the current regulation expands the information gathering powers of an inquiry officer, inquiry assistant and Assistant IGADF, and the committee is concerned that the ES provides no justification for the need to be able to appoint lower level employees of the ADF or APS to these positions.

In addition, the committee is concerned that section 6 contains no requirement that the Inspector-General ADF be satisfied that a person appointed to the role of inquiry officer, inquiry assistant or Assistant IGADF is appropriately trained or qualified for the role.

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

Minister's response

The Minister for Defence advised:

> The view has been taken that it is essential to give the IGADF as much flexibility as possible in appointing people to undertake inquiries on the

IGADF's behalf. The IGADF's primary concern will always be to appoint the best possible person or people available, having regard to all the circumstances. In this regard, it is important to recognise the legal difference between an inquiry appointed under the Defence (Inquiry) Regulations 1985, which operates independently from the appointing officer, and an inquiry officer or assistant IGADF appointed under this Regulation, who operates as an 'agent' of the IGADF. The IGADF retains responsibility for quality assurance and the final results of the process.

I also note that inquiry officers and assistant IGADF can only use information gathering powers if specifically authorised by the IGADF under section 24. Authorisation under section 24 to use information gathering powers is given by the IGADF personally, and must relate to a particular inquiry (so, for example, an assistant IGADF cannot be authorised generally, but only in relation to a particular inquiry). The additional information gathering powers, outlined in section 23, are only available in certain types of inquiry (into service related deaths, or at the direction of the Minister or CDF). Inquiry assistants cannot be authorised to use any of the information gathering powers.

While acknowledging the Committee's concerns about the appointment of lower level ADF or APS to these positions, a lower level appointment will sometimes be desirable. A number of considerations will be relevant when deciding who to appoint, including what information gathering powers can and should be authorised under section 24 in relation to the inquiry, and the person's training and experience with respect to those powers. Other relevant considerations include: the subject of the inquiry and the person's qualifications and experience in relation to that subject; the person's availability; the skills and experience of the inquiry team as a whole (including inquiry assistants); resources that will be available to the inquiry (for example legal advice available in the Office of the IGADF); and the rank/classification of likely witnesses in the inquiry.

It would not be uncommon to appoint relatively low level ADF members or APS employees as inquiry assistants, given the nature of the work required. Appointment of a lower level inquiry officer or assistant IGADF may also be appropriate in some cases. For example, in a deployed environment a Reserve ADF member junior in rank may be highly experienced in their normal civilian role in the conduct of inquiries. If a variety of skills and experience is required to properly undertake an inquiry, the IGADF may appoint several people of various ranks, with different skills and experience, giving the IGADF the greatest opportunity for robust consideration of the issues. Limiting the rank or level of an appointee would undermine the IGADF's flexibility to adequately respond to the specific requirements of a matter.

Current IGADF policy requires that all personnel posted into a position in the Office of the IGADF must undertake the Advanced Inquiry Officer course provided by the Military Law Centre (if they have not already done so). Additional in-house training is also provided, and a more senior assistant IGADF provides mentoring of new members in the office.

> I regret that these matters were not more fully explained in the explanatory statements for each Regulation. In future, I will endeavour to ensure that more complete explanations in relation to expansive delegations…are included for instruments in my portfolio.

Committee response

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

The committee also thanks the minister for her advice that endeavours will be made to include sufficient information in relation to expansive delegations in ESs for future instruments in the Defence portfolio.

Instrument	**Therapeutic Goods (Permissible Ingredients) Amendment (2016 Measures No. 1) Determination 2016 [F2016L01588]**
Purpose	Introduces 12 new ingredients for use in listed medicines and clarifies requirements relating to the use of particular ingredients
Last day to disallow	1 December 2016
Authorising legislation	*Therapeutic Goods Act 1989*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 8 of 2016

The committee commented in relation to two matters as follows:

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above the committee notes that Schedule 1, items 28, 30 and 52 of the determination incorporate the British Pharmacopoeia (BP) and United States Pharmacopeia – National Formulary (USP-NF).

However, neither the text of the determination nor the ES expressly states the manner in which BP and USP-NF are incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the 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 documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that Schedule 1, items 28, 30 and 52 of the determination incorporate Food Chemicals Codex (FCC) published by the United States Pharmacopeial Convention, as in force or existing from time to time.

However, the committee notes that the FCC, published by the United States Pharmacopeial Convention, appears to be only available for a fee of $500, and the ES does not indicate how this document may be otherwise freely obtained.

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

Minister's response

The Minister for Health and Aged Care advised:

> In relation to the Therapeutic Goods (Permissible Ingredients) Amendment (2016 Measures No. 1) Determination 2016 [F2016L01588], the intention with regards to each of the instruments incorporated by reference noted by the Committee was to incorporate these as amended from time to time.
>
> The authority to do so is provided by subsection 26BB(8) of the *Therapeutic Goods Act 1989*, which notes that, notwithstanding subsection 14(2) of the *Legislation Act 2003*, a determination under section 26BB may make provision in relation to a matter by applying, adopting or incorporating any matter in an instrument or other writing as in force or existing from time to time.
>
> The Committee's concern that instruments clearly state the manner in which documents are incorporated is appreciated, and the above references will be clarified in the next edition of the permissible ingredients instrument.
>
> The Committee's concern about access to freely obtained documents is noted. However, versions of the documents referred to in the instruments

including the Food Chemicals Codex are available through a number of libraries allowing public access. This information will be clarified in the next edition of the permissible ingredients instrument.

Committee response

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

The committee also notes the minister's undertaking to specify in the next edition of the permissible ingredients instrument the manner in which documents are incorporated and where they can be freely obtained.

Senator John Williams (Chair)

Appendix 1

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 *Legislation Act 2003* (the Act)[1] 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 *Legislation 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.

---

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

It is important to note that section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, 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 15J 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 15J 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:

- **Absence of consultation**: Where no consultation was undertaken the Act requires an explanation for its absence. 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 15J of the Act.

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

Seeking further advice or information

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

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

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

Appendix 2

Correspondence

Senator the Hon Marise Payne
Minister for Defence

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7800

MC16-003341

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

Dear Chair John

Thank you for your letter of 10 November 2016 drawing my attention to the Committee's Delegated Legislation Monitor No. 8 of 2016, and seeking my response in relation to the issues identified in the Monitor in relation to:

- *Army and Air Force (Canteen) Regulation 2016*
- *Defence Regulation 2016*
- *Inspector-General of the Australian Defence Force Regulation 2016*

Army and Air Force (Canteen) Regulation 2016

I understand that the Committee was concerned that there was no justification in the explanatory statement for the capacity of the Board established in the Regulation to delegate powers to 'employees of the Board'.

This Regulation and the *Navy (Canteen) Regulation 2016* were introduced to replace the *Army and Air Force Canteen Service Regulations 1959* and *Navy (Canteens) Regulations 1954* respectively, which were to sunset on 1 October 2016. The legal entities established under these regulations, and options for the broader governance arrangements of Australian Defence Force (ADF) canteen services, service trusts and companies established in legislation for the welfare of serving and former ADF members, are currently the subject of an internal Defence review as part of the Government's smaller government initiative. When complete, recommendations from that review could lead to significant change to legislation establishing these entities, including possible repeal of the *Army and Air Force (Canteen) Regulation 2016.*

In this context, the decision was made to re-make the regulations with substantively the same effect so that existing canteen services could continue uninterrupted, without undertaking a more thorough review of the regulations, pending completion of the review and a decision on the long term governance of these entities. It is acknowledged that this has perpetuated some irregularities and inconsistencies in the regulations. An example is the capacity of the Board to delegate to 'employees of the Board' in the *Army and Air Force (Canteen) Regulation 2016*, which may be unnecessarily broad and is different from the equivalent provision in the *Navy (Canteen) Regulation 2016*. The only substantive change made to the previous regulations was to replace references to the Service Chiefs with references to the Chief of the Defence Force (CDF), consistent with the outcome of the First Principles Review.

Defence Regulation 2016

I understand that the Committee was concerned that the explanatory statement failed to provide justification for inclusion of a strict liability offence provision in the Regulation. I also understand that the Committee was concerned about the capacity to delegate certain powers in the Regulation to Australian Public Service (APS) 4 and 6 level employees, without adequate justification in the explanatory statement. The following information is provided to assist the Committee in this respect.

Strict liability offence

The strict liability offence in section 76 of the Regulation makes it an offence to use prohibited words or letters in connection with business if the use is not in accordance with a consent obtained under section 77. Strict liability applies to the requirement that the use is not in accordance with a consent, which means that it is not necessary for the prosecution to prove that the person knew that the use was not in accordance with a consent. This offence is substantively identical to the offence previously contained in sub regulation 2(2) of the *Defence (Prohibited Words and Letters) Regulations 1957*, including the strict liability element. The only change has been to increase the penalty from five to ten penalty units.

In reviewing the offence provision, as re-made in section 76, it was considered that the difficulty of proving that a person has positive knowledge of the non-existence of the relevant consent would undermine the effectiveness of this offence provision as a deterrent. Accordingly, the strict liability element was retained. The relatively low penalty is well within the penalties discussed in relation to strict liability offences in the Attorney General Department's: *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers.*

Delegation of powers

Part 16 of the Regulation enables powers outlined in different parts of the Regulation to be delegated down to different ADF ranks/APS classifications. These levels were determined having regard to the nature of the powers in question, and how they are administered in practice. Of particular concern to the Committee is the ability to delegate some powers down to APS 4 and APS 6 classifications.

For the purposes of performing clerical duties (as opposed to the exercise of military command responsibilities), the APS classifications in each provision in Part 16 are treated in Defence as comparable to the military ranks listed. Defence is an increasingly integrated work environment, where ADF members and APS employees work together. Some decision-making previously conducted by ADF members is now conducted by APS employees (including where a particular position is temporarily filled by an APS employee) and this possibility may continue in the future. Accordingly, all delegation powers in the Regulation have been written to enable delegations to be made both ADF members and APS employees at comparable levels.

Subsection 82(2) provides that the Minister's powers under Part 14 can be delegated to ADF officers down to Major or equivalent rank, and to APS employees down to APS 6 classification. These powers are to accept or refuse, or accept with conditions, applications for consent to use prohibited words and letters. A similar power exists under section 83 of the *Defence Act 1903* in relation to the use of emblems and flags, which is not limited by rank or classification, and it was considered important that delegations under the Regulation correspond with authorisations under section 83 of the Act. Brand managers for the ADF, Navy, Army and Air Force, and their staff (including both ADF members and APS employees), are responsible for administering applications for consent. Elevating the level of delegates in relation to these powers could unnecessarily slow down the decision-making process.

Subsections 83(2) and 84(3) provide that the Secretary's and CDF's powers under Part 11 can be delegated to ADF officers down to Major or equivalent rank, and to APS employees down to APS 6 classification. These powers are to: determine when entry to a defence area is prohibited; direct the removal of property from a defence area while entry is prohibited; authorise the installation of equipment in a defence area; and authorise a person to grant permission for a person to enter a defence area while it is prohibited. These are decisions that, by their nature, are undertaken at a local level in relation to particular defence areas, in order to facilitate defence operations or practices as they arise. Commanders and other staff responsible for the day to day decision-making in defence areas will often be at the levels outlined in subsection 83(2) and 84(3), and the ability to delegate these powers to these levels is essential for the effective operation of Part 11 of the Regulation.

Subsection 84(1) provides that the CDF's powers under Parts 3, 4 and 5 can be delegated to ADF members down to Warrant Officer 2 or equivalent rank, and to APS employees down to APS 4 classification. These powers relate to personnel decision-making for ADF members, and there are a massive volume of these decisions made every day. In order to effectively administer the ADF, it is necessary that they be delegable to relatively low levels. For example, the CDF's power in paragraph 12(1)(b) to enlist a person in the Army has been delegated to Warrant Officers posted to Defence Force Recruiting.

Inspector-General of the Australian Defence Force Regulation 2016

I understand that the Committee's concern was that the explanatory statement inadequately justified the capacity of the Inspector-General of the ADF (IGADF) to appoint any ADF member or APS employee as an inquiry officer, inquiry assistant or assistant IGADF, particularly having regard to the additional information gathering powers available under the Regulation (as compared to the IGADF's previous powers under the *Defence (Inquiry) Regulations 1985*).

The Committee was also concerned that there is no requirement in the Regulation in relation to the training or qualifications of people appointed to these positions.

The view has been taken that it is essential to give the IGADF as much flexibility as possible in appointing people to undertake inquiries on the IGADF's behalf. The IGADF's primary concern will always be to appoint the best possible person or people available, having regard to all the circumstances. In this regard, it is important to recognise the legal difference between an inquiry appointed under the Defence (Inquiry) Regulations 1985, which operates independently from the appointing officer, and an inquiry officer or assistant IGADF appointed under this Regulation, who operates as an 'agent' of the IGADF. The IGADF retains responsibility for quality assurance and the final results of the process.

I also note that inquiry officers and assistant IGADF can only use information gathering powers if specifically authorised by the IGADF under section 24. Authorisation under section 24 to use information gathering powers is given by the IGADF personally, and must relate to a particular inquiry (so, for example, an assistant IGADF cannot be authorised generally, but only in relation to a particular inquiry). The additional information gathering powers, outlined in section 23, are only available in certain types of inquiry (into service-related deaths, or at the direction of the Minister or CDF). Inquiry assistants cannot be authorised to use any of the information gathering powers.

While acknowledging the Committee's concerns about the appointment of lower level ADF or APS to these positions, a lower level appointment will sometimes be desirable. A number of considerations will be relevant when deciding who to appoint, including what information gathering powers can and should be authorised under section 24 in relation to the inquiry, and the person's training and experience with respect to those powers. Other relevant considerations include: the subject of the inquiry and the person's qualifications and experience in relation to that subject; the person's availability; the skills and experience of the inquiry team as a whole (including inquiry assistants); resources that will be available to the inquiry (for example legal advice available in the Office of the IGADF); and the rank/classification of likely witnesses in the inquiry.

It would not be uncommon to appoint relatively low level ADF members or APS employees as inquiry assistants, given the nature of the work required. Appointment of a lower level inquiry officer or assistant IGADF may also be appropriate in some cases. For example, in a deployed environment a Reserve ADF member junior in rank may be highly experienced in their normal civilian role in the conduct of inquiries. If a variety of skills and experience is required to properly undertake an inquiry, the IGADF may appoint several people of various ranks, with different skills and experience, giving the IGADF the greatest opportunity for robust consideration of the issues. Limiting the rank or level of an appointee would undermine the IGADF's flexibility to adequately respond to the specific requirements of a matter.

Current IGADF policy requires that all personnel posted into a position in the Office of the IGADF must undertake the Advanced Inquiry Officer course provided by the Military Law Centre (if they have not already done so). Additional in-house training is also provided, and a more senior assistant IGADF provides mentoring of new members in the office.

Conclusion

I regret that these matters were not more fully explained in the explanatory statements for each Regulation. In future, I will endeavour to ensure that more complete explanations in relation to expansive delegations and strict liability offences are included for instruments in my portfolio.

Yours sincerely

MARISE PAYNE

22 NOV 2016

TREASURER

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

Dear Chair

Thank you for your letter of 10 November 2016 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice on the *Banking, Insurance and Life Insurance (prudential standard) determination No. 4 of 2016 – Prudential Standard 3PS 310 – Audit and Related Matters* and *Banking, Insurance and Life Insurance (prudential standard) determination No. 8 of 2016 – Prudential Standard CPS 510 Governance* (the Instruments).

I have raised with the Australian Prudential Regulation Authority (APRA), which is responsible for making the Instruments, the Committee's concern that neither the Instruments nor the Explanatory Statement (ES) to the Instruments clearly state the manner in which certain cited documents have been incorporated.

APRA noted that Prudential Standard 3PS 310 – Audit and Related Matters [F2016L01437] (3PS 310), is part of a suite of legislative instruments that provide for the regulation of Level 3 Groups (Level 3 Standards). It was developed as a technical document for reference by auditors and regulated entities (authorised deposit-taking institutions, general insurers and life insurance companies) who have specialist technical skills and knowledge of the prudential framework.

Prudential Standard 3PS 001[F2016L01428] (3PS 001), which comes into effect on the same day as 3PS 310, provides definitions which are required to be used by regulated entities when interpreting the other Level 3 Standards.

Paragraph 4 of Prudential Standard 3PS 001 provides that "Australian Auditing and Assurance Standards is a reference to the Australian Auditing and Assurance Standards issued by the Australian Auditing and Assurance Standards Board (AUASB) as in force from time to time."

APRA considers that it is implicit that the guidance material issued (which includes the Framework for Assurance Engagements) would also be incorporated as in force from time to time, and that auditors and regulated entities would understand this.

APRA agrees however that this could be made clearer and consider that including further description in the ES would be appropriate for this instrument and will revise the ES accordingly. APRA will also include in the revised ES a description of the document and where it can be freely obtained. APRA will also include further clarification in 3PS 310 the next time that the instrument is amended.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

Prudential Standard CPS 510 Governance [F2016L01432] (CPS 510) refers at paragraph 80 to APES 110 Code of Ethics for Professional Accountants, issued by the Accounting Professional and Ethical Standards Board in December 2010 (APES 110). It was developed as a technical document for reference by regulated entities (authorised deposit-taking institutions, general insurers and life insurance companies) who have specialist technical skills and knowledge of the prudential framework. All references to extrinsic material in Prudential Standards made by APRA have, unless the contrary intention has been overtly expressed, been to material as it exists or is in force from time to time. In the case of APES 110 the inclusion of the date of publication was not intended to indicate that the document referred to was only as it existed at the date of publication.

APRA accepts that the paragraph is not clear on this point, but given the nature of the readership of the prudential standard, considers that including further description in the ES would be appropriate for this instrument and will revise the ES accordingly, with APRA including clarification in CPS 510 the next time that the instrument is amended. APRA will also include in the revised ES a description of the document and where it can be freely obtained.

Yours faithfully

The Hon Scott Morrison MP

29 / 11 / 2016

ATTORNEY-GENERAL

MC16-142617

CANBERRA

Senator John Williams
Chair
Senate Standing Committee on
Regulations and Ordinances
Room S1.111
Parliament House
Canberra ACT 2600
<regords.sen@aph.gov.au>

Dear Senator Wacka

Thank you for the letter from Ms Toni Dawes, Committee Secretary, dated 10 November 2016, advising my Office of the Senate Standing Committee on Regulations and Ordinances' request for advice regarding the Defence Force Discipline Appeals Regulation 2016 (the Regulation) in the Delegated Legislation Monitor No.8 of 2016.

The Committee requested my advice regarding section 17 of the Regulation which sets the fees for the Registrar of the Defence Force Discipline Appeal Tribunal (Tribunal) to supply copies of documents relating to an appeal, to an appellant. The Committee notes that there is an unclear basis for determining the fees and the Explanatory Statement (ES) does not state the basis on which the fees have been calculated.

I provide the following information about the Regulation and the fees set out in section 17 of the Regulation.

The Tribunal was established under the *Defence Force Discipline Appeals Act 1955* (the Act). Section 60 of the Act provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. In particular, subsection 60(b) allows regulations to be made for prescribing fees, to be charged in respect of proceedings under the Act.

The Regulation was remade in substantially the same form in circumstances where it was otherwise due to sunset on 1 October 2016 and the regulations were, and continue to, work efficiently and effectively. As such, the Regulation updated phrasing and references to conform to current drafting practices and otherwise preserved the existing arrangement and procedures of the Tribunal.

Section 17 of the Regulation sets the fees for the Registrar of the Tribunal to supply copies of documents relating to an appeal to an appellant. If the document is under 50 pages the fee is $12, and if the document is over 50 pages the fee is $12 plus 10 cents per page in excess of 50 pages.

The Tribunal and the Department of Defence were consulted throughout the process of re-making the Regulation and raised no issues with the fee structure or amounts in section 17. As noted in Monitor No.8, these fees reflect those that existed in the previous regulations and have remained the same since 1985. The Tribunal has confirmed the fee amounts remain appropriate and justified and additionally advised that there are very few, if any, occasions where the fee has been charged.

I also draw to your attention to the consistency of these fees with the prescribed fees payable under the *Defence Force Discipline Act 1982* (see section 195) and the Defence Force Discipline Regulations 1985 (see section 46) for the supply of a copy of the record of proceedings of a trial. Given that the Tribunal is empowered to hear and determine appeals by persons convicted or acquitted of relevant service offences by a court martial or a Defence Force Magistrate, under the Defence Force Discipline Act and Regulations, it is appropriate that the same fees apply for the similar circumstances in relation to the supply of copies of documents.

For these reasons, I am of the view that the fee amounts for supplying copies of documents in section 17 of the Regulation continue to be appropriate and justified. I trust that this information will assist the Committee in its consideration of the Regulation.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Minister for Small Business
Assistant Treasurer

The Hon Kelly O'Dwyer MP

Ref: MS16-000137

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

Dear Senator Williams John

The Senate Standing Committee on Regulations and Ordinances has requested advice in relation to the issue identified in the *Delegated legislation monitor* No. 8 of 2016 concerning the *Excise (Mass of CNG) Determination 2016 (No. 2)* [F2016L01522].

The legislative instrument provides rules for how Compressed Natural Gas (CNG) is to be measured for the purposes of paying excise duty. The new instrument is identical in effect to the former instrument and has been developed merely to reflect minor technical amendments.

The Committee has sought further information on the renewal of this instrument. The Committee expressed concerns where incorporated documents are not publicly and freely available, persons interested or affected by the law may have inadequate access to its terms. In particular the Committee noted that neither the determination nor the Explanatory Statement provides information about whether the below Australian and International Standards incorporated in the determination are otherwise freely and readily available.

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

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

The Australian Taxation Office (ATO) has advised me that the Legislative Instrument provides a number of alternatives to calculate the mass of CNG without the requirement to use the incorporated Australian and International Standards. These freely available alternatives include the use of a conversion factor as prescribed in section 24(3) of the Excise Regulation 2015 and the use of corrected heating values as supplied by gas distributors with their tax invoice. The prescribed conversion factor is based on an average of the energy content of natural gasses supplied for use in Australia.

Where a person elects not to use the prescribed average based conversion factor and selects to calculate the mass of CNG using a precise measurement of the energy content for a particular gas supply, the Legislative Instrument provides accepted methods that incorporate the Australian and International Standards.

Parliament House Canberra ACT 2600 Australia
Telephone: 02 6277 7360 Facsimile 02 6273 0434

Due to the technical expertise and the cost of equipment required to determine the energy content for a particular gas supply, the ATO considers the methods in the Legislative Instrument which incorporate the Australian and International Standards will not be used by the general public but by members of the petroleum and gas supply industry if they elect to do so.

The ATO are mindful of the recent issues surrounding the loss of electronic access to Australian and International Standards at the National and State Libraries of Australia. The National Library of Australia has been contacted and confirms that due to their year of publication, the incorporated standards are still freely accessible through the comprehensive hardcopy collections of Australian and International Standards held by the National Library of Australia and State Libraries.

The ATO will forward an amended Explanatory Statement to the Table Office of the House of Representatives and Senate respectively in order to further address the concerns of the Committee. The amended Explanatory Statement will include information detailing that the incorporated standards are subject to copyright and publically accessible free of charge through the National Library of Australia or alternatively may be purchased at the website from which they are available at the time of publication (currently – the websites are https://infostore.saiglobal.com and http://www.iso.org respectively).

The amended Explanatory Statement will be forwarded to the Tabling Officers prior to the last day to disallow on 1 December 2016.

Yours sincerely

Kelly O'Dwyer

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS16-001617

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

Dear Senator Williams

I refer to the Committee Secretary's letter dated 10 November 2016 sent to my office seeking further information about the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulation 2016* (the Regulation).

In the *Delegated legislation monitor, Monitor 8 of 2016*, 9 November 2016, the Committee requested further information about the National Indigenous Law Awards Programme, an item in the Regulation.

The Attorney-General, Senator the Hon George Brandis QC, has provided the attached response to the Committee's request and I have provided the Attorney-General with a copy of this letter.

I trust this advice will assist the Committee with its consideration of this matter.

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

Kind regards

Mathias Cormann
Minister for Finance

24 November 2016

Attachment A

Attorney-General's response to the Senate Standing Committee on Regulation and Ordinances request - item 170, Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*, establishing legislative authority for the National Indigenous Law Awards programme

The Senate Standing Committee on Regulation and Ordinances (the committee) notes that administrative decisions taken under the National Indigenous Law Awards programme (the programme) will not be subject to review of their merits by a judicial or other independent tribunal. The committee has sought further information on the policy considerations and program characteristics which are relevant to the question of whether such decisions should be subject to merits review.

The objective of the programme is to recognise and reward publicly the exceptional achievements of Indigenous Australians who either work or study in the legal sector and can demonstrate that they are committed to achieving real and positive change for Indigenous Australians. The programme is administered through the Indigenous Legal Assistance Program, the objective of which is to ensure Indigenous people are able to access justice and exercise their rights in the same way as other Australians.

The programme includes the National Indigenous Law Professional of the Year Award (the Professional Award) and the National Indigenous Law Student of the Year Prize (the Student Prize). The process for determining recipients will be based on assessment criteria and guidelines published on the Attorney-General's Department website. Applications will be assessed by an appropriate panel, which will make recommendations to me as the final decision-maker.

Funding decisions for the measure will be made in accordance with the above selection process, and in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grant Rules and Guidelines*. The guaranteed right of review under section 75(v) of the Australian Constitution, and review under section 39B of the *Judiciary Act 1903*, would still be available. Persons affected by spending decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

As noted in the Explanatory Statement for the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulation 2016*, the programme has a small scale.

The programme is not considered suitable for independent merits review because it will involve the allocation of finite resources (with the Student Prize valued at $2 500 and the Professional Award valued at $5 000). Since the Programme has limited funds, only a proportion of applications may be met. The remaking of a decision under merits review would necessarily affect allocations available to other parties. An application for merits review also may result in delays in finalising annual awards, which would affect the timely provision of support to recipients for the purpose of professional development or further studies.

The Hon Alan Tudge MP

Minister for Human Services

MS16-001077

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

Dear Chair John

Thank you for the letter of 10 November 2016 from the Secretary of the Senate Standing Committee on Regulations and Ordinances, drawing attention to the Committee's comments in *Delegated Legislation Monitor* 8 of 2016 regarding the *Human Services (Centrelink) Amendment (Protected Symbols) Regulation 2016* ('the Regulation').

The Committee noted that the Explanatory Statement for the Regulation provides no information regarding consultation. The Committee has sought advice in relation to this matter and requested that the Explanatory Statement be updated in accordance with the requirements of the *Legislation Act 2003*.

The Regulation amended the *Human Services (Centrelink) Regulations 2011* to provide that the name 'myGov' is a protected name and that two logos associated with the myGov digital service are protected symbols. Consultation was not undertaken prior to making the Regulation. Consultation was considered unnecessary as the amendment:

- was of a minor and machinery nature; and
- would not impact on existing rights, as the use of the 'myGov' name is already restricted due to its registration as a trademark under the *Trade Marks Act 1995*.

I am advised that the omission of information about consultation in the Explanatory Statement was an oversight. My Department is currently preparing a Supplementary Explanatory Statement to address this oversight.

Thank you for bringing this matter to my attention.

Yours sincerely

Alan Tudge

SUPPLEMENTARY EXPLANATORY STATEMENT

Human Services (Centrelink) Act 1997

Human Services (Centrelink) Regulations 2011

Human Services (Centrelink) Amendment (Protected Symbols) Regulation 2016

After '...and the Commonwealth needs to protect this branding against unauthorised use.' in the Explanatory Statement to the Human Services (Centrelink) Amendment (Protected Symbols) Regulation 2016, insert new paragraph:

It was not necessary or appropriate to undertake consultation under section 17 of the *Legislation Act 2003* as the amendments set out in the *Human Services (Centrelink) Amendment (Protected Symbols) Regulation 2016*:

- are of a minor and machinery nature; and
- do not impact on existing rights as the use of the 'myGov' name is already restricted by virtue of its registration as a trademark under the *Trade Marks Act 1995*.

THE HON SUSSAN LEY MP
MINISTER FOR HEALTH AND AGED CARE
MINISTER FOR SPORT

Ref No: MC16-032798

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

Dear Chair John

I refer to the letter of 10 November 2016 from the Senate Standing Committee on Regulations and Ordinances, drawing my attention to the *Delegated legislation monitor 8 of 2016*, which outlines a number issues identified by the Committee in relation to several instruments for which I have responsibility. I appreciate the opportunity to provide clarification and my response to each matter is as follows:

- **QAA 10/2016: Australian Vigilance and Surveillance System for Organ Donation and Transplantation**

The *Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 10/2016* was made following an application from the Australian Organ and Tissue Donation and Transplantation Authority for a declaration under section 124X of the *Health Insurance Act 1973* in respect of the Australian Vigilance and Surveillance System for Organ Donation and Transplantation, which it conducts. An application to have an activity declared under section 124X of the Act requires the applicant to provide details of two independent referees, typically members of the medical profession, who support the application.

My Department consulted with the Australian Organ and Tissue Donation and Transplantation Authority in relation to the final design and content of the declaration, including through correspondence and meetings between the agencies. Wider consultation was not considered necessary as QAA 10/2016 relates only to the Australian Organ and Tissue Donation and Transplantation Authority's Australian Vigilance and Surveillance System for Organ Donation and Transplantation.

- **QAA 11/2016: Professional Qualities Reflection of the Royal Australasian College of Physicians and**

- **QAA 12/2016: MyCPD of the Royal Australasian College of Physicians**

The *Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 - QAA 11/2016* and *Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 - QAA 12/2016* were made in respect of two continuing professional development activities conducted by the Royal Australasian College of Physicians (RACP). These activities had previously been declared as quality assurance activities under section 124X of the *Health Insurance Act 1973*, however those declarations were expiring.

The two declarations were made to replace those expiring declarations following applications from the RACP wanting to continue the declaration of their activities as quality assurance activities. An application to have an activity declared under section 124X of the Act requires the applicant to provide details of two independent referees, typically members of the medical profession, who support the application.

I am advised that my Department consulted with the RACP in writing about the design of the program during the assessment process. Wider consultation was not considered necessary as QAA 11/2016 and QAA 12/2016 relate only to the RACP's Professional Qualities Reflection of the Royal Australasian College of Physicians and MyCPD programs. Additionally, the new declarations replaced the existing declarations that had expired and did not substantially change existing arrangements.

Amendments to Explanatory Statements

Replacement Explanatory Statements for QAA 10/2016, QAA 11/2016 and QAA 12/2016 will be prepared and registered, as soon as practicable, to clearly describe the nature of consultation.

- **Private Health Insurance (Prostheses) Amendment Rules 2016 (No 3)**

Schedule 1, item 1 of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 3) [F2016L01596] (the amendment instrument) amends the minimum benefit for billing code BS120 in Part A of Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L00381] (the principal instrument) to correct an error. The amendment instrument increases the minimum benefit for billing code BS120 in Part A from $168 to $336.

The minimum benefit of $168 for billing code BS120, which relates to intraoperative accessories in Part A of the principal instrument, was in effect from 8 September to 6 October 2016. The correction in the amendment instrument to specify a minimum benefit of $336 was not applied retrospectively. The device sponsor has advised my Department that the device was used 12 times during this period at a benefit of $168 each. Making these amendments retrospectively would have imposed a retrospective liability on private health insurers.

- **Therapeutic Goods (Permissible ingredients) Amendment (2016 Measures No.1 Determination 2016**

In relation to the Therapeutic Goods (Permissible Ingredients) Amendment (2016 Measures No.1) Determination 2016 [F2016L01588], the intention with regards to each of the instruments incorporated by reference noted by the Committee was to incorporate these as amended from time to time.

The authority to do so is provided by subsection 26BB(8) of the *Therapeutic Goods Act 1989*, which notes that, notwithstanding subsection 14(2) of the *Legislation Act 2003*, a determination under section 26BB may make provision in relation to a matter by applying, adopting or incorporating any matter in an instrument or other writing as in force or existing from time to time.

The Committee's concern that instruments clearly state the manner in which documents are incorporated is appreciated, and the above references will be clarified in the next edition of the permissible ingredients instrument.

The Committee's concern about access to freely obtained documents is noted. However, versions of the documents referred to in the instruments including the Food Chemicals Codex are available through a number of libraries allowing public access. This information will be clarified in the next edition of the permissible ingredients instrument.

Thank you for bringing these matters to my attention.

Yours sincerely

The Hon Sussan Ley MP

24 NOV 2016